THE

ALL INDIA REPORTER

1930

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

CALCUTTA SECTION

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CALCUTTA HIGH COURT

1930

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

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Puisne Judges :

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——S. 78—"Gross neglect" — Meaning explained **22***e*
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THE

ALL INDIA REPORTER

1930 CALCUTTA

COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1930 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS and JOURNALS for the year 1930 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER for 1930 with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

Showing seriatim the pages of INDIAN LAW REPORTS, CALCUTTA SERIES, for the year 1930, with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No 1 denotes pages of I. L. R. 57 CALCUTTA.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R 57 Calcutta=All India Reporter

ILR)	A. I. R			ILR)	A. I. R			ILR)	A. I. R			ILR)	A. I. R.			ILR)	A. I. R.		
1	1929	*PC*	305	148	1930	*C*	422	344	1930	*C*	240	497	1930	*C*	487	649	1929	*C*	726
10	"	*C*	651	154	1929	"	470	349	"	"	42	500	1929	"	480	655	1930	"	739
17	"	"	457	162	1930	"	33	360	1929	"	717	508	"	"	739	666	1929	"	813
25	1930	"	392	170	"	"	113	364	"	"	703	509	"	*PC*	190	669	"	"	799
39	1929	"	787	205	1929	*PC*	171	368	1930	"	486	520	"	*C*	769	676	1930	"	685
44	"	"	598	215	1930	*C*	418	371	"	"	579	526	1930	"	286	679	"	"	631
61	1930	"	320	226	1929	"	814	381	1929	"	533	533	"	"	508	688	"	"	568
65	"	"	347	231	1930	"	404	386	"	"	796	538	1929	"	553	695	"	"	697
67	1929	"	818	248	1929	"	765	394	"	"	444	549	"	"	676	704	1929	"	609
73	"	"	700	252	"	"	507	398	1930	"	534	558	"	"	563	715	"	"	710
82	1930	"	335	258	1930	"	47	403	1929	"	374	570	1930	"	173	724	1930	"	574
92	"	"	341	268	"	"	457	424	1930	"	521	582	1929	"	614	730	"	"	692
99	1929	"	754	274	1929	"	494	434	"	"	69	587	1930	"	65	733	"	"	384
102	"	"	730	282	"	"	768	457	"	"	369	597	1929	"	697	736	"	"	623
106	1930	"	324	285	"	"	480	460	1929	"	635	607	"	"	646	740	1929	"	742
114	"	"	385	289	1930	"	165	468	"	"	815	612	1930	"	806	751	1930	"	111
118	1929	*PC*	184	298	"	"	151	469	1930	"	465	623	1929	*PC*	225	756	1929	*PC*	286
122	"	*C*	524	309	"	"	608	473	"	"	580	634	1930	*C*	298	764	1930	*C*	17
181	"	"	819	328	"	"	586	480	"	"	169	642	1929	"	679	775	"	"	94
187	"	"	568	337	1929	"	771	488	"	"	633								

I. L. R. 57 Calcutta=All India Reporter (*Concld.*)

ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.			ILR)	A. I. R.		
783	1930	C	821	891	1930	C	729	1007	1930	C	366	1143	1931	C	51	1261	1930	C	281
789	1929	"	687	897	"	"	318	1013	1929	"	689	1148	1930	PC	64	1265	"	"	276
796	1931	"	25	904	"	"	351	1042	"	"	756	1153	"	C	274	1274	1931	"	246
801	1930	"	139	910	"	"	1	1062	1930	"	291	1159	1931	"	1	1280	"	"	279
807	1929	"	807	918	"	"	641	1074	"	"	209	1162	1930	"	434	1286	1930	"	332
814	"	"	661	931	"	"	327	1084	"	"	295	1168	1931	"	33	1293	"	PC	103
831	1930	"	361	940	"	"	706	1089	"	"	558	1176	1930	PC	59	1302	"	"	100
837	"	"	471	945	"	"	754	1093	"	"	596	1183	1931	C	15	1311	"	"	158
843	1929	"	779	949	1929	"	775	1097	"	PC	28	1189	1930	"	561	1322	1931	C	219
849	1930	"	713	953	1930	"	357	1101	"	C	782	1206	1931	"	35	1330	1930	"	625
855	1931	"	23	964	"	"	502	1115	"	"	428	1210	1930	"	459	1336	"	"	449
860	1930	"	329	980	"	"	147	1123	"	"	273	1217	"	"	244	1341	"	PC	113
869	1929	"	778	987	"	"	450	1127	1931	"	61	1228	"	"	212	1350	1931	C	203
872	1930	"	810	996	"	"	804	1137	1930	"	614	1248	"	"	490	1358	"	"	45
884	"	"	297	1001	"	"	797												

TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1930 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

51 Calcutta Law Journal=All India Reporter

CLJ)	A. I. R.			CLJ)	A. I. R.			CLJ)	A. I. R.			CLJ)	A. I. R.			CLJ)	A. I. R.		
1	1929	PC	286	120	1930	PC	59	230	1930	PC	79	392	1930	C	459	481	1929	C	514
6	"	"	279	124	"	Notes	18d	237	"	"	133	396	"	"	365	485	1930	"	595
16	"	"	283	128	"	PC	56	243	1931	C	233	400	"	PC	100	489	"	PC	151
23	"	Notes	40b	131	"	"	38	253	1930	PC	86	407	"	"	113	502	"	"	45
25	1930	C	270	136	"	"	18	264	"	C	428	414	"	"	139	518	"	"	91
30	"	"	327	142	"	"	22	270	1931	"	174	418	"	"	144	527	"	"	165
36	"	"	247	150	"	"	24	272	1930	"	397	424	"	Notes	10c	538	"	C	568
38	"	"	384	154	"	"	64	280	"	"	349	427	"	PC	142	545	"	"	576
41	"	"	164	162	"	"	83	283	"	"	547	434	"	"	163	547	"	"	673
44	1929	"	479	168	"	"	44	297	"	"	411	439	"	"	134	560	"	"	586
45	1930	"	282	171	"	C	212	309	"	PC	158	447	"	"	60	565	"	"	572
51	"	"	278	193	"	"	111	320	"	C	69	455	"	"	57	569	"	"	577
56	1929	PC	297	197	"	"	348	336	"	"	511	461	"	C	612	571	"	"	588
70	"	"	288	199	"	"	281	339	"	"	442	465	"	"	591	574	1929	Notes	7d
76	1930	"	29	203	"	"	276	342	"	"	444	469	"	"	285	577	1930	C	368
80	"	C	495	208	"	"	352	345	"	PC	103	472	1929	"	779	578	"	"	716
105	1929	PC	179	209	"	"	502	352	"	C	437	476	1930	"	665	581	"	PC	76
112	1930	"	17	224	"	"	365	362	"	"	455	477	"	"	274	592	"	"	93
117	"	"	99	227	"	"	273	364	"	"	539								

52 Calcutta Law Journal=All India Reporter

CLJ)	A. I. R.			CLJ)	A. I. R.			CLJ)	A. I. R.			CLJ)	A. I. R.			CLJ)	A. I. R.		
1	1930	PC	205	110	1930	PC	147	197	1930	C	651	405	1931	C	18	512	1931	PC	5
10	"	"	185	117	"	"	183	222	"	PC	177	415	"	"	65	524	1930	C	488
16	"	C	762	123	"	"	179	225	"	"	209	417	"	"	11	528	1931	"	163
19	"	"	761	132	"	"	198	235	"	C	815	423	"	"	65	531	"	"	166
23	1931	"	319	138	"	"	249	247	1931	"	29	425	1930	Notes	23d	534	1930	PC	238
26	1930	PC	66	142	"	C	738	254	1930	PC	224	429	1931	PC	22	539	"	"	188
49	"	"	176	145	"	"	781	260	"	C	332	431	1930	"	226	551	"	"	251
52	"	C	705	149	"	"	671	265	"	PC	234	435	"	"	217	558	"	"	300
54	"	PC	232	153	"	"	745	272	"	"	193	442	"	"	297	561	"	"	245
60	1931	C	285	158	1931	"	171	283	"	"	281	450	"	"	270	565	1931	C	164
66	1930	"	803	165	1930	"	731	287	"	"	242	462	"	"	253	569	"	"	312
68	"	"	616	171	"	"	577	298	1931	C	211	466	"	"	239	583	"	"	265
73	"	"	776	173	"	"	525	314	"	"	359	475	1931	C	138	589	"	"	159
78	1931	"	281	177	"	"	710	345	"	"	81	486	"	"	160	591	"	"	157
87	1930	"	721	179	"	"	823	357	"	"	76	492	"	"	144	594	"	"	332
100	"	"	770	183	"	PC	35	365	"	"	269	505	"	"	42	597	"	"	321

34 Calcutta Weekly Notes=All India Reporter

CWN)	A.I.R.			CWN)	A.I.R.			CWN)	A.I.R.			CWN)	A.I.R.			CWN)	A.I.R.		
1	1929	*PC*	286	223	1930	*C*	136	447	1930	*C*	774	696	1930	*C*	701	928	1930	*C*	759
6	"	"	279	227	"	"	447	449	"	"	665	698	1931	"	67	930	1931	"	5
13	"	*C*	756	228	1929	"	813	451	"	"	633	702	"	"	202	931	"	"	337
31	"	"	572	230	1930	*PC*	54	452	"	"	368	707	"	"	14	933	1930	*PC*	245
33	1930	"	382	235	"	"	44	453	"	*PC*	158	709	1930	*PC*	151	939	1931	*C*	96
36	"	"	327	238	"	*C*	502	462	"	"	103	720	"	"	224	944	"	"	105
41	"	"	344	246	"	"	466	470	1931	*C*	193	730	"	*C*	744	948	"	"	131
43	"	"	339	250	"	"	302	483	1930	*PC*	113	731	1931	"	52	951	"	"	129
47	1929	"	303	254	"	"	390	489	"	"	100	733	1930	*Notes*	9*e*	953	1930	"	594
51	1930	"	111	256	"	"	379	495	1931	*C*	40	735	"	*C*	716	954	1931	"	10
53	"	"	388	257	"	*PC*	82	498	1930	*C*	673	737	"	*PC*	185	956	1930	"	577
56	"	"	366	262	"	"	56	506	"	*PC*	76	741	1931	*C*	36	957	1931	"	2
59	1929	"	778	265	"	*C*	424	512	"	"	42	746	"	"	42	959	"	"	357
61	"	*PC*	283	268	"	"	468	515	1931	*C*	27	751	1930	"	459	961	"	"	113
66	"	*C*	689	272	"	"	457	519	1930	"	313	754	1931	"	73	972	"	"	288
80	1930	"	361	275	"	"	461	522	"	"	637	758	"	"	58	986	"	"	102
82	1929	"	805	277	"	"	244	524	"	"	728	761	1930	"	762	988	1930	"	646
86	1930	"	318	281	"	"	273	526	"	"	276	763	1931	"	59	989	1931	"	168
89	1929	*PC*	300	283	"	"	443	529	"	*PC*	142	765	1930	*PC*	179	991	"	"	303
97	1930	*C*	321	285	"	*PC*	83	534	"	"	144	772	"	"	198	996	"	"	155
102	"	"	329	289	"	"	64	540	1931	*C*	223	779	1931	*C*	140	999	"	"	327
106	"	"	291	294	"	*C*	454	548	1930	"	599	785	"	"	133	1002	"	"	323
114	"	"	295	296	"	"	212	554	"	*Notes*	8*a*	788	1930	"	625	1009	"	"	100
117	1929	*PC*	246	310	"	"	463	556	"	*C*	711	792	"	"	754	1013	"	"	129
121	1930	*C*	357	313	"	*PC*	38	557	"	*PC*	66	793	"	*PC*	221	1014	"	"	6
127	1929	"	614	319	"	*C*	558	565	"	"	57	801	1931	*C*	69	1017	1930	*PC*	209
131	"	"	679	321	"	"	473	570	"	*C*	782	807	1930	*Notes*	26*f*	1045	"	"	297
135	"	"	612	328	"	"	471	577	"	"	348	809	"	*C*	621	1051	1931	*C*	167
139	1930	"	353	327	"	"	1	578	1931	"	268	813	1931	"	109	1054	1930	"	770
143	1929	"	635	331	"	"	490	580	1930	"	645	816	1930	"	627	1059	"	"	586
144	1930	"	294	339	"	"	274	582	"	"	760	820	1931	"	92	1063	1931	"	135
145	1929	*PC*	297	342	"	*PC*	59	583	"	"	720	821	1930	*PC*	193	1068	"	"	205
150	1930	*C*	356	347	"	*C*	561	585	"	*PC*	134	839	1931	*C*	353	1070	1929	"	779
153	"	"	351	358	"	"	450	593	"	"	170	845	"	"	91	1073	1930	*PC*	239
155	"	"	38	363	"	"	449	599	"	"	201	849	1930	*PC*	232	1079	1931	*C*	306
160	1929	"	697	365	"	"	434	605	1931	*C*	223	854	"	"	188	1087	"	"	329
164	"	"	742	369	"	*PC*	79	621	1930	"	767	870	"	*C*	686	1093	"	"	209
170	1930	"	134	375	"	*Notes*	18*d*	625	"	*PC*	176	876	1931	"	92	1095	"	"	337
173	"	*PC*	17	379	"	*C*	693	627	"	"	168	877	1930	*PC*	249	1101	1930	*PC*	281
177	"	*C*	495	388	"	"	596	631	1931	*C*	79	881	1931	*C*	171	1106	"	"	283
188	"	"	147	390	"	"	481	634	"	"	45	887	"	"	87	1107	"	"	300
192	"	"	384	397	"	*PC*	29	642	1930	*C*	748	892	"	"	93	1111	"	"	248
194	1929	"	775	401	"	*C*	555	646	"	"	402	895	"	"	104	1113	1931	*C*	239
196	1930	"	369	404	"	"	508	648	"	"	779	897	"	"	112	1119	"	"	298
197	"	"	369	409	"	"	474	651	"	"	802	899	1930	"	715	1127	"	"	261
198	1929	"	807	413	"	"	806	653	"	*PC*	177	901	"	"	717	1129	1930	"	787
201	1930	*PC*	22	419	"	"	488	661	"	"	183	905	1931	"	111	1142	1931	"	248
206	"	"	24	422	"	"	281	667	"	"	196	907	1930	"	849	1146	"	"	244
208	"	"	41	425	"	*PC*	86	671	"	*C*	737	909	1931	"	170	1151	1930	"	708
210	"	*C*	477	432	"	"	60	673	"	"	619	911	1930	"	680	1154	1931	"	178
213	1929	"	687	437	"	*C*	614	675	"	"	734	912	1931	"	107	1161	1930	*PC*	242
217	1931	"	388	440	"	"	610	679	"	"	700	914	1930	"	721	1169	"	"	270
220	1930	"	426	442	"	"	690	681	"	*PC*	165	923	1931	"	3	1175	1931	*C*	359
222	"	"	387	445	"	"	590	689	1931	*C*	53	925	"	"	8				

13 & 14 All India Criminal Reports=All India Reporter

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1930 Allahabad.**

31 Cr. L. J. & 121 to 128 I. C.=All India Reporter

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1930 Lahore.**

1930 Criminal Cases=All India Reporter

Please refer to COMPARATIVE TABLE *No. II in* **A. I. R. 1930 Nagpur.**

P. N. Bali
Advocate High Court
Jammu & Kashmir

TABLE No. III

Showing seriatim the pages of ALL INDIA REPORTER, 1930 Calcutta Section, with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS.

N. B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1930 Calcutta. Column No. 2 denotes corresponding references of other REPORTS and JOURNALS.

A. I. R. 1930 Calcutta=Other Journals

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
1FB	50 C L J 375	61	121 I C 401	136	31 Cr L J 572	190	123 I C 649
	34 C W N 327		31 Cr L J 260		123 I C 751	193	33 C W N 1226
	57 Cal 910		13 AI Cr R 352	138	1930 Cr C 138		31 Cr L J 817
	126 I C 193	63	33 C W N 1002		124 I C 520		1930 Cr C 225
5	56 Cal 689		1930 Cr C 15		31 Cr L J 697		125 I C 205
	120 I C 710		125 I C 858	139	50 C L J 467	199	124 I C 818
10	56 Cal 686		31 Cr L J 945		1930 Cr C 139		31 Cr L J 737
	121 I C 636	65	50 C L J 164		31 Cr L J 610		1930 Cr C. 231
15	33 C W N 963		33 C W N 952		124 I C 66	205	56 Cal 919
	56 Cal 1180		122 I C 630		57 Cal 801		122 I C 212
	121 I C 407		57 Cal 587	141	50 C L J 518	207	56 Cal 960
17	50 C L J 303	69	33 C W N 930		1930 Cr C 141		33 C W N 388
	57 Cal 764		51 C L J 320		124 I C 486		119 I C 207
	126 I C 138		57 Cal 434		31 Cr L J 667	209	50 C L J 593
22	56 Cal 868		124 I C 167	144	1930 Cr C 144		1930 Cr C 209
	121 I C 625	78	126 I C 124		124 I C 832		125 I C 656
32	56 Cal 584	79	56 Cal 910		31 Cr L J 767		31 Cr L J 903
	120 I C 249		122 I C 193	145	33 C W N 1000		57 Cal 1074
34	49 C L J 362	81	56 Cal 653		125 I C 859		14 AI Cr R 527
	33 C W N 519		120 I C 706	146	56 Cal 976	212FB	1930 Cr C 212
	56 Cal 1117	85	124 I C 520		122 I C 214		34 C W N 296
	122 I C 201	86	56 Cal 608	147 (1)	125 I C 104		51 C L J 171
38	50 C L J 537		120 I C 107		33 C W N 168n		31 Cr L J 536
	34 C W N 155	89	56 Cal 550	147 (2)	34 C W N 188		123 I C 664
	57 Cal 162		120 I C 807		57 Cal 980		57 Cal 1228
	124 I C 483	92	33 C W N 994		125 I C 102	219	1930 Cr C 219
41	126 I C 267		125 I C 863	150	56 Cal 1070		56 Cal 1157
42	33 C W N 769	94	57 Cal 775		121 I C 687		31 Cr L J 406
	57 Cal 349		126 I C 550	151	33 C W N 1163		122 I C 291
	125 I C 726	97	56 Cal 763		57 Cal 298		14 AI Cr R 121
47	33 C W N 876		121 I C 312		126 I C 125	220	56 Cal 1085
	57 Cal 258		31 Cr L J 215	154	33 C W N 1104		1930 Cr C. 220
	124 I C 161		13 AI Cr R 316		125 I C 721		121 I C 749
51	56 Cal 755	109	33 C W N 1081	159	50 C L J 403		31 Cr L J 313
	33 C W N 888		124 I C 323		126 I C 45		13 AI Cr R 458
	121 I C 574	111	34 C W N 51	161	126 I C 195	222	1930 Cr C 222
53	56 Cal 704		51 C L J 193	163	56 Cal 1064		50 C L J 527
	121 I C 403		57 Cal 751		121 I C 744		124 I C 488
55	50 C L J 70		125 I C 855	164	51 C L J 41		31 Cr L J 670
	123 I C 241	113	50 C L J 208		33 C W N 1168	225	33 C W N 1077
57	33 C W N 967		57 Cal 170		126 I C 128		127 I C 51
	121 I C 413		123 I C 250	165	50 C L J 260	228	50 C L J 584
58	1930 Cr C 10	130	1930 Cr C 130		57 Cal 289		1930 Cr C 196
	124 I C 496		31 Cr L J 771		123 I C 444		125 I C 743
59	33 C W N 1004		125 I C 111	169	33 C W N 1221		31 Cr L J 916
	1930 Cr C 11	131	1930 Cr C 131		57 Cal 480		14 AI Cr R 506
	125 I C 857		31 Cr L J 804		125 I C 302	230	56 Cal 989
	31 Cr L J 944		125 I C 273	171	56 Cal 1074		121 I C 737
60 (1)	33 C W N 948	132	50 C L J 524		121 I C 745	235	83 C W N 1211
	1930 Cr C 12		1930 Cr C 132	173	33 C W N 1042		125 I C 603
	31 Cr L J 613		124 I C 175		57 Cal 570	238	33 C W N 1156
	124 I C 69		31 Cr L J 656		124 I C 327		126 I C 132
60 (2)	33 C W N 692	134	34 C W N 170	178FB	33 C W N 1190	240	33 C W N 839
	56 Cal 1154		1930 Cr C 134		123 I C 312		57 Cal 344
	1930 Cr C 12		125 I C 746	180	50 C L J 382		123 I C 316
	31 Cr L J 377		31 Cr L J 918		126 I C 36	244FB	34 C W N 277
	122 I C 219		15 AI Cr R 8	188	1930 Cr C 145		57 Cal 1217
	14 A I Cr R 76	136	50 C L J 476		124 I C 513		31 Cr L J 1147
61	33 C W N 974		34 C W N 223		31 Cr L J 695		127 I C 73
	1930 Cr C 13		1930 Cr C 136	190	33 C W N 1023		15 AI Cr R 51

Comparative Tables

A. I. R. 1930 Calcutta=Other Journals—(*Contd.*)

A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
244	1930	*Cr C*	32	235	1930	*Cr C*	355	341	57	*Cal*	92	379 (1)	127	*I C*	672
247	51	*C L J*	33	239	124	*I C*	820		125	*I C*	655		82	*Cr L J*	18
	125	*I C*	732		31	*Cr L J*	751	344	34	*C W N*	41		1930	*Cr C*	643
249	34	*C W N*	1170		1930	*Cr C*	377		123	*I C*	261		15	*A I Cr R*	234
	123	*I C*	207	291	34	*C W N*	106	346		...		379 (2)	127	*I C*	557
251 (1)	50	*C L J*	549		125	*I C*	733	347	57	*Cal*	65		31	*Cr L J*	1239
	123	*I C*	411		57	*Cal*	1052		125	*I C*	320		1930	*Cr C*	613
251 (2)	125	*I C*	93		1930	*Cr C*	379	348 (1)	34	*C W N*	577		15	*A I Cr R*	193
252	33	*C W N*	1148	294	34	*C W N*	144		127	*I C*	552	382	34	*C W N*	32
	123	*I C*	646		125	*I C*	855	348 (2)	51	*C L J*	197		123	*I C*	545
253	53	*Cal*	1161		31	*Cr L J*	944		125	*I C*	655	384	51	*C L J*	33
	33	*C W N*	531		1930	*Cr C*	382	349	51	*C L J*	280		34	*C W N*	192
	120	*I C*	458	295	34	*C W N*	114		34	*C W N*	907		57	*Cal*	733
255	50	*C L J*	333		125	*I C*	650		123	*I C*	754		127	*I C*	68
	125	*I C*	290		31	*Cr L J*	907	351	34	*C W N*	153	385	57	*Cal*	114
258	53	*Cal*	979		15	*A I Cr R*	18		57	*Cal*	901		125	*I C*	607
	122	*I C*	197		57	*Cal*	1084		123	*I C*	263	387	34	*C W N*	223
262	33	*C W N*	1207		1930	*Cr C*	333	352	51	*C L J*	203		126	*I C*	779
	125	*I C*	654	297 SB	33	*C W N*	1205		123	*I C*	416	389	34	*C W N*	53
263	33	*C W N*	997		57	*Cal*	884	353	34	*C W N*	139		125	*I C*	851
	125	*I C*	861		125	*I C*	603		127	*I C*	54	390	34	*C W N*	254
265	53	*Cal*	1079	298	33	*C W N*	1043	356	34	*C W N*	150		127	*I C*	670
	121	*I C*	747		124	*I C*	832		123	*I C*	265	393	57	*Cal*	25
267	50	*C L J*	513		57	*Cal*	634	357	34	*C W N*	121		125	*I C*	667
	126	*I C*	401	300	33	*C W N*	1224		57	*Cal*	953	397	51	*C L J*	272
270	51	*C L J*	25		125	*I C*	301		127	*I C*	76		126	*I C*	707
	126	*I C*	203	302	50	*C L J*	532	361	34	*C W N*	80		53	*Cal*	15
273	34	*C W N*	281		34	*C W N*	250		57	*Cal*	831	402	34	*C W N*	646
	51	*C L J*	227		124	*I C*	481		125	*I C*	748		129	*I C*	414
	57	*Cal*	1123	304	124	*I C*	830		31	*Cr L J*	921	404	57	*Cal*	231
	15	*A I Cr R*	45	305 (1)	33	*C W N*	1173		15	*A I Cr R*	21		125	*I C*	647
	127	*I C*	57		126	*I C*	131		1930	*Cr C*	537	411	51	*C L J*	297
	31	*Cr L J*	1151	305 (2)	33	*C W N*	1215	362	123	*I C*	720		126	*I C*	769
	1930	*Cr C*	358		125	*I C*	597		31	*Cr L J*	1077	418	57	*Cal*	215
274	34	*C W N*	339	308	33	*C W N*	904		1930	*Cr C*	533		125	*I C*	316
	51	*C L J*	477		125	*I C*	641	363	123	*I C*	768	422	57	*Cal*	148
	31	*Cr L J*	1227	311	33	*C W N*	1085		31	*Cr L J*	1114		124	*I C*	817
	57	*Cal*	1153		124	*I C*	321		1930	*Cr C*	539	424	34	*C W N*	265
	127	*I C*	555	313	50	*C L J*	317	365	51	*C L J*	224		127	*I C*	71
	1930	*Cr C*	354		34	*C W N*	519		51	*C L J*	806	423	34	*C W N*	220
	15	*A I Cr R*	187		123	*I C*	257		31	*Cr L J*	999		126	*I C*	781
276	51	*C L J*	203	315	33	*C W N*	1193		123	*I C*	134	428	51	*C L J*	264
	34	*C W N*	523		123	*I C*	253		1930	*Cr C*	541		126	*I C*	705
	57	*Cal*	1253	318	50	*C L J*	589	366	34	*C W N*	56		57	*Cal*	1115
	31	*Cr L J*	1207		34	*C W N*	88		57	*Cal*	1007	430	1930	*Cr C*	657
	127	*I C*	270		57	*Cal*	897		123	*I C*	853		126	*I C*	775
	1930	*Cr C*	356		125	*I C*	849		31	*Cr L J*	942		31	*Cr L J*	1115
	15	*A I Cr R*	182		31	*Cr L J*	940		1930	*Cr C*	542	433	126	*I C*	762
278	51	*C L J*	51	320	57	*Cal*	61	368	34	*C W N*	452		31	*Cr L J*	1092
	127	*I C*	267		31	*Cr L J*	761		51	*C L J*	577		1930	*Cr C*	741
	31	*Cr L J*	1205		1930	*Cr C*	401		127	*I C*	672	434	34	*C W N*	365
	1930	*Cr C*	358		125	*I C*	97		32	*Cr L J*	19		57	*Cal*	1162
281	51	*C L J*	199	321	34	*C W N*	97		1930	*Cr C*	544		32	*Cr L J*	111
	34	*C W N*	422		126	*I C*	782	369 (1)	34	*C W N*	197		128	*I C*	354
	127	*I C*	799	324	57	*Cal*	106		1930	*Cr C*	567		1930	*Cr C*	742
	57	*Cal*	1261		125	*I C*	594		57	*Cal*	457	437	51	*C L J*	352
	32	*Cr L J*	38	327	51	*C L J*	30		127	*I C*	58		129	*I C*	884
	1930	*Cr C*	361		34	*C W N*	35		31	*Cr L J*	1152		1930	*Cr C*	745
282	51	*C L J*	45		57	*Cal*	931		15	*A I Cr R*	60	442	51	*C L J*	399
	127	*I C*	265		126	*I C*	118	369 (2)	34	*C W N*	196		31	*Cr L J*	1203
	1930	*Cr C*	362	329	34	*C W N*	102		1930	*Cr C*	568		127	*I C*	263
285	51	*C L J*	469		57	*Cal*	830		127	*I C*	63		1930	*Cr C*	750
	31	*Cr L J*	1224		126	*I C*	239		31	*Cr L J*	1158		15	*A I Cr R*	148
	127	*I C*	552	332	52	*C L J*	230		15	*A I Cr R*	64	443	34	*C W N*	293
	1930	*Cr C*	355		57	*Cal*	1286	370	127	*I C*	657		31	*Cr L J*	1150
286	33	*C W N*	915		128	*I C*	248		32	*Cr L J*	10		127	*I C*	79
	57	*Cal*	526	335	57	*Cal*	82		58	*Cal*	96		15	*A I Cr R*	61
	125	*I C*	610		125	*I C*	661		1930	*Cr C*	634		1930	*Cr C*	751
	31	*Cr L J*	850	339	34	*C W N*	48	379 (1)	34	*C W N*	256	444	51	*C L J*	342
	15	*A I Cr R*	415		126	*I C*	259								

A. I. R. 1930 Calcutta=Other Journals—(*Contd.*)

A.I.R.)	Other Journals			A.I.R.)	Other Journals			A.I.R.)	Other Journals			A.I.R.)	Other Journals		
444	31	*Cr L J*	1201	502	57	*Cal*	964	591	128	*I C*	108	664	128	*I C*	332
	127	*I C*	261		128	*I C*	97	594	34	*C W N*	953		32	*Cr L J*	136
	1930	*Cr C*	752	508	34	*O W N*	404		128	*I C*	805	665 (1)	34	*C W N*	449
	15	*A I Cr R*	151		128	*I C*	241	595	51	*C L J*	485		1930	*Cr C*	1057
446	126	*I C*	753	511	51	*C L J*	336		35	*C W N*	210		128	*I C*	335
	31	*Cr L J*	1090		127	*I C*	264		128	*I C*	177		32	*Cr L J*	138
	1930	*Cr C*	707	513	57	*Cal*	337	596	34	*C W N*	338	665 (2)	51	*C L J*	476
447	1930	*Cr C*	659		1930	*Cr C*	857		57	*Cal*	1093		1930	*Cr C*	1057
	34	*C W N*	227		33	*C W N*	829		127	*I C*	774		128	*I C*	181
	126	*I C*	761	515	1930	*Cr C*	859	598	57	*Cal*	533		32	*Cr L J*	90
	31	*Cr L J*	1091		126	*I C*	553		128	*I C*	329	666	1930	*Cr C*	1058
449**SB**	34	*C W N*	363		31	*Cr L J*	1055	599	34	*C W N*	543		129	*I C*	182
	57	*Cal*	1336	520	129	*I C*	319		128	*I C*	188		32	*Cr L J*	243
	128	*I C*	327	521	57	*Cal*	424	603	57	*Cal*	309	668	1930	*Cr C*	1060
450	34	*C W N*	358		126	***I C***	405		127	*I C*	753		129	*I C*	184
	57	*Cal*	987	525	52	*C L J*	173	610	34	*C W N*	440		32	*Cr L J*	245
	128	*I C*	251		126	*I C*	717		129	*I C*	609	671	52	*C L J*	149
454	34	*C W N*	294	526	126	*I C*	712	612	51	*C L J*	461		1930	*Cr C*	1068
	130	*I C*	227	530	57	*Cal*	473		128	*I C*	106		31	*Cr L J*	1145
455	51	*C L J*	362		126	*I C*	413	614	34	*C W N*	437		127	*I C*	65
	128	*I C*	81	533	126	*I C*	560		57	*Cal*	1137		15	*A I Cr R*	77
457	34	*C W N*	272	534	57	*Cal*	398		129	*I C*	572	673	34	*C W N*	498
	57	*Cal*	268		127	*I C*	772	616	52	*C L J*	68		51	*C L J*	547
	127	*I C*	66	536	57	*Cal*	328	619	34	*C W N*	673		128	*I C*	195
459	51	*C L J*	392		127	*I C*	760		128	*I C*	111	678	129	*I C*	612
	34	*C W N*	751	539	51	*C L J*	364	621	34	*C W N*	809	685	57	*Cal*	676
	57	*Cal*	1210		127	*I C*	785		129	*I C*	401		129	*I C*	181
461	34	*C W N*	275	547 (1)	126	***I C***	559	623	57	*Cal*	736	686	34	*C W N*	870
	127	*I C*	59	547 (2)	51	*C L J*	283		129	*I C*	189		58	*Cal*	281
463	34	*C W N*	310		126	*I C*	754	625**FB**	34	*C W N*	788	690	34	*C W N*	442
	129	*I C*	408	555	34	*C W N*	401		57	*Cal*	1330		129	*I C*	574
465	57	*Cal*	469		128	*I C*	246		129	*I C*	411	692	57	*Cal*	730
	126	*I C*	404	558	34	*C W N*	319	627**FB**	34	*C W N*	816		129	*I C*	190
466	34	*C W N*	246		57	*Cal*	1089		129	*I C*	405	693	34	*C W N*	379
	128	*I C*	103		127	*I C*	559	630**FB**	34	*C W N*	911		130	*I C*	433
468	34	*C W N*	268	559	126	*I C*	715		129	*I C*	407	697	57	*Cal*	695
	127	*I C*	60	561	34	*C W N*	347	631	57	*Cal*	679		129	*I C*	305
471	34	*C W N*	323		57	*Cal*	1189		129	*I C*	191	700	34	*C W N*	679
	57	*Cal*	837		128	*I C*	321	633	57	*Cal*	488		128	*I C*	182
	127	*I C*	666	568	51	*C L J*	538		126	*I C*	547	701	34	*C W N*	696
473	34	*C W N*	321		57	*Cal*	683		1930	*Cr C*	969		129	*I C*	365
	227	*I C*	665		128	*I C*	183	636	128	*I C*	804	703	35	*C W N*	103
474	34	*C W N*	409	572	51	*C L J*	565		32	*Cr L J*	184		129	*I C*	108
	128	*I C*	201		128	*I C*	192		1930	*Cr C*	972	705	52	*C L J*	52
477	34	*C W N*	210	574**SB**	57	*Cal*	724	637	34	*C W N*	522		129	*I C*	110
	126	*I C*	765		126	*I C*	558		128	*I C*	330		1930	*Cr C*	1105
479		...		576	51	*C L J*	545		32	*Cr L J*	134	706	57	*Cal*	940
481	34	*C W N*	390		128	*I C*	182		1930	*Cr C*	973		128	*I C*	801
	127	*I C*	767	577 (1)	51	*C L J*	569	638	34	*C W N*	451		1930	*Cr C*	1106
	32	*Cr L J*	33		128	*I C*	187		129	*I C*	358		32	*Cr L J*	180
	1930	*Cr C*	793	577 (2)	34	*C W N*	956		1930	*Cr C*	974	708	34	*C W N*	1151
486	57	*Cal*	368		52	*C L J*	171		32	*Cr L J*	320		129	*I C*	99
	127	*I C*	762		1930	*Cr C*	908	639	129	*I C*	111		53	*C L J*	54
	32	*Cr L J*	33		126	*I C*	780		1930	*Cr C*	975		1930	*Cr C*	1108
	1930	*Cr C*	798		31	*Cr L J*	1117		32	*Cr L J*	238		32	*Cr L J*	228
487	57	*Cal*	497	578	1930	*Cr C*	892	641**FB**	57	*Cal*	918	710	52	*C L J*	177
	126	*I C*	412		31	*Cr L J*	1154		129	*I C*	782		129	*I C*	101
	31	*Cr L J*	1014		127	*I C*	64	645	34	*C W N*	580		1930	*Cr C*	1110
	1930	*Cr C*	799	579	57	*Cal*	371		127	*I C*	553		32	*Cr L J*	231
488	34	*C W N*	419		127	*I C*	763		31	*Cr L J*	1225	711	34	*C W N*	556
	128	*I C*	94	583	127	*I C*	49		1930	*Cr C*	1206		32	*Cr L J*	110
	52	*C L J*	524	586	51	*C L J*	560		15	*A I Cr R*	221		128	*I C*	208
490	34	*C W N*	331		34	*C W N*	1059	646	34	*C W N*	988		1930	*Cr C*	1111
	128	*I C*	89		128	*I C*	244		1930	*Cr C*	1068				
	57	*Cal*	1248	588	51	*C L J*	571	647**FB**	129	*I C*	619	712	1930	*Cr C*	1112
495	34	*C W N*	177		128	*I C*	96		1930	*Cr C*	1069		129	*I C*	109
	51	*C L J*	80	590	34	*C W N*	445	651**FB**	52	*C L J*	197		32	*Cr L J*	236
	128	*I C*	82		129	*I C*	822		129	*I C*	787	713	57	*Cal*	849
502	34	*O W N*	238												
	51	*C L J*	209	591	51	*C L J*	465	664	1930	*Cr C*	1104		128	*I C*	806

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	129 *I C*	359	744	34 *C W N*	730		31 *Cr L J*	1226		129 *I C*	774
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	31 *Cr L J*	1223	748	34 *C W N*	642	762	34 *C W N*	761		129 *I C*	413
	127 *I C*	551	750	129 *I C*	97		52 *C L J*	16	803	52 *C L J*	66
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	129 *I C*	561		129 *I C*	364		130 *I C*	225		57 *Cal*	612
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	32 *Cr L J*	137		32 *Cr L J*	182		128 *I C*	333		129 *I C*	769
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729	57 *Cal*	891	756	129 *I C*	105		130 *I C*	254	821	57 *Cal*	783
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A. I. Cr. R.	...	All India Criminal Reports.
All. or A.	...	Indian Law Reports, Allahabad Series.
A. L. J.	...	Allahabad Law Journal.
A. I. R. All.	...	All India Reporter, Allahabad.
Bom. or B.	...	Indian Law Reports, Bombay Series.
Bom. L. R.	...	Bombay Law Reporter.
A. I. R. Bom.	...	All India Reporter, Bombay.
Bur. L. T.	...	Burma Law Times.
Cal. or C.	...	Indian Law Reports, Calcutta Series.
C. L. J.	...	Calcutta Law Journal.
C. L. R.	...	Calcutta Law Reports.
Cr. C.	...	Criminal Cases.
C. W. N.	...	Calcutta Weekly Notes.
A. I. R. Cal.	...	All India Reporter, Calcutta.
Cr. L. J.	...	Criminal Law Journal.
I. A.	...	Law Reports, Indian Appeals.
I. C.	...	Indian Cases.
Lah. or L.	...	Indian Law Reports, Lahore Series.
A. I. R. Lah.	...	All India Reporter, Lahore.
Lah. L. J. or L. L. J.	...	Lahore Law Journal.
L. B. R.	...	Lower Burma Rulings.
A. I. R. L. B.	...	All India Reporter, Lower Burma.
L. R. A.	...	The Law Reporter, Allahabad.
Luck.	...	Indian Law Reports, Lucknow Series.
Mad. or M.	...	Indian Law Reports, Madras Series.
M. L. J.	...	Madras Law Journal.
Mad. Cr. C.	...	Madras Criminal Cases.
M. L. T.	...	Madras Law Times.
L. W. or M. L. W.	...	Madras Law Weekly.
M. W. N.	...	Madras Weekly Notes.
A. I. R. Mad.	...	All India Reporter, Madras.
N. L. J.	...	Nagpur Law Journal.
N. L. R.	...	Nagpur Law Reports.
A. I. R. Nag.	...	All India Reporter, Nagpur.
O. C.	...	Oudh Cases.
A. I. R. Oudh	...	All India Reporter, Oudh.
O. L. J.	...	Oudh Law Journal.
O. W. N.	...	Oudh Weekly Notes.
P. R.	...	Punjab Record.
P. L. R.	...	Punjab Law Reporter.
P. W. R.	...	Punjab Weekly Reporter.
Pat. or P.	...	Indian Law Reports, Patna Series.
P. H. C. C.	...	Patna High Court Cases (Supplt. to C. W. N.)
A. I. R. Pat.	...	All India Reporter, Patna.
A. I. R. P. C.	...	All India Reporter, Privy Council.
Pat. L. J.	...	Patna Law Journal.
Pat. L. T.	...	Patna Law Times.
Pat. L. W.	...	Patna Law Weekly.
Rang. or R.	...	Indian Law Reports, Rangoon Series.
A. I. R. Rang.	...	All India Reporter, Rangoon.
Sar.	...	Saraswati's P. C. Judgments.
S. L. R.	...	Sind Law Reporter.
Suther.	...	Sutherland's P. C. Judgments.
A. I. R. Sind	...	All India Reporter, Sind.
U. B. R.	...	Upper Burma Rulings.
A. I. R. U. B.	...	All India Reporter, Upper Burma
W. R.	...	Weekly Reporter.

OTHER ABBREVIATIONS.

Appl.	...	Applied	Disc.	...	Discussed.	F. B	... Full Bench.
Appr.	...	Approved.	Diss. from	...	Dissented from.	P. C.	... Privy Council.
Cons.	...	Considered.	Expl.	...	Explained	Ref.	... Referred to.
Dist.	...	Distinguished.	Foll.	...	Followed.	S. B.	... Special Bench.

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CALCUTTA HIGH COURT

** A. I. R. 1930 Calcutta 1
Full Bench

RANKIN, C. J., AND C. C. GHOSE AND BUCKLAND, JJ.

Gooptu Estate Ltd. In re.

Civil Reference, Decided on 12th August 1929, made by Commissioner of Income-tax, Bengal.

***(a) Income-tax Act (1922), S. 9 — Assessee owner of property consisting of building —Income-tax is charged upon basis of notional income.**

Where the assessee is the owner of property consisting of any building or land appurtenant thereto, the statute charges him upon the basis of a notional income the amount of which is computed by finding the bona fide annual value and making the deductions therefrom which are allowed by S. 9. [P 3 C 1]

****(b) Income-tax Act, S. 9—S. 9 is inapplicable to assessees having limited interest in land.**

Where the assessee have only a limited interest, namely the interest of a lessee for fifty years, S. 9 is inapplicable. [P 3 C 1]

(c) Income-tax Act (1922), S. 10 — Sum earned by acts done in carrying on business in house property is assessable—Assessee is, however, entitled to allowance for depreciation as mentioned in S. 10 (2) (vi).

Where the letting out of property upon lease for salami and for rent, the forfeiting of leases where possible and exaction of fresh salami and increased rent are all acts done in the carrying on or carrying out of a business in house property, the sum is earned as part of the profits of the business, and is assessable accordingly to tax, but the assessee will be entitled to the allowance in respect of depreciation on buildings, machinery, plant or furniture prescribed by Cl. (vi), sub-S. 2, S. 10: *Commissioner of Taxes* v. *Melbourne Trust Ltd.*, (1914) A. C. 1001; *In re, Spanish Prospecting Co.* (1911), 1 *Ch.* 92 and *Assets Co. Ltd.* v. *Forbes* (1897); 3 *T. C.* 542, *Rel. on.* [P 3 C 1, 2]

****(d) Income-tax Act (1922), S. 10 — "Profits" explained.**

"Profits" implies a comparison between the state of a business at two specific dates usually separated by an interval of a year, and if the company is to be regarded as dealing in house property by letting it out for premium and rent in the course and for the purposes of its business, the money value of the extent to which at the end of a year it betters its position by such means will be assessable as profit. If its position is bettered by other means, from causes not directly connected with the business of the company, the enhanced value though realised is not part of the profits of the business. Everyting depends upon what the business is. *In re, Spanish Prospecting Co.*, (1911) 1 *Ch.* 92; *Californian* Case (1904) 5 *T. C.* 159 and *Tebrau* Case, (1910) 5 *T. C.* 658, *Rel. on.* [P 3 C 2]

****(e) Income-tax Act (1922), S. 12 — Expenditure to obtain income from capital asset negligible—It is a case of man in receipt of clear revenue— Accounting principles explained.**

If the expenditure required to obtain the income from the capital asset is negligible the case is the simple case of a man in receipt of a clear revenue therefrom. If some considerable expenditure is necessary before the annual return can be obtained then the history of the year will be stated in the form of a "Trading" or "Revenue" account or account of the receipts and expenditure during the year. It is essential when accounting on this basis, to exclude from either side of the account, matters which in substance represent only a rise or fall in the value of the asset from which revenue is derived as distinct from net revenue itself or which represent only a change in the form of the investment, whether the change be a change into money or into some other form of property. [P 3 C 2, P 4 C 1]

****(f) Income-tax Act (1922), S. 12— Assessees taking lease from *R*— This lease subject to building lease demised to Tata Bank—Tata Bank paying salami—Tata Bank going into voluntary liquidation for purpose of amalgamation with Central Bank—Assessees taking advantage of forfeiture clause of re-entry—Central Bank compromising by paying one lakh of rupees —Income-tax authorities claiming this sum assessable in-**

come—Sum held to be salami but not assessable.

The assessees were limited company who in 1922 took a lease for fifty years from the representatives of one *R* of certain properties which included the premises known as 100 Clive Street, Calcutta. This lease was subject to a building lease previously granted in June 1920, by the executors of the will of *R* whereby the premises 100 Clive Street were demised for fifty years to the Tata Industrial Bank Limited on a monthly rental of Rs. 5,000. The Tata Industrial Bank Limited had paid a premium or salami of one lakh of rupees and by the terms of the lease had undertaken to demolish the building then standing on the demised premised and to erect thereon a new office building in accordance with conditions to be approved by the lessors. In August 1923 the Tata Insudstrial Bank Limited having expended a large amount of money upon the erection of the new building, went into voluntary liquidation for the purposes of a scheme of amalgamation with the Central Bank Limited. Thereupon the assessees taking advantage of a forfeiture clause in the lease of 1920 which gave power to the lessors to re-enter if the Tata Industrial Bank Limited should go into liquidation, claimed to determine the lease and demand immediate possession. The Central Bank of India, Limited, faced with this claim, compromised with the assessees who waived the forfeiture and agreed to a transfer of the lease to the Central Bank Limited in consideration of a lump sum payment of Rs. 1,00,000 and a further monthly payment of Rs. 750 during the residue of the lease. The sum of one lakh was paid by the Central Bank Limited to the assessees on 21st December 1923. Income-tax authorities for the year of assessment 1927-1928 claimed to treat this sum as part of the assessable income of the assessees.

Held: that the sum of one lakh of rupees was to be regarded as a salami or premium in the ordinary sense, but could not be treated as an assessable income within the meaning of S. 12: *A. I. R.* 1924 *Pat.* 679, *Ref.* [P 4 C 2]

A. K. Roy, *Sukumar Mitter* and *Susil Sen*—for Assessees.

Advocate General and *Radha Binode Paul*—for Reference.

Rankin, C. J.—The assessees are a limited company (Gooptu Estate Limited) who in 1922 took a lease for 50 years from the representatives of one Ram Chunder Gooptu of certain properties which included the premises known as 100 Clive Street, Calcutta. This lease was subject to a building lease previously granted in June 1920, by the executors of the will of the said Ram Chunder Gooptu, whereby the premises 100 Clive Street were demised for 50 years to the Tata Industrial Bank Limited on a monthly rental of Rs. 5,000. The Tata Industrial Bank Limited had paid a premium or salami of 1 lakh of rupees and by the terms of the lease had undertaken to demolish the building then standing on the demised premises and to erect thereon a new office building in accordance with conditions to be approved by the lessors. In August 1923 the Tata Industrial Bank Limited having expended a large amount of money upon the erection of the new building, went into voluntary liquidation for the purpose of a scheme of amalgamation with the Central Bank Limited. Thereupon the assessees, Gooptu Estate Limited, taking advantage of a forfeiture clause in the lease of 1920 which gave power to the lessors to re-enter if the Tata Industrial Bank Limited should go into liquidation, claimed to determine the lease and demand immediate possession. The Central Bank of India Limited, faced with this claim, compromised with the assessees who waived the forfeiture and agreed to a transfer of the lease to the Central Bank Limited in consideration of a lump sum payment of Rs. 1,00,000 and a further monthly payment of Rs. 750 during the residue of the lease. The sum of 1 lakh was paid by the Central Bank Limited to the assessees on 21st December 1923. Income Tax authorities for the year of assessment 1927-1928 have claimed to treat this sum as part of the assessable income of the assessees and the Commissioner of Income-Tax, Bengal, has at their request referred to this Court the following questions of law:—

(1) Whether the sum of Rs. 1.00,000, having been received in consideration of the waiver of their rights in connexion with a breach of the lessee of a vital condition of the lease, is in the circumstances a casual gain or a non-recurring income within the meaning of S. 4, sub-S. 3, Cl. 7, Income-Tax Act.

(2) Whether the said sum Rs. 1,00,000 was a salami, and whether even assuming that it was a salami, it is an assessable income within the meaning of the Income-tax Act or is a capital or capital and casual non-recurring receipt as held in the case, *Shiva Prasad Singh* v. *Emperor* (1).

(3) Whether the income derived accrued and received in the year 1923 can in the circumstances, viz., the transfer of the amount from one account to another to suit the convenience of accountancy be treated as assessable income in the year 1927-28.

I propose to consider the second question first. The assessment order dated 30th November 1927 has been included in the paper book and from this as well as from the case stated, it appears that

(1) A. I. R. 1924 Pat. 679=4 Pat. 73.

the assessment was made under S. 12 of the Act under the head "other source." The assessment order shows that the assessment being under S. 12, and not under the head "business," the Income-tax authorities have refused to permit the assessee to take credit for any sum on account of depreciation of the buildings etc. which are part of their capital assets.

In a case of this character much may depend upon the particular head of charge under which the assessees are being brought, and the question before us is not to be decided under S. 9,10 or 11 of the Act. Where the assessee is the owner of property consisting of any buildings or land appurtenant thereto, the statute charges him upon the basis of a notional income the amount of which is computed by finding the bona fide annual value and making the deductions therefrom which are allowed by S. 9. As the assessees in this case have only a limited interest, namely, the interest of a lessee for fifty years the Income-tax authorities may well be right in regarding S. 9 as inapplicable to the case. Again, if in the view taken by the Commissioner the circumstances are not such that the assessees can be regarded as carrying on a business in house property a view which has not been questioned before us and which must clearly be accepted, it is obvious the assessees cannot be made liable upon principles which are applicable only to persons carrying on business.

If we were dealing with this case under S. 10 of the Act, and upon a finding that the letting out of property upon lease for salami and for rent, the forfeiting of lease where possible and the exaction of fresh salami and increased rent were all acts done in the carrying on or carrying out of a business in house property it might well be correct to have that the sum now in question was earned as part of the profits of the business, and was assessable accordingly to tax : : *Commissioner of Taxes* v. *Melbourne Trust Limited* (2), *In re Spanish Prospecting Co.* (3), *Assets Company Limited* v. *Forbes* (4). On the other hand on that view the assessee would be entitled to the allowance in respect of depreciation on buildings, machinery, plant or furniture prescribed by Cl. (vi), sub-S. 2, S. 10.

From this standpoint "profits" as Lord Moulton observed in *In re, Spanish Prospecting Co.* (3), implies a comparison between the state of a business as two specific dates usually separated by an interval of a year, and if the company was to be regarded as dealing in house property by letting it out for premium and rent in the course and for the purposes of its business, the money value of the extent to which at the end of a year it had bettered its position by such means would be assessable as profit. If its position was bettered by other means, from causes not directly connected with the business of the company, the enhanced value though realised is not part of the profits of the business : *Californian* case (5), *Tebrau* case (6). Everything depends upon what the business is.

If, however, the assessee is not carrying on a business the matter must be examined from another angle. The absence of any provision in S. 12 of the Act for an allowance of depreciation on fixed capital is an indication of the difference. It points to the fact that under this head the income can prima facie be ascertained without a valuation of all assets at two different dates and by means of a computation of receipts and expenditure into which the rise or fall of capital values does not enter. If the expenditure required to obtain the income from the capital asset is negligible the case is the simple case of a man in receipt of a clear revenue therefrom. If some considerable expenditure is necessary before the annual return can be obtained then the history of the year will be stated in the form of a "Trading" or "Revenue" account or account of the receipts and expenditure during the year. It is essential when accounting on this basis to exclude from either side of the account matters which in substance represent only a rise or fall in the value of the asset from which revenue is derived as distinct from the net revenue itself or which represent only a change in the form of the investment, whether the

(2) [1914] A.C. 1001=84 L.J. P.C. 21=30 T.L. R. 685=111 L.T. 1010.
(3) [1911] 1 Ch. 92=80 L.J. Ch. 210=27 T.L. R. 76=55 S.J. 63=18 Manson 191=103 L.T. 609.
(4) [1897] 3 T.C. 542.
(5) [1904] 5 T.C. 159=6 F. 894.
(6) [1910] 5 T.C. 658.

change be a change into money or into some other form of property.

Now cases of salami or 'premium upon a lease may present considerable difficulty in maintaining the distinction between capital and revenue accounts. In *Raja Shiva Prasad's* case (1), Dawson-Miller, C. J. discussed the question in the case of a holder of an impartible Raj who possessed zemindari properties. The case before us is the case of a company and apparently of a company which possesses a good many leasehold properties. But under S. 12 of the Act and upon the facts stated in the case I do not see how a different result can be arrived at from that which would have been correct had the lease of 100 Clive Street been the sole capital asset of an individual. S. 12 covers many different types of income but even if it be assumed that such matters would affect the question, the case stated contains no findings as to the character or constitution of the company, the purpose for which it was formed, the extent of its operations or the particular character of the transaction by which the representatives of Ram Chandra Gooptu deceased with the assent of the beneficiaries under his will have demised his properties to Gooptu Estate Ltd. We know indeed that the assessee company is not said to be carrying on a business and it may be, for ought we know, that it has been formed merely to provide convenient machinery for management or as a scheme by which the testator's estate can be administered and in the end distributed to the best advantage.

Looking at the assessees therefore simply as owning leasehold property from which they derive a revenue, we find as regards 100 Clive Street, that they are charged and chargeable under S. 12 with the whole of the rent notwithstanding that it is derived from a wasting asset. They have a lease for 50 years from 1922 and the property is sublet for 50 years from 1921. In 1923 when the Tata Industrial Bank incurred a forfeiture of their lease the assessees instead of being interested merely as reversioners entitled to the rent reserved during the currency of the lease became at one stroke entitled to immediate possession of the property as it then stood. Then investment or capital asset had advanced suddenly in value and they were free to deal with it as they liked, subject only to the covenants in their own lease. Had they sold it no part of the purchase price could have been regarded as revenue. Had they sold a half share in it the same would still hold. What then did they do? By a bargain with the Central Bank they contrived to the extent of Rs. 1,00,000 to realize the enhanced value at once and the rest of the enhancement in value of their asset they converted into a right to an additional monthly sum of Rs. 750. The finding by the Commissioner is that the Rs. 1,00,000 was "in the nature of a salami or premium" and he adds :

"paid in consideration of the Central Bank being allowed to replace the original lessee."

These last words are not very lucid because the sum was not exacted as a term of mere assent to an assignment but by reason of the claim that the lessee had incurred a forfeiture and in consideration that the forfeiture was waived. The sum in question is certainly to be regarded as a salami or premium and that in the ordinary sense. It was demanded and paid in respect of resettlement of this property not for a year or even for a few years only but for the remaining 48 years out of the 49 years which exhausted the assessees' leasehold interest. I do not say that salami can never be income under S. 12 but it would in my opinion be highly unreasonable to treat any part of this salami as income. The very logic by which the Act has excluded from the account any allowance for depreciation of this wasting asset excludes this item also. Neither has place in a revenue account, if the account be strictly limited to its immediate purpose.

In my opinion the second question referred to us should be answered in favour of the assessee. In this view the other questions do not arise and need not be discussed.

The assessees must have their costs of the reference.

C. C. Ghose, J.—I agree.

Buckland, J.—I agree.

V.S./.R.K. *Reference answered.*

* A. I. R. 1930 Calcutta 5

LORT-WILLIAMS, J.

Abdul Rahim Oosman & Co.—Plaintiffs.

v.

Ojamshee Purshottamdas & Co.—Defendants.

Original Civil Suit No. 639 of 1928, Decided on 24th August 1928.

(a) Limitation Act, S. 14—Breach of contract in taking delivery of goods—Dispute referred to arbitration—Award filed in Court—Execution taken out—Deposit of amount under award in Court under protest—Suit by purchaser for declaration that award invalid—Suit decided in favour of purchaser but important finding in favour of seller—Findings as to breach of contract by purchaser necessary for decision in that case but not substantially in issue—Suit by seller for damages for breach of contract—Suit held not barred by res judicata and period after submission of matter to arbitration to final decision in previous suit was suspended while computing limitation for subsequent suit—Civil P. C., S. 11.

A firm entered into a contract to purchase a specific quantity of a commodity expected to arrive ex a ship. Accordingly on arrival a notice of arrival was sent to purchasers and delivery order tendered but purchasers failed to take delivery whereupon goods were resold at a loss. The contract which was partly printed and partly in writing contained an arbitration clause according to which the sellers after giving notice to that effect appointed an arbitrator and filed his award in the Court. Execution was taken out, goods of purchaser seized but were eventually released on purchaser paying the amount of award with costs in Court. The deposit was made under protest. The purchasers then instituted a declaratory suit against the sellers for declaration that arbitration was invalid and obtained an injunction against them restraining them from withdrawing the aforesaid amount. Subsequently an order was made that the suit and arbitration matters should be amalgamated and on purchaser giving surety and undertaking to pay interest in the event of suit being decreed in favour of sellers the amount standing to the credit of the arbitration matter was paid out to purchasers. In that suit the purchasers alleged that they had been always ready and willing to take delivey of the goods, that the resale was bogus, that no loss had been sustained, that the arbitration was invalid as arbitrator was ineligible according to the terms of the arbitration clause and that sellers wilfully misled and deceived the arbitrator and wrongfully procured the award by fraudulently concealing facts, that the resale was bogus as there were no goods to be resold and consequently the sellers suffered no loss. The Court did not specifically find either that the seller was ready or that the resale was genuine or the price was the fair market price; but found that the arbitrator had not been misled, that no fraud had been made out, that the arbitrator was eligible, the arbitration was valid and so passed decree in favour of sellers. On appeal the appellate Court set aside the decree on the ground that the arbitrator was ineligible and so arbitration invalid. It was further found that the sellers had goods, were ready and willing to sell but that the purchasers were unwilling to purchase, that there was genuine resale, that the sellers sustained loss due to breach of contract and the awards had not been procured by fraud. Consequently as the sellers had succeeded upon chief matters which required taking of evidence, the Court made no orders as to cost but ordered the sellers to repay to the purchasers the aforesaid sum in accordance with the order. Thereupon the sellers instituted a suit for damages for breach of contract and alleged that they realized the said sum by enforcing the aforesaid award and were entitled to retain it by reason of their right of appropriation as creditors of the purchasers. They further maintained that original cause of action remained suspended from the date of award or the filing thereof or of the execution proceedings up to the date of the judgment of the Court of appeal, that alternatively a fresh cause of action for the same amount arose in consequence of that judgment; that their original claim remained satisfied up to the judgment and that they had a right of set-off against the sum which they had been ordered to refund.

Held: (1) that the issues of fact raised in this suit were not directly but substantially in issue in the previous suit, as the direct issue in previous suit was whether the award had been obtained by fraud: and it was necessary practically and substantially to go into the whole evidence regarding the contract and its breach and how the loss was sustained and since the previous suit was decreed in favour of purchasers they were not in a position to appeal against the findings of facts against them and sellers could not get a decree, being defendants, and so the issue concerning breach of contract could not be considered as finally decided within the meaning of S. 11, Civil P. C. [P 7 C 2]

(2) The suit was maintainable either on the ground that upon literal construction of S. 14, Lim. Act, limitation was in suspense or upon the ground that a fresh cause of action arose as a result of the judgment of the Court of appeal: 12 *M. I. A.* 244 and *A. I. R.* 1916 *P. C.* 96, *Foll.*; *A. I. R.* 1926 *Cal.* 65; *A. I. R.* 1924 *Cal.* 600; *A. I. R.* 1921 *Lah.* 71 and 43 *Mad.* 845, *Ref.* [P 10 C 1]

(b) Limitation Act, S. 14 — Proceedings before arbitrator.

Proceedings before an arbitrator are proceedings in a Court. [P 8 C 1]

*** (c) Civil P. C. S. 11—S. 11 is not exhaustive.**

Section 11 is not exhaustive of the circumstances in which an issue is res judicata. [P 8 C 1]

N. N. Sircar and *S. C. Bose*—for Plaintiffs.

B. K. Ghosh and *P. C. Ghosh*—for Defendants.

Judgment.—The facts in this case are as follows: By seven contracts, partly printed and partly in writing, and dated 10th November 1920 the plaintiffs sold to the defendants 187½ tons of white Java Sugar ex. S. S. "Rajput." Notice of arrival was sent to the defendants on the 16th December, and on 5th January 1921 the delivery order was tendered. Defendants failed to take delivery, and thereupon the goods were resold on the 6th at a loss of Rs. 22,899-3-3.

Defendants disputed their liability, and as the contracts contained arbitration clauses, plaintiffs appointed a Mr. Duggan to act as sole arbitrator, the defendants having refused to make any appointment. Defendants declined to recognize the arbitration, and on 25th January 1921 the arbitrator made seven ex parte awards in favour of the plaintiffs, and these were filed in Court on the 31st. Seven warrants of attachment were issued on 3rd February. These were entitled "In the matter of the Indian Arbitration Act (9 of 1898)" and "In the matter of a reference to arbitration, etc., Nos. 32 to 38 of 1921." The warrants were executed and goods seized and defendants paid to the Sheriff, under protest, the sum of Rs. 26,220-7-1 for debt and Sheriff's costs to obtain release of their goods, and, on the 15th April, the said sum was paid by him into Court to the credit of Nos. 32-38 of 1921 as aforesaid.

On 5th April, defendants had instituted Suit No. 1008 of 1921 against plaintiffs and obtained an injunction restraining them from withdrawing the aforesaid sum from the Sheriff or from Court, and on 21st an order was made by Greaves, J., that that suit and the seven arbitration matters aforesaid should be amalgamated, and that, without prejudice to the right of contention of the defendants, on the plaintiffs giving security and undertaking to pay interest in the event of the suit being decreed in favour of the defendants, the aforesaid sum then standing to the credit of the said arbitration matters should be paid out to the plaintiffs.

By their plaint in that suit, defendants alleged that they had always been ready and willing to take delivery of the goods, that the resale was bogus and the loss had not been sustained, that the arbitration was invalid as the arbitrator was ineligible according to the terms of the arbitration clause, and that plaintiffs wilfully misled and deceived the arbitrator and wrongfully procured the aforesaid awards by fraudulently concealing material facts, namely, that the delivery order was bogus and did not represent any goods, that the resale was bogus, as there were no goods to resell, and that consequently the plaintiffs suffered no loss.

The suit was heard by Costello, J., and the following issues were raised:

(1) Was there a valid submission?

(2) Was Mr. Duggan eligible to act as arbitrator?

(3) Was he validly appointed as sole arbitrator?

(4) Were the awards obtained by fraud on the basis of a resale which never took place?

The question raised in issue 2 turned on whether Mr. Duggan could be described properly as a European merchant within the meaning of the arbitration clauses, he being only an assistant and head of a department in a firm of European merchants.

On issue 4, evidence was given in full of the facts concerning the readiness of the seller, the unreadiness of the buyer, the resale and the loss sustained. However, in his judgment given on 25th February 1927, Costello, J., quite properly confined himself strictly to the issues raised by counsel, and especially the allegation of fraud which he described as the real ground of complaint. He did not specifically find either that the seller was ready or that the resale was genuine or that the price was the fair market price. But he found that the arbitrator had not been misled, that no fraud had been made out, that the arbitrator was eligible, that the arbitration therefore was valid, and passed a decree in favour of the present plaintiffs.

Upon appeal, the learned Judges, by their judgment delivered on 21st March 1928, set aside this decree on the ground that the arbitrator was ineligible and the arbitration therefore invalid. But with regard to the question which they said had occupied the greatest amount of the time and attention of the Court below and the appeal Court and on which whole case had been thrashed out upon the evidence, they found specifically that the sellers had the goods and were ready and willing to sell, that the buyers were unable and unwilling to take deli-

very, that there was a breach of contract and a genuine resale, that the price was reasonable, that the loss was sustained by the sellers by reason of the breach, and that the awards had not been procured by fraud. Consequently, as the sellers had succeeded upon the chief matters which required the taking of evidence, they made no order as to costs, but ordered the sellers (the present plaintiffs) to repay to the defendants the aforesaid sum of Rs. 26,220-7-3 with interest in accordance with the order of Greaves, J.

Thereupon, on 22nd March 1928 the present suit 639 of 1928 was instituted. By their plaint plaintiffs claim the sum of Rs. 25,016-3-9, as damages for breach of the contract already referred to, and they allege that they realized the said sum by enforcing the aforesaid awards, and are entitled to retain it by reason of their right of appropriation as creditors of the defendants. They also say that their original cause of action remained suspended from the date of the awards or of the filing thereof or of the execution proceedings up to the date of the judgment of the Court of appeal, that alternatively a fresh cause of action for the same amount arose in consequence of that judgment, that their original claim remained satisfied up to that time, and that they have a right of set-off against the sum which they have been ordered to refund.

By their written statement, the defendants allege, inter alia, that the suit is barred by limitation, they deny any breach of contract and all other allegations in the plaint.

The issues raised are as follows :

(1) Is the suit barred by limitation ?

(2) Were plaintiffs ready and willing to perform the contract ?

(3) Was any extension of time given for taking delivery, as alleged in para. 6 of the written statement ?

(4) Was there a genuine resale ?

(5) Did plaintiffs suffer the alleged or any loss ?

(6) Did plaintiffs' claim remain satisfied, as alleged ?

(7) Did plaintiffs' original claim remain suspended as alleged, and could they have instituted a suit meanwhile ?

(8) Have plaintiffs any cause of action by reason of the judgment of the Court of appeal ?

(9) Is the judgment conclusive on the question whether plaintiffs had enough sugar to perform the contract, and whether there was a genuine resale ?

I will deal first with the question of res judicata. This issue is important in the light of events which have happened, though I decided to hear the evidence once again, and came to the conclusion hereinafter stated. S. 11, Civil P. C., states inter alia that no Court shall try any issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties and has been finally decided.

In my opinion, the issues of fact raised in this suit were not directly, though they were substantially, in issue in suit No. 1008 of 1921. The direct issue in that suit was whether the awards had been procured by fraud and were so dealt with by Costello, J. But in order to decide that issue, it was necessary, practically and substantially, to go into the whole of the evidence regarding the contract and its breach by the buyers, and the loss sustained, and in fact all that evidence was given. And the Court of appeal based their decision that the awards were not fraudulently procured upon their specific findings of fact, that the buyers had been guilty of breach of contract and that the sellers had suffered the loss claimed. However, the issue cannot be said to have been finally decided within the meaning of the section, because the suit was decreed in favour of the buyers, who were not therefore in a position to appeal against the specific findings, and the sellers being defendants in the suit were not in a position to ask for a decree. Further, I doubt whether these findings were necessary for the determination of the appeal. However that may be, I have heard the evidence over again and have come to the same conclusion. I do not propose to discuss for a third time evidence which has been dealt with at length on two previous occasions. It is sufficient for me to say that I am satisfied upon the evidence that the plaintiffs had the goods and were ready and willing to deliver them, that the defendants were not ready and willing and failed to take delivery, that no extension of time was given for taking delivery, that there was a genuine resale, that the sum realised was reasonable and at the market rate, and that plaintiffs suffered the loss alleged in consequence of defendant's said breach of contract.

But S. 11, Civil P. C is not exhaustive of the circumstances in which an issue is res judicata. Upon general principles of law, no issue ought to be twice litigated, and it is clear that in this case to some extent the same evidence has been given, and the same issues decided as in suit No. 1008; and the question of res judicata arises in an unusual way, for it is urged on behalf of the plaintiffs, who say that they ought not to have to prove the same facts a second time, which have already been found in their favour in the former suit. Moreover, the question whether this issue has already been decided in suit 1008 becomes important on the question of limitation.

In my opinion, the plea of res judicata is misconceived, and is due to some confusion of thought arising from the contemplation of an unusual and somewhat complicated legal puzzle, the solution of which will be found more readily when discussing the question of limitation, which I will now consider.

In S. 9, Lim. Act of 1908, it is stated that "Where once time has begun to run, no subsequent disability to sue stops it." Time in the present case, so far as the original cause of action is concerned began to run when the breach occurred. But in S. 14 (1) it is provided that

> "In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which from defect of jurisdiction, or other cause of a like nature, is unable to entertain it."

In my opinion, the proceedings before the arbitrator were proceedings in a Court within the meaning of the section. Moreover his awards were filed in Court with the result that, in accordance with the provisions of S. 15, Arbitration Act, they became enforcible as decrees, and were executed as such, and the amounts due thereunder were realised by payment to the Sheriff. It is true that those amounts were paid under protest, and were paid out to the present plaintiffs only upon the undertaking given to Greaves, J. but that undertaking was given in suit 1008, with which the execution proceedings were amalgamated, and it is difficult to see how the plaintiffs could have instituted another suit for the same amount while that amalgated suit was pending and until the awards and the execution were set aside. In that suit, the present defendants—then plaintiffs—by an amendment of their plaint, made four years after the institution of the suit, themselves raised all the issues of fact regarding the contract and its breach, which were subsequently decided in favour of the present plaintiffs. That proceeding, therefore, was, to that extent, founded upon the same cause of action as in the present suit. But the appeal Court owing to the form of the suit, had no jurisdiction to give effect to their decisions of fact in favour of the present plaintiffs, by decreeing the amount due to them as a result of the breach of contract.

The argument for the plaintiff is put in two ways. Either that, in computing the period of limitation, the time during which they were prosecuting the proceedings in suit 1008, which was amalgamated with the execution proceedings, ought to be excluded, or that their right of action was extinguished when they executed the awards, revived when the Court of appeal ordered them to refund the money; or in other words, their cause of action accrued at the time when the awards having been set aside the defendants' obligation to pay damages revived, and that defendants, when the awards were set aside and they recovered the money paid in execution, took it back with the obligation to pay plaintiffs the damages found due to them by the appeal Court, and that such damages must be taken to have become due when the repayment was ordered to be made, or, to put it another way there was a failure of consideration. They further say that upon execution, their claim was satisfied, and they could not have sued for damages until the awards had been set aside.

I agree generally with these contentions, and in my opinion, they are supported by the decision of the Judicial Committee in the case of *Surno Moyee* v. *Shooshee Mokhee Burmonia* (1).

In that case a zemindar had caused the rights of certain patindars in a patni

(1) [1868] 12 M. I. A 244=11 W.R. 5=2 B.L. R. 10 (P. C.).

taluk to be sold for arrears of rent under Bengal Regulation 8 of 1819. The sale was cancelled on the ground that the zamindar had failed to give the necessary notices, and she was ordered to pay the patnidars mesne profits for the period during which they were out of possession. Thereupon, she brought a suit for the arrears which had accrued before and during that time and was met by a plea of limitation under S. 32, Act 10 1859. It was held by the Deputy Collector that the suit was not barred, inasmuch as the plaintiff could not both take the rents and sell the patni taluk, that so long as she was engaged in lawfully defending a suit to reverse the sale she could not possibly sue for the rents, and, therefore, her cause of action did not accrue until the sale was set aside. On appeal, the High Court of Calcutta reversed this decision. The learned Judges said that

"the plaintiff urged that the arrears were put in abeyance by satisfaction out of the proceeds of the irregular sale, and revived or rather became a second time due . . . . . this ground of contention is untenable, otherwise the plaintiff would be enabled to take advantage of her own wrong. . . . . it was her duty in law to have that notice duly served . . . . . she maintains that she was unable on account of the pending litigation to sue . . . . . We must observe that the words of S. 32 of that Act are absolute and do not admit of any exception whatever to their operation. Moreover, it is not correct to say that this suit could not have been brought pending the litigation respecting the irregular and invalid sale, and here again she cannot claim any benefit from acts of her own, which she ought from the beginning to have known were illegal or defective, or she could at any time have sued or abided the result, so saving her time."

On appeal to the Privy Council, their Lordships said that it was perfectly clear that the cause of action accrued at the time at which, the sale having been set aside, obligation to pay this money revived, that upon the fair construction of S. 32 of that Act the time had really not run; that because, when the zemindar pursued the remedy which was clearly competent to her if it had been regularly pursued, she inadvertently omitted one of the formalities prescribed by the Act, she could not in bringing the suit be said to be seeking to take advantage of her own wrong, and that it was clear that until the sale had been finally set aside she was in the position of a person whose claim had been satisfied, and that her suit might have been successfully met by a plea to that effect.

It will be observed that there is a curiously close analogy between the facts and the arguments on both sides in that, and the present case. The main distinction is that in that case the patnidars had been dispossessed by the sale, whereas in this case, the money realized by the execution was paid to the plaintiffs only upon giving the security and undertaking already mentioned.

That case was followed in *Lakhan Chunder Sen* v. *Madhusudan Sen* (2). In that case, which was a suit for possession of a share in certain property *A* sued *B* and *C*. *C* supported *A*, and an issue concerning a share claimed by *C* was raised at *B's* request as between himself and *C*. A decree was passed in favour of *A*, and a declaration made in favour of *C* and possession ordered to be given in accordance therewith. On appeal the decree so far as *C* was concerned, was set aside on the ground that the suit being for possession and not partition, the Judge had no power to give relief as between two co-defendants. Thereupon *C* brought a suit, and was met by a plea of limitation. Bodilly, J. made a decree in favour of the defendant, holding that to avoid the bar it must be shown that the claim in the first suit had been satisfied, and that this could not be established where the decree had been set aside as invalid for want of jurisdiction. On appeal, the learned Judges expressed a doubt whether the case fell within the provisions of S. 14, Lim. Act, but held that so long as the decree was undischarged it was susceptible of execution, and it was not open to *C* to institute a fresh suit, and, therefore, the right of action was suspended and was not barred by limitation. On appeal to the Privy Council: *Nrityamoni Dassi* v *Lakhan Chandra Sen* (3) this judgment was affirmed. Their Lordships concurred generally with the reasons given by the appellate Court for overruling the plea of limitation and held that limitation remained in suspense whilst *C* was bona fide litigating for rights in a Court of justice, and that the decree was made by a competent Court and was capable of being enforced until set aside.

(2) [1907] 35 Cal. 209=7 C. L. J. 59=12 C. W. N. 326.
(3) A. I. R. 1916 P. C. 96=43 Cal. 660.

In my opinion, the present case falls within the rationes decidendi of those cases. It is not necessary for me to deal seriatim with the large number of cases which have been decided upon this question, because the whole subject has been exhaustively considered by Mukerji, J. in *Sarat Kamini Dasi* v. *Nagendra Nath Pal* (4) and by Sir Asutosh Mookerjee, J. in *Dwijendra Narayan Roy* v. *Joges Chandra De* (5). The cases of *Kartar Singh* v. *Bhagat Singh* (6) and *Muthuveerappa Chetty* v. *Adaikappa Chetty* (7) are directly in point upon the question whether a fresh cause of action arose. In my opinion, the suit is maintainable either on the ground that upon a liberal construction of S. 14, limitation was in suspense, or upon the ground that a fresh cause of action arose as a result of the judgment of the Court of appeal.

Therefore, there will be a decree in favour of the plaintiffs for Rs. 22,899-3-3 with costs, and with interest on the above sum at 3 per cent from 7th February 1921, to date of decree and at the rate of 6 per cent from date of decree until realization.

Plaintiffs will realize the said decretal amount and the costs of this suit out of the sum of the Rs. 37,291-6-8 now laying in Court in Suit No. 1008 of 1921 and the balance will be withdrawn by the defendants.

V.B./R.K. *Claim decreed.*

(4) A. I. R. 1926 Cal. 65.
(5) A. I. R. 1924 Cal. 600.
(6) A. I. R. 1921 Lah. 71=2 Lah. 320.
(7) [1920] 43 Mad. 845=39 M. L. J. 312=12 M. L. W. 240=59 I. C. 472=(1920) M.W. N. 505.

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* A. I. R. 1930 Calcutta 10

PAGE, J.

Chowdhury T. C. and *Bros.*—Plaintiffs.

v.

Girindra Mohan Neogi—Defendant.

Original Civil Suit No. 2390 of 1927, Decided on 6th February 1929.

*** Contract Act, Ss. 194 and 195—Privity of contract between principal and person appointed by agent authorized in that behalf to perform part of agency transaction determines whether person is substituted agent or sub-agent.**

The true test to determine whether the person appointed by the agent authorised in that behalf to perform part of the business of agency is a substituted agent of the principal or the sub-agent of the agent is to see if there is a privity of contract between the principal and the person so appointed, and the test to be applied is the same whether the case falls within S. 194 or whether the person so appointed is nominee of the principal, although there is difference in the obligation undertaken by the agent. For S. 195 applies to a case falling within S. 194, while in cases where the substituted agent is the nominee of the principal, the agent is not concerned with the character or efficiency of the person so appointed and his obligation quoad the part of the business of the agency entrusted to the substituted agent ceases if and so soon as privity of contract has been created between the substituted agent and principal. [P 14 C 1, 2]

N purchased from a firm *C* at Calcutta a quantity of corrugated iron sheets and paid a sum of Rs. 250 in part payment of price. *N* instructed the firm to send the goods to his place *K* and collect the balance of purchase money through the local Bank at *K*. The firm *C* thereupon sent goods to *K* and directed the railway receipt, their bill and demand draft with a covering letter to National Bank their bankers at Calcutta, instructing them to collect the bills through the Bank at *K*. Contrary to instructions the Bank at *K* made over goods to *N*. *N* delayed payment and later offered to pay in instalments. Whereupon the firm *C* brought a suit to recover balance from National Bank.

Held: that the local bank at *K* was the agent of the firm *C* for the work directed to be done at *K*, and the National Bank was merely the conduit pipe through which *C* firm communicated their instructions to Bank at *K* and the Bank at *K* was not the sub-agent of the National Bank. [P 14 C 2, P 15 C 1]

S. C. Bose and *P. C. Basu*—for Plaintiffs.

W. W. K. Page and *E. C. Ormond*—for Defendant.

Judgment.—I have taken time to consider this case which is not free from difficulty. In May 1927, defendant 1 purchased from the plaintiffs a quantity of corrugated iron sheets for the sum of Rs. 6,689-11-6. The defendant Neogi forthwith paid Rs. 250, part of the price, and instructed the plaintiffs to forward the goods by rail to Khulna. The goods were duly sent to Khulna in two consignments: on 1st June and 8th June 1927. On 6th June, the plaintiffs, by letter, gave the following instructions to the defendant bank in respect of the first consignment:

"No. 1883. *Calcutta, 6th June* 1927.

To

The Manager,
National Bank of India Ltd.,
Calcutta.

Dear Sir,

We beg to request you to be good enough to realize the amount of Rs. 2,675-10-6 from our

dealer Mr. G. M. Neogi of Khulna through the Khulna Union Bank, Limited, as advised by him, against railway receipt No. 171 of 1st June 1927, as usual.

We are enclosing herewith the abovementioned railway receipt, our bill No. 5342 in duplicate and demand draft as usual requesting your goodself to kindly have the amount together with your usual charges realized from the party through the Khulna Union Bank, Ltd., against delivery of the documents (railway receipt, etc.), as usual and oblige.

Yours faithfully,
(Sd) T. C. Chowdhury & Bros.

Enclosure:
Railway Receipt No. 171 of 1st June 1927.
Our bill in duplicate.
Demand draft."

(His Lordship here considered the relevant letters between the plaintiffs, the National Bank of India and the Khulna Bank). The first letter was from the plaintiffs T. C. Choudhury and Bros., authorising the National Bank of India to realize Rs. 2,675-10-6 and other extra charges from Mr. G. M. Neogi through the Khulna Union Bank, Khulna. The National Bank accordingly sent the bills to the Union Bank for collection and remittance, on the same date and informed their clients Choudhury and Bros. the same on the following day. On 20th June the plaintiffs requested the National Bank to realize the bills for Rs. 2,675 and odd and for Rs. 3,764 on account of second consignment within seven days of the receipt of their letter to the Khulna Bank as the plaintiffs were afraid that the goods might not be accepted. On the following day the plaintiffs again wrote to their Bank to inform the Khulna Union Bank by telegram not to give delivery of goods to Neogi and ascertain from him if he is willing to pay the bills or not. The plaintiffs' Bank telegraphed the same to the Khulna Bank and a telegram was received by the plaintiffs' Bank that Neogi would inform them his intention tomorrow and that they had taken the delivery of goods and they were lying in their godowns. The same was communicated to the plaintiffs on 23rd June 1927. (His Lordship then considered the letters between the parties to the suit which included the following and then continued): Accordingly, the bank sent the documents under a covering letter of even date to the Union Bank of Khulna:

"Copy.
Registered.
National Bank of India, Ltd.,
Calcutta, 6th June, 1927.

The Union Bank of Khulna,
Khulna.

Dear Sirs,

We beg to hand you herewith bills as noted below for favour of collection and remittance of proceeds by demand draft on Calcutta.

Yours faithfully,
Sd.
Manager.

Number M.B.C.	Drawee.	Term.	Nature.	Amount.	Remark.
				Rs. a. p.	
65/2978	G.M. Neogi	D/D	Doety	2,675 10 6	
				6 11 0	
				2,682 5 6	

Rupees two thousands six hundred and eighty two 5/6.

Please collect all your charge from the drawees.

Note—
D/A. Indicates documents attached to be delivered on acceptance of bill.
D/P. Indicates documents attached to be delivered on payment only.
C. Indicates clean.

National Bank of India Ltd.
Sd.
Calcutta."

And on 7th June, the bank replied to the plaintiffs' letter of 6th June as follows:

"*National Bank of India, Ltd.,*
Calcutta, 7th June 1927.

Messrs. T. C. Chowdhury Bros.,
Calcutta.

Dear Sirs,

We beg to acknowledge receipt of your letter of 6th instant enclosing the undernoted which we have sent for collection on your account, the proceeds of which will be paid upon receipt of advice of payment only.

Please note that the bank will not be responsible for any loss that may occur by delay in transmission or collection.

Yours faithfully,
Sd.
Manager.

Bill	On	Amount.	Remarks.
		Rs. a. p.	
	Khulna	2,675 10 6	

Similar letters were sent in respect of the second consignment. On 20th June 1927, the plaintiffs wrote to the defendant bank.

T. C. Chowdhury Bros,

No. 1907.

Calcutta, 27th June 1927.

To
The Manager,
National Bank of India Ltd.,
Calcutta

Dear Sir,

With reference to your letter of 7th instant, we beg to request you to kindly advice the Khulna Union Bank, Ltd., to receive payment of our bill of Rs. 2,675-10-6 from our party Mr. G. M. Neogi within 7 days from the day of receipt of your letter of advice, if the

amount is not realized in the mean-time, as we are afraid the party may refuse the goods.

Also please do the same treatment regarding our bill No. 5344 for Rs. 3,764.

An early compliance into the matter will oblige.

Yours faithfully,
(Sd.) T. C. Chowdhury & Bros."

and the defendant bank forwarded the instructions therein contained to the Khulna Bank.

On 21st June the plaintiffs wrote to the defendant bank:

" No. 1913.

T. C. Chowdhury Bros.
Calcutta, 21*st June* 1927.

To
The Manager,
National Bank of India, Ltd.

Dear Sir,

In continuation of our letter No. 1907 of 21st instant please instruct the Khulna Union Bank Ltd., by telegram not to clear or take delivery of the goods from the railway but to retain the railway receipt in case it is not paid for by the drawees, pending further instructions from us for its disposal. Please also instruct the Khulna Union Bank, Ltd., to obtain a definite answer from drawees whether or not they are going to pay the bills.

Yours faithfully,
(Sd.) T. C. Chowdhury & Bros."

And on 23rd June, the defendant bank replied:

" National Bank of India, Ltd.
Calcutta, 23*rd June* 1927.

Messrs. T. C. Chowdhury Bros.,
Calcutta.

Dear Sirs,

Re: Your bill on G. M. Neogi, Khulna
Rs. 2,675-10-6 *and Rs.* 3,764-1-0.

With reference to your letter No. 1913, dated 21st instant, we wired our Khulna agents in terms of your instructions and have received the following telegram from them:

" Neogi Calcutta will arrive tomorrow. Informing intention tomorrow goods our godown." Please note.

We have debited your account Rs. 1-14-0 for cost of our wire.

Yours faithfully,
Sd.
Manager."

(His Lordship proceeded after referring to the letters between the parties including the following):

" 1934. *Dated* 27*th June* 1927.

The Manager,
National Bank of India.

Dear Sir,

Re: Our bills on G. M. Neogi, Khulna
Rs. 2,675-10-6 *and Rs.* 3,764-1-0.

With reference to your letter of 23rd instant, we beg to request you to kindly furnish us with the following information, also advise the Khulna Bank as under:

We shall be obliged if you kindly give the matter your careful attention as the party is harrassing us for nothing by taking time unnecessarily.

Yours faithfully,
(Sd.) T. C. Chowdhury & Bros.

1. Whether Khulna Bank has any authority to have the goods cleared from the Railway Co. and stored in their godown without taking any permission or giving any intimation either to yourself as our banker or to us direct ?

2. What is the financial condition of the Khulna Bank at present ?

3. Please cable the Khulna Bank again asking about the intention of Mr. Neogi regarding the payment of our above bills.

4. Place write the Khulna Bank strictly to re-book the goods to us in the 1st week of July if the payment is not made within this half yearly closing."

" No. 1773.

Urgent.
Calcutta, 18*th July* 1927.

To
The Manager.
National Bank.

Dear Sir,

Re: M. B. C. 65/2978 & 3042 *on G. M. Neogi, Khulna, Rs.* 2,675-10-6 *and Rs.* 3,764-1-0.

(1) Please instruct Khulna Union Bank, Ltd. to remit to you immediately by wire the 25 per cent margin received by them from the drawees.

(2) To give notice to drawees that unless the remaining 75 per cent is paid by them, together with all charges and interest within 22nd instant the goods will be returned to Calcutta for disposal on their account and risk according to law.

(3) In the event of default by the drawees to comply with this demand, to return the goods to Calcutta forthwith and send the R/R to you with debit note for the charges incurred by them.

(4) To treat this our final instruction, which should not be deviated from by them, otherwise they will be held liable for all losses incurred by us in consequence.

Yours faithfully,
(Sd.) T. C. Chowdhury & Bros."

" *Calcutta*, 2*th July* 1927.

Messrs. T. C. Chowdhury Bros.,
Calcutta.

M. B. C. No. etc.

Dear Sirs,

We have received the following wire from the Khulna Union Bank Ltd. of Khulna.

" Goods delivered our risk against hundis understanding payment be made definitely by 15th August."

We have written them pointing out in delivering the relative goods in this manner they have acted entirely outside their authority as agents for collection and had requested them to remit us forthwith the full amount of the bills.

We shall communicate with you in due course.

(Sd.) National Bank."

[His Lordship then continued:]

The Khulna Bank having pressed the defendant Bank for time, in which to remit the proceeds of the bills, the defendant Bank, on 2nd September asked the plaintiffs for instructions, and received the following reply on 9th September:

" No. 1980. *Dated 9th September* 1927.

To

The Manager,
National Bank of India Ltd.,

Dear Sir,

Re: M. B. C. 2978, 3012 *on G. M. Neogi, Khulna for Rs.* 2,675-10-6 *and Rs.* 3,764-1-0.

With reference to your letter of 2nd instant, we beg to advise you kindly inform Khulna Bank to pay the amount within 26th instant, i. e., before our closing with the local parties for coming Puja holidays also please inform if such payment is not made you are advised to take necessary legal action to realise the amount as usual.

Yours faithfully,
(Sd). T. C. Chowdhury & Bros. "

No further payments having been made either by Neogi or by the defendant Bank, the plaintiff, on 27th November 1927, brought the present suit, claiming against defendant 1 the balance of the purchase price with interest thereon at 12 per cent, and against the defendant Bank a like sum as damages, which the plaintiffs (alleged that they) had suffered by reason of the negligence and breach of duty of the defendant Bank :

" in delivering the said railway receipts and or in causing the same to be delivered by their Khulna agents to the defendant Neogi without receiving payment of the full amount of the said drafts. "

The defendant Neogi has not appeared and as against him the plaintiffs have proved their claim, and the issue that remains to be determined is whether the defendant bank is liable for the admitted loss caused to the plaintiffs by the negligence and breach of duty of the Khulna Bank.

The issue is one of fact whether in connexion with the collection of the bills in Khulna the Khulna Bank was acting as the agent of the plaintiffs or of the defendant Bank. The material sections of the Contract Act (9 of 1872) are Ss. 191, 192, 194 and 195 which run as follows :

Section 191.—A " sub-agent " is a person employed by, and acting under the control of, the original agent in the business of the agency.

Section 192.—Where a sub-agent is properly appointed the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

The agent is responsible to the principal for the acts of the sub-agent,

The sub-agent is responsible for his acts to the agent, but not to the principal, except in case of fraud or wilful wrong.

Section 194.—Where an agent, holding an express or implied authority to name another person to act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

Section 195.—In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case and if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

Now, it is plain and must be borne in mind that at all material times, until after the goods had been delivered to Neogi, communications with the Khulna Bank were carried on by or through the defendant Bank and further that in the course of such communications, the defendant Bank sometimes referred to the Khulna Bank as " our Khulna agents, " and in the letter of 25th August threatened " to place the matter in the hands of our solicitors. " But undue stress ought not to be laid upon loose or casual words and phrases used in business letters, and regard must be had to the substance of the transaction to ascertain whether in fact the Khulna Bank was acting as the sub-agent of the defendant Bank in endeavouring to collect the plaintiffs' bills. Now, it cannot be doubted, I think that in so far as the collection was to be carried out at Khulna, the defendant Bank had express authority to appoint the Khulna Bank to act in the transaction as the agents of the plaintiffs. But in my opinion, having regard to the terms of the letters that passed between the plaintiffs and the defendant bank on 6th, 7th, 9th and 13th June the authority thereby conferred upon the defendant bank to appoint the Khulna Bank the plaintiffs' agent for collection in Khulna was not within the ambit of S. 194, Contract Act. I think that Ss. 194 and 195 are to be read together and that the authority to create a third person an agent of the principal referred

to in S. 194 connotes that the agent has a discretion "in selecting such agent for his principal." These sections do not apply to cases where the agent has no power of selection, and if he undertakes the agency is compelled to appoint a particular nominee of his principal as the agent of the principal for some part of the business of the agency. In my opinion, the effect of the letters in which the terms of the agreement of agency between the plaintiffs and the defenant Bank are set out was that the defendant Bank became authorized and undertook to appoint the Khulna Bank and no other person as the agent of the plaintiffs for that part of the business of collection that was to be carried out at Khulna.

Now, it is common ground that the defendant Bank did appoint the Khulna Bank to carry out that part of the collection which was to take place at Khulna but the question to be decided is whether the defendant Bank appointed the Khulna Bank so to act as the sub-agent of the defendant Bank or as the substituted agent of the plaintiffs. The issue depends upon whether the defendant Bank on behalf of the plaintiffs and the Khulna Bank agreed that the Khulna Bank should act at Khulna as the plaintiffs' agent for the purpose of collecting the bills or, in other words, whether the defendant Bank created privity of contract between the plaintiffs and the Khulna Bank. In my opinion, that is the true test to determine whether the person appointed by an agent authorized in that behalf to perform part of the business of the agency is a substituted agent of the principal or the sub-agent of the agent, and the test to be applied is the same whether the case falls within S. 194 or whether, as in the present case, the person so appointed is the nominee of the principal although there is a difference in the obligation undertaken by the agent, for S. 195 applies to a case falling within S. 194, while in cases where the substituted agent is the nominee of the principal, the agent is not concerned with the character or efficiency of the person so appointed, and his obligation quoad the part of the business of the agency entrusted to the substituted agent ceases if and so soon as privity of contract has been created between the substituted agent and the principal. *Solly* v. *Rathbone* (1), *Schmaling* v. *Thomlinson* (2), *Stephens* v. *Badcock* (3), *Mackersy* v. *Ramsays* (4), *Lockwood* v. *Abdy* (5), *Robbins* v. *Fennel* (6), *De Bussche* v. *Alt* (7), *New Zealand* and *Australian Land Co.*, v. *Watson* (8), *Fine Art Society* v. *Union Bank of London* (9), *Eossaise Steamship Co.* v. *Lloyd Low & Co.* (10), *Powell & Thomas* v. *Evan Jones & Co.* (11). Story on Agency Edn. 9, p. 255 : see also *Nensukhdas* v. *Birdichand* (12), for a general discussion of the sections. Now, applying this test to the facts of the present case, I am of opinion that, while the letters and telegrams to the Khulna Bank were sent by the defendant Bank, the mandates therein contained came from the plaintiffs. As I apprehend the facts, in endeavouring to carry out the collection of the bills at Khulna, the Khulna Bank was not acting under the control of the defendant Bank, for, so far as the collection at Khulna was concerned, the defendant Bank was acting under the directions of the plaintiffs who throughout took charge of the transaction. The defendant Bank, in my opinion, was merely the conduit pipe through which the plaintiffs communicated their instructions to the Khulna Bank, and, inasmuch as the defendant Bank invariably, I think, forwarded to the Khulna Bank the communications which they received from the plaintiffs, it is clear that the Khulna Bank was fully aware that the instructions which the defendant Bank forwarded to them proceeded from the plaintiffs, and not from the defendant Bank.

Take one letter alone by way of illustration, that of 18th July 1927, from the plaintiffs to the defendant Bank, in which the plaintiffs directed the defendant Bank to warn the Khulna Bank that it is :

(1) [1814] 2 M & S 298.
(2) [1815] 6 Taunt 147=1 Marsh 500.
(3) [1832] 3 B & Ad 354=1 L. J. K. B. 75.
(4) [1843] 9 Cl. & F. 818.
(5) [1845] 14 Sim. 437=9 Jur. 267.
(6) [1847] 11 Q. B. 248=12 Jur. 157=17 L. J. Q B. 77.
(7) [1878] 8 Ch. D. 286=38 L. T. 370=47 L. J. Ch. 381.
(8) [1881] 7 Q. B. D. 374.
(9) [1885] 1 T. L. R. 594.
(10) [1890] 7 T. L. R. 76.
(11) [1905] 1 K B. 11.
(12) [1917] 19 Bom. L. R. 948=43 I. C. 699.

"to treat this as our final instruction which should not be deviated from by them, otherwise they will be held liable for all losses incurred by us in consequence."

The fact that the Khulna Bank, to which that letter was sent by the defendant Bank, received it without challenge or protest is cogent evidence that the Khulna Bank had consented to act as the agent of the plaintiffs quoad the part of the collection that was to be carried out at Khulna. The correspondence speaks for itself and it is necessary for me to discuss the letters in detail. Upon a perusal of the evidence as a whole, the conclusion at which I have arrived is that in the collection at Khulna the Khulna Bank was acting as the agent of the plaintiffs, and not as the sub-agent of the defendant Bank. The result is that as against the defendant Bank, the suit will be dismissed with costs on scale 2, but as against the defendant Neogi there will be a decree for the plaintiffs for Rs. 5,157-6-9, interest on judgment at 6 per cent and costs on scale 1.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 15

JACK AND MITTER, JJ.

Harasit Golder and *others* — Defendants—Appellants.

v.

Jaladhar Biswas and *others*— Plaintiffs—Respondents.

Appeal No. 26 of 1927, Decided on 6th February 1929, from appellate decree of Addl. Sub-Judge, Khulna, D/- 13th July 1926.

(a) Limitation Act Art. 144 — Symbolic possession in execution of decree — It has same effect as actual possession against judgment-debtor and mortgagee pendente lite—Civil P. C., O. 21, Rr. 95 and 96.

Where in execution of a decree on a mortgage symbolic possession is delivered of immovable property to the person entitled to possession thereof and such person brings a suit for recovery of actual possession; the symbolic possession is deemed equivalent to actual possession as against the judgment-debtor his representatives and the suit is brought in time if it is brought within twelve years from the date of the said symbolic possession. And further if during the pendency of suit on such mortgage another mortgage is executed by the mortgagor in favour of third persons they are bound by the decree in execution of which symbolic possession was delivered. They are affected by the doctrine of lis pendens and the symbolic possession as against them would be equivalent to actual possession and in this respect their possession is not different from that of the judgment-debtor of that mortgage decree. [P 16 C 1, 2]

(b) Adverse possession —Mortgagee's possession after payment of mortgage money is not adverse.

Mere payment of mortgage money without more does not amount to adverse possession by the mortgagee after the date of payment. [P 16 C 2]

Amarendra Nath Bose, *Arun Chunder Bose* and *Benoyendra Nath Ghose* — for Appellants.

Jadunath Kanjilal and *Nagendra Coomar Dutt*—for Respondents.

Mitter, J.—The relevant facts necessary for deciding the question of limitation which falls for determination in this appeal may be briefly stated thus: Rati Kanta (the predecessor-in-interest of defendants 1 to 5) and Shambhu (the predecessor-in-interest of defendants 7 to 11) mortgaged the disputed lands to the father of plaintiffs 1 and 2 in the year 1300 B. S. Rati Kanta and Budhai executed another mortgage in favour of plaintiff 1 in the year 1304 B. S. Plaintiff's father brought a suit on the first mortgage on 12th April 1906 obtained a decree on 24th June 1907 and purchased the mortgaged property on 18th July 1907 in execution of the decree. The sale was confirmed on 7th October 1909 and there was formal delivery of possession on 19th July 1910. During the pendency of the suit on the mortgage Rati Kanta and Budhai executed a mortgage in favour of defendants 12 to 14 and the mortgagees defendants 12 to 14 entered into possession. This mortgage of 1313 was fully paid off. The plaint as originally filed was amended and the plaintiff prayed for recovery of joint possession of the half share of 24 bighas of land with Budhai defendant 6.

This suit was filed on 25th May 1921. The Munsif who tried the suit in the first instance held on 24th November 1922 that the valuation of the suit was beyond the pecuniary jurisdiction of the Court and returned the plaint for presentation to the proper Court. The plaint was refiled on 17th January 1924. The lower appellate Court has given a partial decree to the plaintiffs and has directed that plaintiffs are to recover joint poesession with defendant 6 of one half of sixteen bighas.

In appeal to this Court by defendants 1, 2, 12, 13 and 14 it is contended that

there has not been a proper trial of the question of limitation as the possession of defendants 12 to 14 on the basis of mortgage of 1313 became adverse to Rati Kanta the mortgagee from the date the said mortgage was paid off and if it is found that the payment was made more than twelve years prior to the institution of the suit under Art. 137, Sch. 1, Lim. Act, the suit would be barred by limitation and it is argued for the appellant that the case should be sent back for a proper trial of the question of limitation.

It is conceded by the appellant that for the purpose of determining the question of limitation 25th May 1921, the date on which the plaint was originally filed might be taken to be the date of the institution of the suit and if the payment of the mortgage of 1313 (1906) was made beyond twelve years of this date the suit is barred.

It is true the judgment-debtor under the decree in mortgage suit instituted on 12th April 1906 was not in actual possession at the date of the sale but the mortgagee of the judgment-debtor was in possession. It is said that against such mortgagee symbolic possession of 19th July 1910 is not equivalent to actual possession, for the mortgagee would hold adversely to the mortgagor Rati Kanta after the payment of the mortgage-debt. It is said that symbolic possession cannot operate as actual possession against persons not parties to the suit in which the decree which resulted in the sale was made and reliance is placed on the two Full Bench decisions of this Court in *Jaggabondhu* v. *Ram Chunder* (1), *Juggobondhu* v. *Purnanand* (2). In the last case the defendants were the judgment-debtors and the ijaradar under him. The suit was held not barred as it was brought within 12 years from the date of symbolical possession.

In our opinion the true rule deducible from the authorities is that where in execution of a decree symbolic possession is delivered of immovable property to the person entitled to possession thereof and such person brings a suit for recovery of actual possession the symbolic possession is deemed equivalent to actual possession as against judgment-debtor or his representative and the suit is brought in time if it is brought within twelve years from the date of the said symbolic possession. The mortgage in favour of defendants 12 to 14 having been executed during the pendency of the suit on the mortgage of 1300 they are bound by the decree in execution of which symbolical possession was delivered. They are affected by the doctrine of lis pendens and symbolic possession as against them would be equivalent to actual possession and in this respect their possession is not different from that of the judgment-debtor of the mortgage decree in the suit of 1906. Further in the present case the defendants 12 to 14 do not claim to be in possession of the disputed property adversely to the judgment-debtor for they entered into possession, on the foot of mortgage by the judgment-debtor. For the possession by mortgagee of mortgaged property is not prima facie adverse to the mortgagor. It is not said in this case that defendants 12 to 14 set up a hostile title to their mortgagor Rati Kanta but it is argued that if the mortgage debt was paid off in respect of the mortgage in favour of defendants 12 to 14 the possession of the latter became adverse to the mortgagor Rati Kanta from that date. We are unable to accept this contention for the mere payment of the mortgage money without more does not amount to adverse possession by the mortgagee after the date of payment. Under Art. 148, Sch. 1, Lim. Act the mortgagor gets 60 years from the due date of the mortgage during which to redeem the mortgaged property and admittedly this time has not yet expired.

In this view we think the judgment of the lower appellate Court is right and must be affirmed with costs.

Jack, J.—I agree.

V.B./R.K. *Appeal dismissed.*

(1) [1880] 5 Cal. 584=5 C. L. R. 518 (F. B.).
(2) [1889] 16 Cal. 590.

* A. I. R. 1930 Calcutta 17

C. C. GHOSE AND PAGE, JJ.

Carr Lazarus Phillips and *others*—Appellants.

v.

Alfred Ernest Mitchell and *others*—Respondents.

Appeal No. 67 of 1929, Decided on 29th August 1929, from the original decree of Buckland, J., D/- 26th April 1929, in Suit No. 1476 of 1928.

(a) Contract Act, S. 126 — Contract of guarantee — Construction—Rule—Surrounding circumstances should be considered.

In construing a guarantee Judge must look at and is entitled to have given in evidence all the surrounding circumstances so as to know what the parties meant: *Lloyds* v. *Harper*, (1880) 16 *Ch. D.* 290 and *Hoad* v. *Grace*, (1861) 7 *H & N* 494, *Ref.* [P 19 C 1]

(b) Contract Act, S. 126 — Court is to determine what contingency was decided upon by parties.

A guarantee is a contract to indemnify upon a contingency and whole point in such a case is to determine what was the contingency which the parties had in their minds when the instrument of guarantee was executed: *Ex parte, Gardon*, (1808) 15 *Ves.* 286 and *Sampson* v. *Burton*, (1820) 2 *Brod & Bing* 89, *Ref.* [P 19 C 2]

*** (c) Contract Act, Ss. 140 and 128—When surety is entitled to dividend in bankruptcy of principal debtor explained.**

If the amount for which the surety is liable is less than the total debt owing to the creditor by the debtor it is always necessary in bankruptcy to consider whether the surety is bound for the whole of that debt with a limitation of his liability or whether he is only bound for a part of it equal to the amount for which he is liable. If the former is the case he has no right in bankruptcy to a dividend till the creditor has received twenty shillings in the pound on the whole. If the latter, he is relieved to the extent of the proportion of the dividend attributable to that part of the debt which he has guaranteed just as if the amount he has guaranteed were a separate distinct debt from the rest of the creditor's claim: *Ellis* v. *Emmanuel*, (1876) 1 *Ex. D.* 157, *Ref.* [P 20 C 1]

(d) Contract Act, S. 140—Right of surety to benefit of security with creditor cannot be enforced until payment of entire debt.

The right of the surety to the benefit of the security hold by the creditor is derived from the obligation of the principal debtor to indemnify his surety; but a surety is not entitled to the securities which the creditor holds until he pays the entirety of the debt: *Younge* v. *Raynell*, (1852) 9 *Hare* 809; *Re. Howe, Exp. Brett*, (1871) 6 *Ch. App.* 838 and *Gedye* v. *Matson*, (1858) 25 *Beav.* 310, *Ref.* [P 20 C 2]

(e) Deed—Construction—Contract of guarantee—Mortgage by debtor—Creditor incurring loan for advancing it on mortgage by debtor—Loan incurred by creditor on sureties guaranteeing payment by his debtor—Contract of guarantee to certain extent for sum ultimately found due from debtor—Suit against sureties without suit on mortgage held not maintainable till debtor's property sold and found insufficient—Contract Act, S. 126.

One *G* who was the owner of a house and very considerable landed properties was in financial difficulties and needed a loan of Rs. 40 lacs of rupees. *S* borrowed the same from a bank, for the accommodation of said *G* and the latter on receipt of the sum executed a mortgage in favour of *S* for the purpose of securing the loan of 40 lacs, undertaking to pay interest at the rate of six per cent per annum by equal monthly instalments with quarterly rests until payment. *S* had agreed to obtain the loan amount at the instance of three persons *A*, *P* and *C* who guaranteed to *S* the payment by *G* of the said sum of 40 lacs to the limit of their aggregate liability to the extent of 18 lacs of rupees each being liable for six lacs of rupees. The deed was the deed of continuing guarantee. The deed recited among other things "that within the aforesaid limit of liability this guarantee shall extend to and be applicable to the whole debt that shall ultimately be due to you from the said *G* in respect of such advance as aforesaid "and not "merely to so much whereof as shall be co-extensive with our aforesaid maximum liability thereunder." It was also agreed between *S* and the sureties that should the common liability be less than the said maximum aggregate sum of 18 lacs of rupees, the share due from each one of them, in respect thereof should be in strict proportion to the individual liability of each of the appellants as referred to above. Payment was demanded and *G* having failed a notice was served on the sureties of the demand and subsequently a suit was filed.

Held: that construing the terms of the guarantee as a whole the liability under the guarantee did not attach until the creditor had pursued their remedies under the mortgage and the proceeds of the sale were proved to be insufficient to satisfy *G's* outstanding indebtedness to *S* in respect of the loan. [P 20 C 2]

L. P. E. Pugh, *S. M. Banerjee* and *T. Ameer Ali*—for Appellants.

N. N. Sircar and *S. M. Bose*—for Respondents.

C. C. Ghose, J.—In my opinion this appeal should be allowed and I will state my reasons. The facts involved in this appeal, shortly stated, are as follows: One J. C. Galstaun, who is the owner of very considerable house and landed properties in and outside Calcutta, was in financial difficulties in the early part of 1927. There were several decrees against Galstaun and he was unable to satisfy the same. He applied to one Arrathoon Stephen for a loan of Rs. 40,00,000 to enable him to pay off the amounts of the said decrees

as well as certain other liabilities. Stephen borrowed from the Imperial Bank of India a sum of Rs. 40,00,000 for the accommodation of Galstaun and the latter on receipt of the amount executed a mortgage on 14th February 1927 in favour of Stephen for the purpose of securing the loan of Rs. 40,00,000 undertaking to pay interest at the rate of six per cent per annum by equal monthly instalments with quarterly rests until payment. Stephen it appears, agreed to obtain the said loan of Rs. 40,00,000 from the Imperial Bank of India at the request of the appellants and the latter guaranteed to Stephen the payment by the said J. C. Galstaun, of the said sum of Rs. 40,00,000 to the limit of their aggregate liability to the extent of Rs. 18,00,000 and of their individual liability of Rs. 6,00,000. It was also agreed between Stephen and the appellants that should the common liability be less than the said maximum aggregate sum of Rs. 18,00,000, the share due from each one of them in respect thereof should be in strict proportion to the individual liability of each of the appellants as referred to above. The guarantee was as follows :

To Arrathoon Stephen,
2, Camac Street,
Calcutta.

"In consideration of your having at our resquest agreed to obtain a loan of Rupees forty lakhs ;bearing interest at six per cent per annum from the Imperial Bank of India for the sole benefit of Jahan Carapiet Galstaun for the purpose of satisfying certain decrees and paying certain pressing debts such sum of Rupees forty lakhs to bear interest at the rate aforesaid and the repayment thereof to be secured by a mortgage to be executed by the said John Carapiet Galstaun in your favour of the properties included in the mortgages held by Framroz Edulji Dinshaw and a second mortgage of the properties included in the mortgage executed by the said John Carapiet Galstaun in favour of the Prudential Assurance Co. Ltd. We, the undersigned Carr Lazarus Phillips of No. 33, Alipore Park Road, Alipore, Arathoon Mackertoom Arathoon of No. 3, Rawdon Street, in Calcutta, and Arathoon Theodre Creet of Ghusick Colliery in the District of Raneegunge, hereby guarantee to you the payment by the said John Carapiet Galstaun of the said sum of Rupees forty lakhs to the limit of our aggregate and individual liability hereinafter prescribed.

"This guarantee shall be a continuing guarantee, but our aggregate liability thereunder shall not under any circumstances exceed the sum of Rupees eighteen lakhs and the liability of each of us individually in respect of the said sum shall not exceed the sum of Rupees six lakhs, being the sum placed opposite our respective signatures at the foot hereof and should the common liability be less than the said maximum aggregate sum, the share due from each one of us in respect-thereof shall be in strict proportion to his individual liability hereunder and not otherwise.

"Within the aforesaid limit of liability this guarantee shall extend to and be applicable to the whole debt that shall ultimately be due to you from the said John Carapiet Galstaun in respect of such advance as aforesaid and not merely to so much thereof as shall be co-extensive with our aforesaid maximum liability hereunder.

"You shall be at liberty without discharging us from liability hereunder to grant time or other indulgences to the said Carapiet Galstaun and to accept payment from him in cash or by means of negotiable intruments or otherwise.

Dated at Calcutta this ninth day of February one thousand nine hundred and twenty seven.

Signature of Sureties.
(Sd.) C. L. Philips. Amount guaranteed.—Rupees six lakhs.
(Sd.) A. T. Creet. Amount guaranteed.—Rupees six lakhs.
(Sd.) A. M. Arathoon. Amount guaranteed—Rupees six lakhs."

Stephen died on 14th May 1927 and the present plaintiffs are the executors and trustees under his will. On 12th October 1927, the plaintiffs as such executors demanded from Galstaun immediate payment of the said sum of Rupees forty lakhs and of the interest due thereon. Galstaun having failed to pay, the plaintiffs gave notice on 15th October 1927 to each of the present appellants of the fact of their having made the said demand on Galstaun. Thereafter on 8th June 1928, the plaintiffs demanded payment from each of the present appellants of the sum of Rupees six lakhs due under and by virtue of the said instrument of guarantee. The present appellants having failed to pay, the plaintiffs instituted the present suit.

The defendants filed three separate written statements; but the main contention on their behalf was that upon a true construction of the said instrument of guarantee it should be held that each of the defendants was liable to the plaintiffs for such sum only as might ultimately be due from Galstaun after realisation of the securities mentioned in the mortgage by Galstaun in favour of Stephen, such liability of each of the defendants in no event to exceed the sum of rupees six lakhs, and that the realization of the securities mentioned in the mortgage executed by Galstaun in favour of Stephen was a condition pre-

cedent to the arising of any obligation or liability under the instrument of guarantee. There was another contention raised at the hearing before Buckland, J. being the second issue, but Mr. Pugh, who appeared for the appellants before us, did not press the same.

Buckland, J. held that the defendants were not entitled to say that they were only liable for the deficiency after the properties mortgaged by Galstaun in favour of Stephen had been brought to sale and that upon the construction of the said instrument of guarantee all that was necessary for the plaintiffs to establish to enforce liability against the defendants was that there had been default by Galstaun in payment of mortgage debt. It is against this judgment that the present appeal has been brought.

It appears that along with their written statements, the defendants filed a suit in this Court being Suit No. 2285 of 1928 against the plaintiffs and the said Galstaun : see p. 29 of the paper book in which they contended that the defendants in the said suit other than Galstaun (i. e. the present plaintiffs) were bound to realise the securities under the mortgage by Galstaun in favour of Stephen and to apply the proceeds in satisfaction of their claims to the extent of the liability mentioned in the said instrument of guarantee and further in the alternative that the plaintiffs were bound to hold as trustees and on behalf of the present appellants any surplus. The said suit, we are informed, is still pending in this Court. It may be stated in passing that the present plaintiffs filed a suit in this Court being Suit No. 664 of 1929 on 8th April 1929 against Galstaun on the mortgage dated 14th February 1927.

A guarantee, like every other contract, must be construed reasonably ; it must be construed by the words used, but also with regard to the surrounding circumstances : see *Lloyds* v. *Harper* (1). In other words, in construing a guarantee you must look at, and are entitled to have given in evidence, all the surrounding circumstances so as to know what the parties meant : Per Pollock, C. B. in *Hoad* v. *Grace* (2). In this case, no oral evidence was adduced by the appellants before Buckland, J. ; and we are therefore left to gather the intention of the parties from the words used with the aid of such light on the surrounding circumstances as is afforded by the documents printed in the paper book. Now, as will be seen from the instrument of guarantee, the appellants requested Stephen to find the money from the Imperial Bank of India for the benefit of Galstaun and their idea was that Stephen was to be secured by a mortgage by Galstaun in his favour of certain immovable properties belonging to Galstaun. The instrument of guarantee is dated 9th February 1927 and it appears that the mortgage by Galstaun in favour of Stephen was not executed till 14th February 1927. Galstaun undertook to pay to Stephen on demand the said sum of rupees forty lakhs. According to the plaintiffs, demand was made on Galstaun and Galstaun failed to pay, and that, thereupon the plaintiffs' cause of action against the defendants arose.

A guarantee is a contract to indemnify upon a contingency : *Exp. Gardom* (3) and *Sampson* v. *Burton* (4) and the whole point in this case is what was the contingency which the parties had in their minds when the instrument of guarantee was executed. It is no doubt true that Galstaun undertook to repay the said sum of Rupees forty lakhs on demand ; but it could not have been the intention of the parties that immediately on the execution of the mortgage, demand would be made on Galstaun and that on Galstaun's failure to pay, the defendants would be forthwith called upon to meet their liabilities under the instrument of guarantee. There would be no sense in an arrangement like this. The defendants executed the instrument of guarantee relying on the fact that the repayment of forty lakhs to Stephen was to be secured by a mortgage of certain immovable properties which was to be executed by Galstaun in favour of Stephen. Was that mortgage to count for nothing ? In these circumstances, I entertain no doubt whatsoever that the intention of the parties was that the

(1) [1880] 16 Ch. D. 290=50 L. J. Ch. 140=29 W. R. 452=43 L. T. 481.

(2) [1861] 7 H. & N. 494=31 L. J. Ex. 98=10 W. R. 85=5 L. T. 359=8 Jur. (n. s.) 43.

(3) [1808] 15 Ves. 286.

(4) [1820] 2 Br. Bing. 89=4 Moore 515.

security specified in the mortgage which was to be executed by Galstaun should be realized first and in the event of a deficiency, the defendants were to be called upon to meet their liabilities as specified in the said instrument of guarantee.

I lay very considerable stress on the word "ultimately" used in Cl. 3 of the letter of guarantee. I am aware that this clause was inserted by the lawyers because of the apprehension felt by them that Galstaun might be adjudged a bankrupt and in that event, for the purpose of securing in an effective manner the right of the creditor to retain certain dividends in bankruptcy. If the amount for which the surety is liable is less than the total debt owing to the creditor by the debtor, it is always necessary in bankruptcy to consider whether the surety is bound for the whole of that debt with a limitation of his liability or whether he is only bound for a part of it equal to the amount for which he is liable. If the former is the case, he has no right in bankruptcy to a dividend till the creditor has received twenty shillings in the pound on the whole. If the latter, he is relieved to the extent of the proportion of the dividend attributable to that part of the debt which he has guaranteed, just as if the amount he has guaranteed were a separate distinct debt from the rest of the creditors' claim. It is usual, for instance, in guarantees taken by banks to insert a clause providing that the bank may prove for its own benefit and that the guarantee is to stand security for the ultimate balance. This principle is exemplified in a long series of cases referred to in *Ellis* v. *Emmanuel* (5) : see 15 Halsbury 481. To put it in plain words, the question which has arisen in bankruptcy is whether the guarantor means:

"I will be liable for Rs. 100 of the amount which *A. B.* shall owe you"

or

"I will be liable for the amount which *A. B.* shall owe you subject to this limitation, that I shall not be called upon to pay more than Rs. 100."

Each case must depend upon its own facts and in deciding the point in issue in this case, it is not necessary in my opinion to go into a discussion about the rules which prevail in bankruptcy and to attribute a peculiar meaning to the word, "ultimately." I think on the whole, when the parties said that the guarantee should extend to and be applicable to the whole debt that should ultimately be due to Stephen from Galstaun, they clearly had not in their minds the peculiar rules in bankruptcy, but that their intention was that the securities mentioned in the mortgage by Galstaun in favour of Stephen should be realized first and that the guarantee given by the present appellants should only come into play in the event of a deficiency. The surety may, no doubt, be sued in the first instance and it may be said that the surety if he pays the creditor is not without his rights. The right of surety to the benefit of the security held by the creditor is derived from the obligation of the principal debtor to indemnify his surety : *Young* v. *Raynell* (6). But a surety is not entitled to the securities which the creditor holds until he pays the entirety of the debt : *Re* : *Howe, Exp. Brett* (7), *Gedye* v. *Matson* (8). In other words not until the sureties in the present case have paid off the entirety of the mortgage debt due to Stephen, would they be entitled to the securities which Stephen held i.e., even if the sureties paid off a sum of Rs. 18 lakhs, they would not be entitled to the said securities until the balance of 40 lakhs was realized. The sureties would, in such a case be without any security whatsoever during the interval. Could they have intended that such circumstances should intervene ? I answer 'no.' In this case you have the further fact that a suit to enforce the mortgage in favour of Stephen has already been instituted ; it was instituted before the present suit came on for trial and one may not unreasonably conclude that the intention of the parties was as I have attempted to state. In my view the present suit is premature and that this appeal should be allowed. The appeal will be allowed with costs and the suit should stand dismissed with costs.

Page, J.—I have arrived at the same conclusion, but only after much consideration, for, in my opinion, the con-

(5) [1876] 1 Ex. D. 157=46 L. J. Ex. 25=24 W. R. 832=34 L. T. 553.

(6) [1852] 9 Hare 809.

(7) [1871] 6 Ch. 838=40 L. J. B. K. 54=19 W. R. 1101=25 L. T. 252.

(8) [1858] 25 Beav. 310.

struction of this guarantee is not free from difficulty.

If, as the appellants urge, the parties intended that the guarantee should only attach to the balance of the debt (if any) outstanding after the mortgaged properties had been sold, I agree with Buckland, J., that one would expect to find such an intention expressed in precise and unambiguous terms. That, however, has not been done. On the other hand, if it had been intended that the guarantors should forthwith become liable upon the failure of Galstaun to repay the loan it was unnecessary to make any reference to the mortgage in the guarantee, as the mortgage would be an independent collateral security upon the enforcement of which the liability of the guarantors in no way depended. Indeed, if the construction for which the respondents contend is correct it would follow that the day after the mortgage had been executed, Stephen would have been entitled to demand repayment from Galstaun, and upon his default to claim immediate payment of the loan from the guarantors.

Thus the substance of the transaction would be that the guarantors would be responsible for the loan to the extent of 18 lacs without any security to which they could have immediate recourse, while Stephen would be responsible for 22 lacs only the repayment of which was secured by the mortgage; for, although the guarantors upon honouring the guarantee would obtain as against Galstaun a co-extensive charge upon the mortgaged properties nevertheless, until the whole of the indebtedness of Galstaun to Stephen in respect of the loan had been satisfied the guarantors would be precluded from enforcing the charge which had accrued to them upon the properties that had been mortgaged *Gedye* v. *Matson* (8).

That the guarantee would create such a situation, in my opinion, was neither intended nor contemplated. Indeed, the intention of the parties to the transaction becomes manifest from a perusal of the terms of the guarantee and the mortgage.

It appears that Stephen had been persuaded at the instance of the appellants to advance 40 lacs at 6 per cent interest to Galstaun, "the repayment thereof to be secured by a mortgage to be executed" by Galstaun in favour of Stephen of the properties referred to in the guarantee. Stephen, however, would seem to have been uncertain whether the mortgaged properties would prove to be sufficient to cover the loan, and it was to meet that possible contingency that the appellant contended within the limits specified in the guarantee to become responsible for making good the balance of the debt outstanding after realization of the mortgaged properties.

It was provided that the guarantee should be a continuing one, and it was obviously contemplated that from time to time certain of the mortgaged properties might be sold, and that Galstaun himself might repay instalments of the loan. It was for the repayment of the whole debt outstanding after giving credit for the sums so realized that it was intended that the guarantors should make themselves responsible and under Cl. (3) in the event of Galstaun becoming insolvent the guarantors would not be able to obtain any dividend out of Galstaun's estate in respect of any payment they had made until the whole of the indebtedness of Galstaun to Stephen had been satisfied: *Hobson* v. *Bass* (9). That such was the intention of the parties to this transaction is not, I think open to doubt but the question is whether, having regard to its true construction, effect was given to such intention in the form of guarantee that was signed. In my opinion it was. The fact that it was made part of the consideration for the guarantee that the repayment of the loan should be secured by the mortgage supports the view that we take of this instrument, and unless and until Galstaun executed the mortgage the guarantee would not become operative. But how is that consistent with the construction for which the respondents contend, namely, that on Galstaun's default in repaying the loan on demand the guarantors automatically became liable under the guarantee without reference to, and independent of, any rights that Stephen might have acquired under the mortgage or any other collateral security? And the construction which we are disposed to put upon this guarantee is further borne out by the language in which Cl. 3 is couched. To what debt was the guarantee to extend?

(9) [1871] 6 Ch. 792=19 W. R. 992.

"The whole debt that shall ultimately be due to you from the said John Carapiet Galstaun in respect of such advance as aforesaid."

What was "such advance as aforesaid?" The advance the repayment of which was to be secured by the mortgage. What is the meaning of "the whole debt that shall ultimately be due?" Surely, the balance of the advance that shall remain unpaid after giving credit for any sums repaid by Galstaun and the proceeds of the sale of the mortgaged properties by which the repayment was to be secured. What other meaning can be attributed to these words? I cannot persuade myself that the phrase "the whole debt that shall ultimately be due" is an apt expression merely to denote the whole debt of 40 lacs with interest.

Construing the terms of this guarantee as a whole I am of opinion that liability under the guarantee does not attach until the respondents have pursued their remedies under the mortgage, and it is proved that the proceeds of the sale of the mortgaged properties are insufficient to satisfy Galstaun's outstanding indebtness to Stephen in respect of the loan.

For these reasons, I agree that the appeal should be allowed and the suit dismissed with costs.

V.B./R.K. *Appeal allowed.*

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PAGE, J.

Lloyds Bank, Ltd.—Plaintiff.

v.

P. E. Guzdar & Co.—Defendant.

Original Suit No. 1435 of 1928, Decided on 10th April 1929.

(a) Transfer of Property Act, S. 78—Apart from notice precedence is to be given to one earlier in date.

Prima facie and apart from notice the priority of mortgages in India depends upon the respective dates of their creation, the earlier in date having precedence: *A. I. R.* 1923 *P. C.* 211; 31 *Cal.* 57 (*P. C.*); 11 *Cal.* 158 and 33 *Cal.* 410, *Rel. on.* [P 23 C 2]

(b) Transfer of Property Act, S. 78—Interpretation—No distinction exists in status of mortgages except as provided by statutes and consequently no distinction exists in rules regulating their priority—While construing, therefore, terms of S. 78, meaning attributed to them by English Courts cannot be referred to.

In India where except as provided by statute no distinction exists in the status of mortgages, in like manner apart from statute, no distinction is made in the rules that regulate their priority. It behoves an Indian Court, therefore, to interpret S. 78 in the light of the condition prevailing in India, and not to put a forced or peculiar construction upon the terms used in the section through attaching undue importance to the meaning attributed to similar words by English Courts diverso intuitu and in circumstances that do not obtain in India: 2 *C. W. N.* 750; *A. I. R.* 1923 *P. C.* 211; 31 *Cal.* 57 (*P. C.*); *Dixon* v. *Muckleston*, (1872) 8 *Ch.* 155, *Ref.* [P 27 C 2, P 28 C 1]

(c) Civil P. C., O. 6, R. 10—If relief claimed on ground of fraud, particulars of fraud must be set out.

If a plaintiff desires to prove a claim to relief against a defendant upon the ground of fraud, fraud must be pleaded and particulars of the fraud alleged must specifically be set out. [P 28 C 1]

(d) Transfer of Property Act, S. 78—For postponement of prior mortgage on ground of "gross neglect"—Court must be satisfied that subsequent mortgagee was directly induced to advance money.

Before a prior mortgage can be postponed under S. 78, the Court must be satisfied that the subsequent encumbrancer was induced directly and not remotely to advance money on the security of the property by reason of gross neglect of the prior mortgagee: *English case law referred.* [P 28 C 2]

(e) Transfer of Property Act (4 of 1882) S. 78—"Gross neglect"—Meaning.

"Gross neglect" in S. 78 means and involves a failure on the part of prior mortgagee to take such reasonable precautions against the risk of subsequent encumbrancer being deceived as in the circumstances render it unjust that the earlier mortgage should retain its priority. Each case must turn upon its own facts and it is undesirable that the terms should be defined with more particularity or precision: 2 *C. W. N.* 750, *Diss. form*; *English case law considered.* [P 29 C 1]

(f) Transfer of Property Act, S. 78—Mortgage of title-deeds with *N* bank to secure overdraft—Mortgagor getting possession of same, by misrepresentation and creating another mortgage to *L* bank—Suit by *L* bank, for declaration of charge and mortgage decree—*L* bank held to have priority over *N* bank to extent of amount of advance *L* bank was induced to make.

G mortgaged certain title deeds of immovable property with the *N* bank to secure an overdraft. Subsequent to this deposit, representing that the title deeds were required to be shown to an intending purchaser *G* obtained possession of the same and mortgaged them to the bank *L* giving them to understand that the property was free from any encumbrance. On the fact of prior encumbrance being discovered the *L* bank applied for decree on the mortgage and for prior charge:

Held: that the *L* bank had the priority of charge over *N* bank and that this priority was to the extent of amount advanced by the *L* bank. [P 31 C 2]

N. N. Sircar, Ameer Ali and *E. C. Ormond*—for Plaintiff.

J. W. Langford James and *S. K. Gupta*—for Defendant.

Judgment.—This is a case of conflicting equities. The defendant firm P. E. Guzdar & Co., mortgaged 42, Chowringhee Road, Calcutta, to the National Bank of India by delivery of the title deeds to secure an overdraft in their current account with the bank, and afterwards, having regained possession of the title deeds, mortgaged the property in like manner to Lloyds Bank to secure a loan of Rs. 5,00,000. The question is, which of the two mortgages in the circumstances is entitled to priority? Now, the defendant firm consisted of two partners E. P. Guzdar and M. C. Guzdar, and, by a power-of-attorney executed on 23rd November 1922, the partners invested their respective sons, J. E. Guzdar and K. M. Guzdar, with a general power to manage and carry on the business of the firm.

It appears from the evidence and I find that at all material times the business of the firm—at any rate in connexion with the plaintiff and defendant banks—was carried on by J. E. Guzdar; that J. E. Guzdar was the only representative of the firm who had any dealings personally with either of the banks, and in the transaction relating to the mortgages in suit J. E. Guzdar alone was interviewed by the officials of the banks. The title deeds of 42, Chowringhee Road, stood in the name of E. P. Guzar, and on 17th September 1924, when the deeds for the first time were deposited by J. E. Guzdar, and again on 26th November 1927, when they were redeposited by him with the defendant bank, J. E. Guzdar produced a letter, which the defendant bank retained, purporting to have been written by E. P. Guzdar admitting that the title deeds had been deposited as security for the repayment of the advances. No such letter was produced when J. E. Guzdar subsequently deposited the title deeds with Lloyds Bank, but both Thomas and Allan stated that when the title deeds were deposited they dealt with J. E. Guzdar upon the footing that he was acting as the agent of the firm under the power of attorney, and having regard to the course of business, the power-of-attorney, and the fact that the members of the firm have never denied the authority of J. E. Guzdar to mortgage the firm's property by delivery of the title deeds to secure advances from the banks or either of them. I am of opinion that J. E. Guzdar in effecting the mortgages in suit purported to be, and was, acting within the scope of his authority as the agent of the firm. Now, prima facie and apart from notice the priority of mortgages in India depends upon the respective dates of their creation, the earlier in date having the precedence: Transfer of Property Act (4 of 1882), Ss. 48, 58, 59, 78, 79, 80; *Imperial Bank of India* v. *U. Rai Gyaw Thu & Co. Ltd.* (1), *Webb* v. *Macpherson* (2), *Coggan* v. *Pogose* (3), *Gokul Dass* v. *Eastern Mortgage and Agency Co.* (4).

It is necessary, therefore, to ascertain the circumstances in which the two mortgages in suit were created in order to determine whether in law the mortgage to the National Bank, which is earlier in date, has lost its right to priority. I will consider first the circumstances attending the creation of the mortgage in favour of Lloyds Bank, the plaintiff. It is common ground that at all material times prior to 3rd July 1928, when P. E. Guzdar & Co., failed, the defendant firm was regarded as a sound and reliable commercial undertaking, and that neither bank, where the deeds were deposited, was under the impression that the firm would not be able to carry out its obligations. In each case, however, the deeds were deposited by way of security for monetary advances, and each bank relied upon the title deeds as effective security for repayment of its loan. It appears that since 1926 the firm had been customers of the plaintiff bank, and from time to time had obtained loans from the bank, which had duly been repaid. In the early part of June 1928, J. E. Guzdar obtained an interview with Thomas, the manager of the bank, and informed him that Guzdar & Co., would be requiring a temporary loan at the end of June for the purpose of floating a limited company to acquire their aluminium business, and Thomas said that the bank would provide the necessary accommodation if reasonable security was forthcoming. At that time the

(1) A. I. R. 1923 P. C. 211=51 Cal. 86=1 Rang. 637=50 I. A. 283 (P.C.).
(2) [1903] 31 Cal. 57=30 I. A. 238=8 Sar. 554 (P.C.).
(3) [1884] 11 Cal. 158.
(4) [1905] 33 Cal. 410=4 C. L. J. 102=10 C. W. N. 276.

current account of the firm was in debit to the extent of about Rs. 60,000 On 20th June, J. E. Guzdar called at the bank; produced the title deeds of 42, Chowringhee Road; asked Thomas to satisfy himself that there were no encumbrances upon the property, and said that he would return in a few days and formally deposit the deeds. Now, it is of importance to bear in mind that under S. 59, T. P. Act, a mortgage may be created by delivering to the mortgagee the documents of title to immovable property in Calcutta and in certain other districts. Such mortgages being created merely by depositing the title deeds ex necessitate rei would not be registered, and Thomas stated that when J. E. Guzdar referred to "encumbrances upon the property" he understood him to mean registered encumbrances, and not mortgages by way of the deposit of title deeds which in India are commonly, though loosely and inaccurately, called equitable mortgages. On 21st June the plaintiff bank instructed their solicitors, Morgan & Co., to have the registers searched for encumbrances, and were informed, though not before 30th June that no encumbrances had been registered. Meanwhile, on 26th June, J. E. Guzdar personally deposited the title deeds with the bank by way of security for a loan of five lacs, and signed a promissory note for that amount in the name of the firm. The loan was placed in deposit account, and against the five lakhs so deposited J. E. Guzdar became entitled to overdraw on the firm's current account. On 27 June, J. E. Guzdar drew cheques against the loan of five lacs, and the total sum due from the firm to the plaintiff bank in respect of the loan and the current account when the present suit was filed was Rs. 4,65,747-3-9. In the course of his examination Thomas was asked:

Q. 31.—You gave him accommodation for five lacs against the deposit of these title deeds? Yes.

Q. 33.—When you did that had you any suspicion at all that there were any encumbrances on this property? None whatever, otherwise I should not have accepted them.

Q. 34.—Had you any suspicion that there was an equitable mortgage attached to this property? None, there could not be.

Q. 35.—Why do you say "there could not be"? Because I had the deeds.

Q. 36. — Because he produced the deeds? Yes.

Upon the evidence I am satisfied and find that the plaintiff bank was induced to advance five lacs to the defendant firm upon the security of 42, Chowringhee Road , because J. E. Guzdar produced the title deeds, thereby fraudulently representing to the plaintiff bank and inducing it to believe that there was no equitable mortgage upon the property.

No doubt it would have been wiser policy for the bank to have refused to accept the mortgage until the result of the search had been received, but the action of the bank in not waiting for the search report in no way affected the course of events, and I find that there was no act or omission on the part of the plaintiff bank which can deprive it of such rights as accrued to the bank by the creation of the mortgage in its favour. It was also not disputed, and I find, that it was the action of the defendant bank in handing back the title deeds to J. E. Guzdar that enabled him to induce the plaintiff bank to advance the five lacs on depositing the title deeds as security.

Allan was asked:

Q. 109—I suppose it is fair to say that if you had not given these deeds over to Mr. Guzdar he would not have been able to take them to Lloyds Bank? That is so.

Q. 110.—And if the deeds had remained in your safe there would have been no transaction on them with Lloyds Bank? That is so.

Q. 111.—You don't suggest that Mr. Thomas acted in any other way than in good faith in this matter? None whatever.

Q. 112. — And he must genuinely have believed that the man who brought him these deeds had power to pledge them or mortgage them? He apparently had.

Q. 113.—You have no reason to suppose otherwise? None whatever.

Q. 114.—To that extent at any rate you will admit, Mr. Allan, that the fault was yours? It was, to that extent.

I must now consider the circumstances under which the defendant bank

handed back the title deeds to Guzdar in order to determine whether the conduct of the defendant bank was such that the mortgage to the defendant bank, though prior in date, is to be postponed to that of the plaintiff bank. From 1921, until the firm failed on 3rd July 1928 P. E. Guzdar & Co. had been customers of the defendant bank, and when the firm's account was opened the title deeds of 42, Chowringhee Road, were deposited with the bank to secure an overdraft to a miximum limit of 6 lacs. In 1921 the overdraft limit was increased to 10 lacs, and in December 1927, J. E. Guzdar, on behalf of the firm, applied for a further temporary advance of five lacs, pending the result of negotiations for the sale of 42, Chowringhee Road, on the further security of other immovable property and the hypothecation of the firm's stocks in their godowns. It was expected at that time that the sale of 42, Chowringhee Road, would realize about eight lacs, and it was arranged that the proceeds of the sale should be utilized to reduce the indebtedness of the firm on the overdraft of its current account. It was further agreed that if 42, Chowringhee Road, was not sold by 30th June 1928, the limit of the overdraft should be reduced to 10 lacs.

Allan, the-sub-manager of the defendant bank, stated that while the firm was a customer of the bank there never had been any trouble between the bank and the firm, and in June 1928, the bank had no reason to suppose that the firm was not a reliable undertaking or in a condition of financial embarrassment. On 22nd September 1927, J. E. Guzdar, who was the only representative of the firm with whom Allan at any time had any business dealings, asked Allan to allow him to take away the title deeds of 42, Chowringhee Road, for the purpose of showing them to a prospective purchaser of the property, and Allan thereupon handed the title deeds to J. E. Guzdar. J. E. Guzdar returned the deeds on 7th November 1927, stating that the negotiations for the purchase had proved abortive. On 13th June 1928, J. E. Guzdar called at the bank, and again asked Allan to allow him to have possession of the title deeds. At that time the current account of the firm was in debit to the extent of about 16 lacs, and, as appears from the letter of 30th June from the bank to the firm and the statement, Ex. 9 (which was adduced in evidence by the defendant bank), the bank was anxious that the firm should not fail to reduce its indebtedness by 30th June according to the arrangement made in December 1927. Further, as the firm was under an obligation to find more than five lacs by 30th June, it would be for the benefit of the bank that a purchaser of 42, Chowringhee Road, should pay as high a price for the property as he could be induced to give, for the higher the price the greater the facilities at the disposal of the firm to enable them to reduce their indebtedness to the bank. In these circumstances, J. E. Guzdar requested the bank to hand the title deeds to him to show to a purchaser of the property, "as they had finally concluded an arrangement for the sale." On 15th June Allan gave back the deeds to J. E. Guzdar.

I am bound to say that I was not impressed by the way in which Allan gave his evidence as to the reasons which induced him to part with the title deeds by handing them to J. E. Guzdar on 15th June. The prudent and normal practice of the defendant bank and of other responsible bankers in Calcutta who hold the title deeds of property deposited with them as security for an advance, when the mortgagor applies that the title deeds may be shown to a purchaser of the property, is not to allow the mortgagor to have possession of the title deeds, but to hand over the title deeds to the bank's solicitors on their accountable receipt in order that the bank's solicitors should arrange with the solicitors of the purchaser for the examination of the documents. To adopt this practice is not only a prudent but the only safe course for a bank to follow in Calcutta and in the districts to which S. 59 , T. P. Act applies, for such mortgages are not capable of registration, and to permit the mortgagor to have possession of the title deeds is to put it in his power to raise money on the property by representing that no mortgage thereon by way of deposit of title deeds had been effected. Allan stated that he suggested to J. E. Guzdar that the usual course should be followed, and that inspection should be given through the solicitors. Now, if the property

had already been sold, there could have been no objection to the usual practice being followed, and Allan at first stated that Guzdar told him that the property had been sold, and that he had handed over the deeds to him as he trusted him and had no reason to suppose that Guzdar would be dishonest. But it must be borne in mind that Allan knew that, although the estimated value of the securities held by the bank was sufficient to cover the firm's indebtedness, the firm's account was an overdraft account, and the debit balance was about 16 lacs; that previous attempts to sell the property had come to nothing, and that the firm was under a legal obligation to find at least five lacs within two or three weeks in order to reduce their indebtedness within the agreed limit. I am of opinion that in such circumstances the bank was running an unreasonable risk in departing from what admittedly was the usual and prudent practice, and in allowing J. E. Guzdar to obtain possession of the documents of title. Later in his evidence Allan changed his ground, and stated :

"I am not positive that he said definitely that the sale had been concluded. He gave us to understand that it was practically on the point of being sold, and it was only a question of inspection."

It was essential for the case that Allan was then making that he should have understood that the matter was still in the stage of negotiation and that the sale had not been concluded, because he stated that a special reason or excuse had been given by J. E. Guzdar which, in part at any rate, had induced him to depart from the usual practice and the excuse given would have been no reason at all justifying a departure from the usual prudent course taken by bankers if the property had already been sold. Allan was asked :

Q. 154.—You said there was some particular remark that he made which made you depart from the usual course ? Yes, he said if we handed the documents through the usual course, which meant through our solicitors over to the buyer's solicitors, then the buyer would know that the deeds had been pledged, and he would probably attempt to beat us down in price thinking we needed money.

Q. 155.—That is what he said ? Yes.

Q. 156.—You are quite sure ? Yes, quite certain. And again:

Q. 226.—You remember that little conversation with Mr. Guzdar when he said "it will be a pity for the deeds to go through the solicitors" and so on ? Yes.

Q. 227.—Did you understand from him that he did not want his buyer to know that there was an encumbrance on the property ? Yes.

Q. 228.—When you handed over these documents to him did you do so in order that he might represent or to facilitate his representing to the buyer that there was no encumbrance on the property ? That did not enter into my mind at all, that he did want to do so; he was merely selling the property. He wanted to get as good a price as he could.

Q. 229.—You understand that he did not want the buyer to know that there was an encumbrance ? That is so.

Q. 230.—And what he was asking was to effect that purpose, for that purpose? Yes.

Q. 231.—Then your handing over the deeds to him was in order to represent to the buyer that there was no encumbrance? That may be so.

Q. 232—It is so? Yes.

Q. 233.—You know, of course, that here in Calcutta and in India generally there is a system of registration, that is to say, regular mortgages are registered? Yes.

Q. 234—Of course, there is no registration of equitable mortgages ? That is so.

Q. 235—Did you make enquiries as to who the buyer was ? I can't remember.

In these circumstances Allan handed over the title deeds to J. E. Guzdar, and took from him a receipt in the following terms :

"Received from the National Bank of India, Limited, title deed of 42, Chowringhee, held by them as security against overdraft in our current account."

"We undertake to pay the sale proceeds of the property sold by us otherwise we undertake to return the said title deeds to the Bank."

P. E. Guzdar & Co.
Calcutta, 15th June 1928.

On 27th June, Cook, the manager of the bank, telephoned to J. E. Guzdar inquiring when the money would be paid, and J. E. Guzdar said that payment would be made on 30th June. On 30th June, Cook wrote to P. E. Guzdar & Co., requesting that the reduction of the overdraft should immediately be carried

out, and calling upon the firm to return the title deeds without further delay. On 3rd July, the firm failed.

The question is whether in these circumstances the mortgage to the defendant bank is to be postponed to that of the plaintiff bank.

The material section of the Transfer of Property Act is S. 78, which is in the following terms :

"Where, through the fraud, misrepresentation or gross neglect of a prior mortgagee, another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee."

Now, the origin of the rules of equity which regulate the priority of mortgages in England is to be found in the conscience of the Chancellors which was offended by the notion that a mortgage, though prior in date, should have precedence in circumstances which rendered it inevitable that injustice would be done if its rights to priority was sustained.

But, in seeking to penetrate the dark recesses of the cases decided by the English Courts administering equity "as furnishing by way of illustration a useful clue to the meaning" of the terms of this section: see per Jenkins, J., in *Monindra Chandra Nandy* v. *Troyluckho Nath Burat* (5), a Judge in India is embarking upon a perilous though interesting adventure, for the equity Judges in England in endeavouring to evolve rules by which to regulate the priority of mortgages in accordance with the principles of equity and good conscience found themselves confronted with the sanctity attaching to the legal estate with which English law was saturated, and were constrained to interfere with the legal rights of a owner of the legal estate in such circumstances only as plainly violated the fundamental principles of justice. The result has been that :

"in cases of this class injustice is sometimes done, and, but for the honour and integrity generally shown by the persons engaged in these transactions, much more might frequently be done. It is impossible to reflect on this injustice without finding very cogent arguments in favour of some attempt to improve the state of the law as to the title of real estate, and to get rid of the difficulty which arises from the distinction between a legal and an equitable estate : per Lord Selborne, L. C., in *Dixon* v. *Mucaleston* (6)."

(5) [1898] 2 C. W. N. 750.

In India, however, a Judge is able to approach the subject with his mind untrammelled by the peculiar rights and privileges by which in England the legal estate is hedged about; for :

"it is to be observed that there is here no distinction between legal and equitable mortgages as in English Law, where the legal mortgage will always prevail against the equitable unless the holder of the legal estate has done or omitted to do so something which prevents him in equity from asserting his permanent rights : per Lord Dunedin in *Imperial Bank of India* v. *U. Rai Gyaw Thu & Co. Ltd.*, (1)."

In England a mortgage by deposit of title deeds, such as the mortgages in suit, is not regarded in law as an actual conveyance of the property, although in equity "such deposit might effect a mortgage good against the mortgagor ;" but in India :

"unless the deposit of title deeds effects the transfer of an interest in a specific immovable property for the purpose of securing the payment of money advanced or to be advanced it is absolutely nothing at all. Further, the concluding words of S. 59 actually use the word 'mortgage' to denote the security effected by delivery of documents of title."

The learned Advocate General urged that in India a mortgage by way of deposit of title deeds having the same status as a mortgage created in any other way, the mortgage to the defendant bank could only be postponed to that of plaintiff bank upon grounds which would justify the postponement of a "legal" mortgage in England. I entirely demur to such a proposition, which, in my opinion is wholly untenable ; for :

"as stated by the Judicial Committee in the case of *Webb* v. *Macpherson* (2), 'the law of India, speaking broadly knows nothing of the distinction between legal and equitable property in the sense in which that was understood when equity was administered by the Court of Chancery in England.' The case of the company, as presented to us, is that they are 'legal' mortgagees and that they are in the same position as a legal mortgagee in England, who has obtained the legal estate without notice of the prior equitable encumbrance. But the reasoning is fallacious, because in India there is no such distinction between legal and equitable estates as is known to the English Law : per Maclean, C. J., in *Gokul Dass* v. *Eastern Mortgage and Agency Co.* (4)."

In India where, except as provided by statute, no distinction exists in the status of mortgages, in like manner, apart

(6) [1872] 8 Ch. 155=42 L. J. Ch. 210=21 W. R. 178=27 L. T. 804.

from statute, no distinctioni s made in the rules that regulate their priority. It behoves an Indian Court, therefore, to interpret S. 78 in the light of the conditions prevailing in India, and not to put a forced or peculiar construction upon the terms used in the section through attaching undue importance to the meaning attributed to similar words by English Courts diverso intuitu, and in circumstances that do no. obtain in India.

Now, in this case I am relieved from the necessity of interpreting the meaning of the term "fraud" in S. 78, T. P. Act, because there is no allegation in the plaint that the plaintiff bank was induced to advance money on the security of 42, Chowringhee Road, by reason of any fraud on the part of the defendant bank. If a plaintiff desires to press a claim to relief against a defendant upon the ground of fraud, fraud must be pleaded and particulars of the fraud alleged must specifically be set out. I refrain, therefore, from expressing an opinion as to whether, if fraud had aptly been pleaded, the defendant bank in this transaction was or was not guilty of fraud in the sense in which that term is used in S. 78. I am bound, however, to consider whether the plaintiff bank was induced to accept the mortgage of 26th June by reason of the "gross neglect" of the defendant bank.

Now, what is the meaning of "gross neglect" in this section ? The decisions at common law in this connexion are not of much assistance, for :

"the action at law for negligence imports the existence of a duty on the part of the defendant to the plaintiff, and a loss suffered as a direct consequence of the breach of such duty ;"

whereas it cannot, I think, fairly be said that a mortgagee owes a duty to all persons who in the future may become puisne mortgagees of the same property to take care that the mortgagor is not enabled to commit a fraud upon subsequent encumbrances by allowing him to be in possession of the documents of title.

Title deeds are not

"in the eye of the law analogous to fierce dogs or destructive elements where from the nature of the thing the Courts have implied a general duty of safe custody on the part of the person havng their possession or control" Per Fry L. J. in *Northern Counties of England Fire, Insurance Co.* v. *Whipp* (7)."

and a person in possession of title deeds is not under an absolute obligation at all events to retain possession of them lest, perchance, if inadvertently he allows them to pass out of his possession, he thereby enables another person to commit a fraud. Further, there must be a direct connexion between the "gross neglect" and the inducement to make the subsequent advance, for to cite a familiar illustration

"in one sense every man who sells a pistol or a dagger enables an intendin gmurderer to commit a crime; but is he, in selling a pistol or a dagger to some person who comes to buy in his shop acting in breach of any duty? Does he owe any duty to all the world, as is suggested here, to prevent people taking advantage of his selling pistols or daggers in his business, because he does in one sense enable a person to commit a cime?', Per Lord Halsbury, L. J. in *Farquharson* v. *King* (8); see also Per Lord Watson in *Scholfield* v. *Earl of Londesborough* (9).

Before a prior mortgage can be postponed under S. 78 the Court must be satisfied that the subsequent encumbrancer was induced directly and not remotely to advance money on the security of the property by reason of the gross neglect of the prior mortgagee.

What then is "gross neglect" within S. 78? I respectfully agree with Lord Cranworth that

"cases are very difficult to deal with when you are obliged to use vituperative epithets of that sort to enunciate a principle. What constitutes "gross negligence" is always excessively difficult to define or by way of anticipation to illustrate," *Colyer* v. *Finch* (10), but it must be something which raises a positive equity against him, upon the principle which in equity, as distinct from law, is conveniently designated by the term 'estoppel.' In other words, the man who has conducted himself in such a manner is not entitled to deny the truth of his own representations if it be a case of express representation—he is not entitled to deny being bound by the natural consequences of his own acts if it be a case of positive acts—he is not entitled to refuse to abide by the consequences of his own wilful and unjustifiable neglect, if that is the nature of the ease. By one or other of those means he may have armed another person with the power of going into the world under false colours; and if it be really and truly the case that by his act, or his improper omissions, such an apparent authority and power has been vested in that other person,

(7) [1884] 26 Ch. D. 482=53 L. J. Ch. 629=32 W. R. 626=51 L. T. 806.
(8) [1902] A. C. 325=71 L. J. K. B. 667=51 W. R. 94=86 L. T. 810.
(9) [1896] A. C. 514.
(10) [1856] 5 H. L. C. 905=3 Jur. (n.s.) 25=26 L. J. Ch. 65.

he is bound upon equitable principles by the use made of that apparent authority and power. But as that is a doctrine resting upon the highest principles of justice, the Courts of Equity have been very careful that it should not be extended beyond the point at which it is consonant with practical justice; and this particular class of cases has presented very difficult questions for determination on that point" Per Lord Selborne, L. C. in *Diron* v. *Mackleston* (6)."

As the issue raised is one of general importance, and of special concern to the commercial community, I have taken time to look into the authorities, and in my opinion, "gross neglect" in S. 78 means and involves a failure on the part of the prior mortgagee to take such reasonable precautions against the risk of a subsequent encumbrancer being deceived as in the circumstances renders it unjust that the earlier mortgage should retain its priority. Each case must turn upon its own facts, and it is undesirable even if it were practicable, that I should attempt to define the term with more particularity or precision. For instance, an act or omission that would amount to gross neglect in a banker or a man of business might not so be regarded in the case of an ill-educated man or a woman Again,

"where the relation between the equitable incumbrancer and the person in possession of the title deeds is not merely that of mortgagee and mortgagor, but is of a fiduciary nature (as for example, that of cestui que trust and trustee, or client and solicitor), there is a great body of authority to shew that the equitable incumbrancer is not to be deprived of his priority by reason of the improper act uf the person entrusted with the deeds, so long, at all events, as the incumbrancer has no ground to suppose that there has been any want of good faith on the part of the custodian of the deeds; Per Parker, J. in *Walker* v. *Linom* (11)"

Or again, where the prior mortgagee has surrendered the title deeds to the mortgagor but the prior mortgage had been registered and a later prospective encumbrancer by searching the register would thus be in a position, if he made reasonable enquiry, to discover its existence, the Court would, I conceive, be slow to hold that the prior mortgagee had been guilty of "gross neglect," or that the action of the prior mortgagee in failing to retain possession of the title deeds had in any direct way caused or induced the later encumbrancer to advance money on the security of the property: see *Agra Bank Limited* v. *Barry* (12). I am bound to state with all respect for the opinion of that distinguished Judge that I am unable to subscribe to the view which Jenkins, J., appears to have expressed in *Monindra Chandra Nandy* v. *Troyluckho Nath Burat* (5), that "gross neglect" in S. 78 means neglect that amounts to evidence of fraud, as laid down in the cases of *Evans* v. *Bicknell* (13), *Martinez* v. *Cooper* (14), and *Farrow* v. *Rees* (15), to which he referred. I confess that I have never been able to understand how negligence can be evidence of fraud, although, no doubt, the facts proved may be evidence of negligence or evidence of fraud. Lord Eldon, who enunciated this doctrine obiter in *Evans* v. *Bicknell* (13), in that case was laying down the equitable rules for postponement of a "legal" mortgage, and, for the reasons that I have stated, Lord Eldon's observations in such circumstances must be received with caution, and may prove to be an unrealiable guide to a true construction of S. 78. The fact that a "legal" mortgagee without any reasonable excuse had made no enquiry as to the whereabouts of the title deeds may be perhaps, evidence of a dishonest refusal to make such an enquiry because the mortgagee had reason to suspect the existence of a prior encumbrance, but how negligence in surrendering the title deeds to the mortgagor can be evidence of fraud I am bound to say that I find it difficult to understand.

Lord Justice Fry seems to have experienced the same difficulty, for in *Nothern Counties of England Fire Insurance Co.* v. *Whipp* (7), he referred to the language of Lord Eldon in *Evans* v. *Bicknell* (13) and *Martinez* v. *Cooper* (14), as:

"loose and difficult to construe," and observed that "the expression 'gross negligence' that amounts to evidence of a fraudulent intention is certainly embarrassing, for negligence is the not doing of something from carelessness and want of thought or attention; whereas a fraudulent intention is a design to commit some fraud, and leads men to do or omit doing a thing not carelessly but for a purpose."

The doctrine of equity upon which Jenkins, J. relied in *Monindra Chandra Nandy* v. *Troyluckho Nath Burat* (5),

(11) [1907] 2 Ch. 104=76 L. J. Ch. 500=51 S. J. 483=97 L. T. 92.

(12) [1874] 7 H. L. 135.
(13) [1801] 6 Ves. 174.
(14) [1826] 2 Russell. 198.
(15) [1840] 4 Beav. 18=1 Jur. 1028.

has not been approved or followed in recent cases, and the true rule that regulates the postponment of "legal" mortgages in England, in my opinion, was laid down by Lindley, M. R. in *Oliver* v. *Hinton* (16), and in substance is the same as what I have stated to be the meaning and effect of the rule for postponement on the ground of gross neglect in S. 78, T. P. Act. His Lordship held that :

"to deprive a purchaser for value without notice of a prior encumbrance of the protection of the legal estate it is not, in my opinion, essential that he should have been guilty of fraud ; it is sufficient that he has been guilty of such gross negligence as would render it unjust to deprive the prior encumbrancer of his priority. : see also among other cases *Madras Hindu Union Bank, Ltd.* v. *C. Venkatrangiah* (17), *Shan Manu Mull* v. *Madras Building Co.* (18), *Rangaswami Naicken* v. *Annamalai Mudali* (19), *Shivram* v. *Saya* (20), *Balmakundas Atmaram* v. *Moti Narayan* (21), *Nanda Lal Roy* v. *Abdul Aziz* (22), *Raman Chetty* v. *Steel Brothers & Co. Ltd.* (23), *Shropshire Union Railways & Canal Co.* v. *Reg.* (24), *Hewitt* v. *Loosemore* (25), *Waldron* v. *Sloper* (26), *Manners* v. *Mew* (27), *In re, Vernon, Ewens & Co.* (28), *Farrand* v. *Yorkshire Banking Co.* (29), *In re, Castell & Brown, Ltd.* (30), *Rimmer* v. *Webster* (31), *Burgis* v. *Constantine* (32), *Grierson* v. *National Provincial Bank of England, Ltd.* (33), *Hudston* v. *Viney* (34)."

The decision in *Hall* v. *West End Advance Co. Ltd.* (35), upon which the learned Advocate General relied, may be supported on the ground that the loss which the later encumbrancers sustained was :

"quite as much due to their own neglect and want of care as to the plaintiff's original carelessness."

If the construction that I have put upon the term "gross neglect" in S. 78 is correct, I am clearly of opinion that the mortgage of the defendant bank must be postponed to that of the plaintiff bank. In my judgment Allan, the submanager of the defendant bank, was guilty of gross and wilful negligence in surrendering the title deeds to J. E. Guzdar in the circumstances disclosed by the evidence. He knew that the defendant firm were under an obligation to find about six lacs within less than three weeks ; he knew that previous negotiations to sell the property had failed ; he knew that J. E. Guzdar intended to raise money by means of the title deeds of the property ; he knew that, in order to find money to reduce the overdraft to the bank, J. E. Guzdar was minded, by producing the title deeds to a prospective purchaser, dishonestly and falsely to represent to the purchaser that there was no existing equitable mortgage on the property and thereby to induce him to purchase the property, or to pay a higher price than otherwise he might have paid; and he knew that in surrendering the title deeds to J. E. Guzdar he was departing from the normal and prudent practice of the defendant bank and of all responsible bankers in Calcutta. And yet with all this information at his disposal, and being fully aware that the bank was relying upon the title deeds as a substantial security for repayment of the firm's overdraft, Allan stated that he handed the title deeds to J. E. Guzdar because he believed that the partners of the firm were reliable and trustworthy persons, and J. E. Guzdar himself on a previous occasion had duly returned the title deeds to the bank. I am of opinion that, in surrendering the title deeds to J. E. Guzdar, in the circumstances obtaining in this case, the defendant bank was guilty of gross neglect, and as the plaintiff bank by reason of such gross neglect was induced to advance money on the security of the property, the mortgage of the defendant bank must be postponed to that of the plaintiff bank.

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(16) [1899] 2 Ch. 264=68 L. J. Ch. 583=15 T. L. R. 450=48 W. R. 3=81 L. T. 212.
(17) [1889] 12 Mad. 424.
(18) [1891] 15 Mad. 268=2 M. L. J. 95.
(19) [1907] 31 Mad. 7=17 M. L. J. 400.
(20) [1888] 13 Bom. 229.
(21) [1893] 18 Bom. 444.
(22) [1916] 43 Cal. 1052=34 I. C. 115.
(23) [1911] 15 C. W. N. 813=11 I. C. 503=21 M. L. J. 936 (P.C.).
(24) [1875] 7 H. L. 496=45 L. J. Q. B. 31=23 W. R. 709=32 L. T. 283.
(25) [1851] 9 Hare 449=15 Jur. 1097=21 L. J. Ch. 69.
(26) [1852] 1 Drewry 193.
(27) [1885] 29 Ch. D. 725=54 L. J. Ch. 909=53 L. T. 84.
(28) [1886] 33 Ch. D. 402=56 L. J. Ch. 12=35 W. R. 225=55 L. T. 416.
(29) [1888] 40 Ch. D. 182=58 L. J. Ch. 238=37 W. R. 318=60 L. T. 669.
(30) [1898] 1 Ch. 315=67 L. J. Ch. 169.
(31) [1902] 2 Ch. 163=71 L. J. Ch. 561=50 W. R. 517=86 L. T. 491=18 T. L. R. 548.
(32) [1908] 2 K. B. 484=77 L. J. K. B. 1045=24 T. L. R. 682=99 L. T. 490=11 Asp. M. C. 120=13 Com. Cas. 299.
(33) [1913] 2 Ch. 18=82 L. J. Ch. 481=29 T. L. R. 501=57 S. J. 517=108 L. T. 632.
(34) [1921] 1 Ch. 98.
(35) [1883] 1 Cab. & Ell. 161.

I arrive at the same conclusion on a further or alternative ground. The rule of equity to which I wish to refer is explained in the judgment of the Court in *Perry Herrick* v. *Attwood* (36), *Briggs* v. *Jones* (37), *Brocklesby* v. *Temperance Building Society* (38), *In re Castell & Brown, Ltd.* (30), and *Rimmer* v. *Webster* (31). In the case of *In re Castell and Brown* (4), Romer, J., observed :

"I take it to be established that if a first mortgagee, even though he has the legal estate, authorizes the mortgagor to retain the deeds in order that the mortgagor may thereby, as ostensible owner of the property, be able to deal with it though only to a limited extent, yet if the mortgagor takes advantage of the deeds so left with him to deal with the property to an extent beyond what was authorized, then the mortgagee cannot set up his charge as against an incumbrancer for value without notice, who claims under the unauthorized dealing and relied on the deeds and the apparent ability of the owner to deal with the property free from incumbrances."

His Lordship added :

"this being the case as between a prior legal mortgagee and a subsequent equitable incumbrancer it is an a fortiori case where the first mortgage is only equitable."

And in *Rimmer* v. *Webster* (31), Farewell, J., laid down that if the action of the prior mortgagee

"is also consistent with an intention that the person to whom the indicia of title are entrusted should deal with them ; and if it is once proved, or admitted, that such was the intention, the case then falls to be decided in accordance with the principles governing the cases of authority given by a principal to an agent ; and the owner comes under a duty to the persons whom he intends to act on such authority to give them notice of any limit that he places on the authority, which he has by his own act made apparently co-extensive with absolute ownership. This disposes of Mr. Upjohn's contention that the cases of *Perry Herrick* v. *Attwood* (36), and *Brocklesby* v. *Temperance Permanent Building Society* (38) are confined to an excess of the limit of borrowing, and do not extend to a mortgage when the authority is only to sell. The authority which the owner has given can only be limited by the indicia of property which he has given."

In my opinion, the present case is covered by the decision in *Briggs* v. *Jones* (37) and whether this equitable rule is founded upon estoppel by representation or agency it is clearly established that conduct on the part of the first mortgagee which violates the rule has the effect of postponing the mortgage of the prior mortgagee to that of the later encumbrancer.

It cannot be doubted, I think, that the action of Allan in surrendering the deeds to J. E. Guzdar brings the present case within the principle of this rule of equity. It is apparent from the evidence that Allan intended that J. E. Guzdar should use the title deeds for the purpose of raising money by the sale of the property, and if the sale was completed that J. E. Guzdar should not be under any obligation to restore the title deeds to the defendant bank. To permit the defendant bank to retain priority for its mortgage, when it deliberately had entrusted J. E. Guzdar with the indicia of title for the purpose of dealing with the property in order to raise money to reduce the bank's overdraft and thereby had directly enabled Guzdar to obtain a mortgage from the plaintiff bank upon the security of the property, would be against the plainest equity. For these reasons, therefore, I hold that the mortgage of the defendant bank must be postponed to that of the plaintiff bank, and there will be a declaration to that effect in favour of the plaintiff bank.

A further question arises as to the extent to which the plaintiff bank is entitled to claim priority. That depends upon the amount of the advance which the plaintiff bank was induced to make upon the security of the title deeds.

On behalf of the defendant bank it is urged that the sum advanced was only four lacs, because it was four lacs only which was drawn out by Guzdar on 27th June.

This contention does not appear to be in accordance with the facts.

On 27th June, J. E. Guzdar drew four cheques upon the plaintiff bank for Rs. 50,000, Rs. 1,50,000, Rs. 2,00,000 and Rs. 1,00,000 respectively, aggregating five lacs. Of these five lact cheques to the value of four lacs were cashed by the firm and found their way into the Bank of India.

As regards the cheque for one lac, a transfer cheque by the firm appears to have been paid into Lloyds Bank for a like amount. It is not quite clear whether this was so, or whether the cheques drawn upon the bank in favour of the firm of an aggregate value of five lacs were all paid into the Bank of India,

(36) [1857] 2 De. G. & J. 21=3 W. R. 204=4 Jur. (n.s.) 101=27 L. J. Ch. 121.
(37) [1870] 10 Eq. 92=22 L. T. 212.
(38) [1895] A. C. 173=64 L. J. Ch. 433=59 J. P. 676=43 W. R. 6[illegible]=72 L. T. 477.

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and a cheque for one lac drawn by the firm on the Bank of India and paid into Lloyds Bank to the credit of the firm. In my opinion, it does not matter which course was taken; for, in substance, what took place on 27th June was that the plaintiff bank advanced upon the security of the title deeds five lacs of which four lacs was paid in cash while the bank credited the firm in current account to the extent of a further lac. The one lac represented by the cheque paid into the plaintiff bank on 27th June, to the credit of the firm was allocated to the current account, and the effect of so doing was to wipe out the debit on the current account on 26th June, namely, Rs. 63,105-14-3, the balance being appropriated in reduction of the five lacs which had been advanced to the firm on the security of the title deeds. On 5th July, a further sum of Rs. 6,982-8-0 was paid into the bank to the credit of the firm, and appropriated in further reduction of the loan of five lacs.

On 5th July, it appears that the plaintiff bank debited the firm with a sum of Rs. 25,000 in respect of a hundi drawn on F. P. Walladar in favour of the firm, for which the bank had given credit to the firm, but which was not paid on presentation by the acceptor. The sum received by the firm from the bank in that transaction, however, was not advanced on the security of the title deeds, and, therefore, the plaintiff bank is not entitled to treat that sum as an advance for which they are entitled to priority as against the defendant bank.

In my opinion, the sum in respect of which the plaintiff bank is entitled to priority as against the defendant bank is five lacs with interest amounting to Rs. 780-5-0 less the amounts paid by the firm in reduction of such an advance, and that is Rs. 4,39,754-3-9.

There will be the usual mortgage decree for Rs. 4,65,747-3-9 and interest as agreed in the mortgage against the defendant firm, and as the defendant bank has also obtained a mortgage decree against the firm in the taking of the mortgage accounts, as between the plaintiff bank and the defendant bank the plaintiff bank will be entitled to priority to the extent that I have mentioned. The firm will pay the plaintiff bank's costs on scale No. 1.

As against the defendant bank the plaintiff bank is entitled to costs on scale No. 2.

It appears that in the course of criminal proceedings taken against J. E. Guzdar the Chief Presidency Magistrate ordered that the defendant bank should hold the title deeds in suit, and the plaintiff bank a certain sum in cash amounting to about four lacs, pending the further orders of the Court. The plaintiff bank is not willing to accept this sum in cash in payment pro tanto of its secured debt, and by consent the title deeds now held by the defendant bank will forthwith be handed over to the plaintiff bank, and the cash now held by the plaintiff bank will be handed over to the defendant bank upon the defendant bank giving an undertaking in writing to indemnify the plaintiff bank against any claim which may be made against the plaintiff bank by reason of the plaintiff bank having handed over this sum in cash to the defendant bank.

It appears that this sum has been held in cash by the plaintiff bank and segregated from the bank's other money, and was not utilised by them in any way until 21st February 1929, when by an agreement between the two banks Rs. 3,90,000 in cash out of the said sum was to be treated as earning interest in the hands of the plaintiff bank at the rate of 2 per cent, and interest at that rate from 21st February 1929, must be paid by the plaintiff bank to the defendant bank.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 32

MUKERJI AND BOSE, JJ.

Hemanta Kumari Devi — Plaintiff—Appellant.

v.

Prasanna Kumar Datta — Defendant—Respondent.

Appeals Nos. 546 and 550 of 1926, Decided on 22nd June 1928, from appellate decrees of Sub-Judge, Mymensingh, D/- 10th September 1925.

(a) Bengal Tenancy Act (8 of 1885), S. 109 — Previous applications by one cosharer landlord under S. 105 — Partition — Entire holding falling to cosharer's lot — Fresh suit under S. 105 — Suit held not barred under S. 109.

A cosharer landlord applied under S. 105, for settling fair and equitable rent of his share

of holding, joining other cosharers as pro forma defendants. The tenants objected to the application and their objections were allowed in two Courts. Subsequently High Court remanded the case to the first Court observing that application would be maintainable under certain circumstances notably if there were separate contracts between the parties. Whereupon the cosharer landlord alleging that there were defects in the application which were irremediable withdrew the application. Thereafter on partition with cosharers entire 16 annas share of the holding was allotted to the cosharer landlord. The cosharer landlord then instituted the suit under S. 105.

Held : that the subject-matter of subsequent suit was not the same as the previous application under S. 105 and the suit was not barred under S. 109 : *A. I. R.* 1925 *Cal.* 845 (*F. B.*), *Foll.* [P 33 C 2]

(b) Evidence Act, S. 115—Scope—Tenant taking position that particular application does not lie—Application withdrawn—Subsequent suit — Tenant cannot plead that suit was barred by application.

Where the tenants of a holding take up a position in proceedings under S. 105, Ben. Ten. Act, that the application does not lie and the application is withdrawn, they will not be allowed to say in subsequent proceedings in suit that the application operated as a bar to it. The principle is that a party litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate to the detriment of his opponents and that this wholesome doctrine applies not only to successive stages of the same suit but also to another suit other than the one in which the position was taken up provided the second suit grows out of the judgment of the first : *A. I. R.* 1924 *Cal.* 600, *Foll.* [P 33 C 2 ; P 34 C 1]

Brajalal Chakravarti and *Debendranath Bagchi*—for Appellant.

Judgment.—These five appeals arise out of as many suits that were instituted by the appellant for enhancement of rent under S. 30, Ben. Ten. Act. The Courts below have dismissed the suits on the ground that they were not maintainable in view of S. 109 of that Act.

The plaintiff had previously filed applications under S. 105 of the Act. She was then a cosharer landlord, her share amounting to 14 annas. She made her cosharers pro forma opposite parties to her applications but prayed for enhancement of the rent due to her share. The defendants, who were the principal opposite parties in the proceedings, contested the maintainability of the application, and the trial Court, as well as the Court of first appeal, upheld the objection and ruled that the applications did not lie. She then preferred second appeals to this Court, which held that under certain conditions and circumstances the applications might lie—notably, if there were separate contracts between the parties. As the facts had not been investigated, the cases were remanded for further investigation. The defendants persisted in their opposition, and on that the plaintiff withdrew the applications, alleging that there were defects therein which were irremediable. Thereafter, on a partition with her cosharers, the holdings were exclusively allotted to her share and she came to be the 16 annas landlord in respect thereof. She then instituted the present suits.

We are of opinion that, in the circumstances narrated above, the suits were not barred under the provisions of S. 109 of the Act. There are at least two reasons which induce us to take this view. Full Bench decision of this Court in the case of *Purna Chandra* v. *Narendra Nath* (1), has laid down that if an application is made under S. 105, Ben. Ten. Act, and subsequently withdrawn, whether with or without the permission of the Court, a suit on the same subject matter is barred by the provisions of S. 109 of the Act. The question, therefore, is whether the subject matter in the present cases was the same. The holdings with which the application under S. 105 were concerned consisted of the 14 annas undivided shares of the lands, while the holdings with which the present suits are concerned are the entire lands. The subject matter, therefore, in our opinion was not the same.

Moreover, the effect of the previous litigation may not inaptly be put in this way : That the defendant's objection was given effect to by the two Courts below, and the High Court having held that unless the plaintiff was able to prove certain facts the applications would not be maintainable, the plaintiff withdrew the applications because she would not be able to prove those facts. It is hardly consonant with justice that the defendants, who took up in the proceedings under S. 105 the position that the applications did not lie, should be allowed to turn round and say that the said applications were entertainable in law, and as such operate as a bar to the suits. The present suits may rightly be said to have arisen out of the result of those applications. It is well settled that a party

(1) A.I.R. 1925 Cal. 845=52 Cal. 894 (F.B.),

litigant cannot be permitted to assume inconsistent positions in Court, to play fast and loose, to blow hot and cold, to approbate and reprobate, to the detriment of his opponent; and that this wholesome doctrine applies not only to the successive stages of the same suit, but also to another suit other than the one in which the position was taken up, provided the second suit grows out of the judgment in the first: *Dwijendra Narain* v. *Joges Chandra De* (2). It is true that the applications were withdrawn but that withdrawal was after the defendant's objection had prevailed in the two Courts below and would have prevailed for ever unless the plaintiff was in a position to get over it by establishing certain facts.

We are, accordingly, of opinion that the view taken by the Courts below was erroneous. The appeal must succeed. The decisions of the Courts below being set aside, the suits are sent back to the trial Court to be dealt with on their merits. Costs of this Court as also of the Courts below will be costs in the cause.

V.B./R.K. *Appeal allowed.*

(2) A.I.R. 1924 Cal. 600.

✲ A. I. R. 1930 Calcutta 34

B. B. GHOSE AND PANTON, JJ.

Khondkar Mahomed Saleh and *others* —Defendants—Appellants.

v.

Chandra Kumar Mukerji and *others*—Plaintiffs—Respondents.

Appeal No. 194 of 1927, with Rules Nos. 1105-F and 1200-F of 1928, Decided on 6th February 1929, against original decree of Sub-Judge, Berhampore, D/- 9th May 1927.

✲ (a) Limitation Act (9 of 1908), S. 6 and (15 of 1877), S. 7—Alteration of words—Effect is that privilege enjoyed by minor of making application within prescribed time after cessation of disability is taken away.

The effect of the substitution of the words "make an application for execution of a decree" in S. 6 of the present Act in place of the words "make any application" in S. 7 of the old Act, is that the privilege enjoyed by a minor of making an application within the prescribed period after the cessation of disability has been taken away, and now any application by the minor except an application for the execution of a decree has to be made within the prescribed period from the time when the right to apply accrued. [P 35 C 1, 2]

✲ (b) Limitation Act (9 of 1908)—Interpretation—Act operates restrospectively unless it confiscates vested right under old Act—If effect of new Act is only to curtail the period it should be given retrospective effect.

Statutes of limitation cannot be considered as anything else than matters relating to procedure and ordinarily such statutes have their operation from the date fixed in the statute and govern all matters before the Court after the commencement of the operation of the statute. There is, however, one exception and it is that where under the Act as amended the application could not be made the amendment will not apply retrospectively, for the principle is that the effect of an amendment is to regulate and not to confiscate a vested right.

A right to apply under Civil P. C. O. 34, R. 6, accrued to a minor in September 1908. The mortgagee was under a disability of minority till 23rd September 1923. Under the old act the minor could make application within three years of the cessation of the disability. The new Act substituted for this, three years from the date right to apply accrued. On the date of the coming into force of the new Limitation Act the minor had two years and nine months' time under the new Act within which to apply.

Held: that inasmuch as the effect of change was to cut the period within which to apply and not take away the right, the new Act should be given restrospective operation. [P 37 C 1; P 38 C 2]

Rupendra Coomar Mitter, *Dharma Das Set*, *Kopilendra Krishna Deb* and *A. S. M. Akram*—for Appellants.

Dwarka Nath Chuckerbutty, *Jadu Nath Kanjilal* and *Subodh Chandra Dutt*—for Respondents.

B. B. Ghose, J.—This is an appeal by the original defendant mortgagor in a suit brought on a mortgage which was executed in 1902 in favour of the father of the present respondent one Aswini Kumar Mukerji. The due date under the bond for payment of the mortgage money was 12th April 1904. The original mortgagee died in December 1905, leaving his son the present respondent his only heir who was then a minor. A suit was brought on the mortgage in 1906 and a preliminary decree was passed on 30th November 1906. An order absolute was made under the repealed provisions of the Transfer of Property Act on 7th January 1907. In the suit the plaintiff who was represented by his guardian ad litem prayed, amongst other things, that in case the entire amount of the mortgage be not fully satisfied by the sale of the mortgaged properties, then the balance might be realized from the de-

fendant's other moveables and immovables as well as from his person. According to the usual practice then prevailing, the decree was made for realization of the mortgage money in the first instance out of the mortgaged property leaving it to the mortgagee to apply for a further decree against the person of the mortgagor if by the sale of the mortgaged property the entire money was not realized. The mortgaged property was sold on 16th September 1908, and it was purchased by the mortgagee for Rs. 831. The mortgage decree including all costs was for Rs. 6,666 odd and therefore a considerable sum remained due as balance of the mortgage money. The mortgagee attained majority on 23rd September 1923 and an application was made under Civil P. C. O. 34, R. 6, on 23rd September 1924 for a personal decree against the mortgagor. The mortgagor pleaded that this application was barred by limitation. The learned Subordinate Judge has overruled that objection and made a decree against the mortgagor personally for the balance of the money due together with interest which amounted to Rs. 13,284-6-9. The defendant mortgagor has appealed against that decree and his contention is that the plaintiff's application should be dismissed on the ground that it was barred by limitation.

This question raises an interesting point of law which does not seem to have been directly decided by any reported case. The point arises in this way. Under the Limitation Act 15 of 1877 the plaintiff would be entitled to maintain his application for a personal decree after the attainment of majority within the period of limitation prescribed therein. Under S. 7 of that Act a minor might make any application within the prescribed period after the disability of minority had ceased. The new Limitation Act (Act 9 of 1908) was passed in August 1908 and it came into operation on 1st January 1909. Under S. 6 of that Act, which replaced S. 7, Act 15 of 1877, instead of the words "make any application" the words "make an application for the execution of a decree" were substituted, the result of which is that under the Limitation Act now in force the application for a personal decree against the mortgagor under Civil P. C. O. 34, R. 6 would not fall within the provisions of S. 6; or, in other words, the privilege of making the application after the disability of minority has ceased was taken away and a minor must now make such an application within the period prescribed under Sch. 1, Lim. Act. It has been held by a Full Bench of this Court in the case of *Pell* v. *Gregory* (1) that such an application falls within Art. 181, Sch. 1, Lim. Act (9 of 1908) and therefore, the period of limitation is three years from the time when the right to apply accrued. The contention of the appellant is that in this case the right to apply accrued in September 1908. The law of limitation now in force should be applied in the present case and it should, therefore, be held that the application made in September 1924 is barred by the rule of limitation. It is contended, on the other hand, on behalf of the respondent, as was held by the learned Subordinate Judge, that the Limitation Act (15 of 1877) should apply to this case and although the right to make an application accrued in September 1908 as the mortgagee was under the disability of minority till 23rd September 1923, he was entitled to make the application within three years from that date. And as the application was made within that period, it was within time and the learned Subordinate Judge was right in making the decree.

The question, therefore, is what law of limitation should be applied to the present application. It is argued on behalf of the appellant that the rule of limitation should be applied according to the law in force at the time when the application was made and the learned advocate relies upon the case of *Soni Lal* v. *Kanhaiya Lal* (2) in support of his proposition. He contends that the Subordinate Judge was wrong in holding that the Act of 1908 affected any vested right of the plaintiff and, therefore, his conclusion that the Limitation Act of 1877 was applicable is erroneous. Reliance has been placed with regard to the rule of construction as to the retrospective operation of statutes to the cases of *The*

(1) A. I. R. 1925 Cal. 884=52 Cal. 823 (F.B.)
(2) [1913] 35 All. 227=19 I. C. 201=40 I. A. 74 (P. C.).

Queen v. *Leeds and Bradford Ry. Co.* (3) and *Towler* v. *Chatterton* (4), in support of the contention that the Act of 1908 should be given what is called "retrospective operation." In the case of *Leeds and Bradford Ry. Co.* (3) an Act was passed which came into operation six weeks after its passsing by which it was enacted that awards for compensation made under the Land Clauses Act must be applied for and obtained within six months from the time when the damage was done to any property. The question arose whether the Act had a retrospective operation and was to apply to cases of damage done before its passing. The Court decided that it was retrospective, and Lord Campbell, C. J., in giving judgment observed :

"If the Act had come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention on the part of the legislature not to give it a retrospective operation, but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper tribunal. . . . . A certain time was allowed before the Act was to come into operation, and that removes all difficulty. The case of *Towler* v. *Chatterton* (4) is strongly in point."

It is stated in a well-known text book, Craies on "Statute Law" at p. 334 that the case of *Towler* v. *Chatterton* (4) was, amongst other cases, commented upon somewhat adversely by Rolfe, B. in an elaborate judgment in *Moon* v. *Durden* (5). But notwithstanding these criticizms, *Towler* v. *Chatterton* (4) was followed in *R.* v. *Leeds Bradford Ry. Co.* (3). This observation does not seem to be accurate as would appear from a report of the judgment of Rolfe, B. in the case of *Moon* v. *Durden* (5). There the learned Baron commented adversely upon two nisi prius decisions which were cited before him in support of the contention that a certain Act as regards wagering contracts should be given retrospective effect. But speaking of the decision in *Towler* v. *Chatterton* (4) the learned Baron makes the following observations :

"Whether the decision in *Towler* v. *Chatterton* (4) was correct, would depend on whether the true meaning of S. 10 was to fix a date before which all actions must be brought, or a date beyond which no parol promise should be sufficient to take a case out of the operation of the Statute of Limitations. The Court of Common Pleas adopted the former construction. Neither construction would do injustice by infringing the rule which in general makes all statutes prospective in their operation, and the Court of Common Pleas may have been right in their view of the statute; at all events, it is immaterial, in the present case, to discuss that point."

In the present case the question really is whether the Limitation Act (9 of 1908) affects a vested right as to making applications by the alteration made by S. 6 in the previous law contained in S. 7, Act 15 of 1877. It is a settled principle that there is no vested right in procedure or costs. In *Wright* v. *Hale* (6), Pollock, C. B., observed that there is a considerable difference between new enactments which affect vested rights and those which merely affect the procedure in Courts. In *In re, Athlumney* (7), at p. 551, Wright, J., says:

"Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment."

After citing a large number of authorities in support of the proposition, the learned Judge observes at p. 553 :

"One exception to the general rule has sometimes been suggested, namely, that where, as here, the commencement of the operation of an Act is suspended for a time, this is an indication that no further restriction upon retrospective operation is intended. But this exception seems never to have been suggested except in relation to statutes affecting procedure, such as statutes of limitation, and even in relation to them it is questioned in *Moon* v. *Durden* (5)."

I have pointed out above from the judgment of Rolfe, B., in *Moon* v. *Durden* (5) that the learned Baron did not actually disapprove of the law laid down in *Towler* v. *Chatterton* (4). I may also state here in passing that two other learned Barons who constituted the Court of Exchequer with Rolfe, B, did not say anything with regard to this question. The question, therefore, is whether the Limitation Act of 1908 affected any vested right or it was merely a law affecting procedure. It is clear from the

(3) [1852] 18 Q. B. 343.
(4) [1829] 6 Bing. 258=21 L. J. M. C. 193.
(5) [1848] 2 Ex. 33.
(6) [1861] 6 H. & N. 227=9 W. R. 157=30 L. J. Ex. 40=6 Jur. (n. s.) 1212=3 L. T. 444.
(7) [1898] 2 Q. B. 547=67 L. J. Q. B. 935=5 Manson 322=47 W. R. 144=79 L. T. 303.

observations of Wright, J., that statutes of limitation cannot be considered as anything else than matters relating to procedure and ordinarily such statutes have their operation from the date fixed in the statutes and governs all matters brought before the Court after the commencement of the operation of the statute. There is, however, one exception which has been pointed out in the case of *Gopeshwar Pal* v. *Jiban Chandra* (8), decided by a Special Bench of this Court. There the period of limitation under Sch. 3, Ben. Ten. Act, was amended in such a way as to take away the rights of certain persons to bring a suit within the period of limitation prescribed by the Act before the amendment came into operation. The learned Judges observed as follows :

" Here the plaintiff at the time when the amending Act was passed had a vested right of suit, and we see nothing in the Act as amended that demands the construction that the plaintiff was thereby deprived of a right of suit vested in him at the date of the passing of the amending Act. It is not (in our opinion) even a fair reading of S. 184 and Sch. 3, Ben. Ten. Act, as amended, to hold that it was intended to impose an impossible condition under pain of the forfeiture of a vested right, and we can only construe the amendment as not applying to cases where its provisions cannot be obeyed. The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions but cannot (in our opinion) govern suits where such compliance was from the first impossible. The effect is to regulate not to confiscate. There are thus two positions ; where in accordance with its provisions a suit could be brought after the passing of the amendment, it may be that the amendment would apply, but where it could not, then the amendment would have no application."

Then dealing with the case of *Soni Ram* (2), the learned Judges say that case applies where it was possible for the plaintiff to bring a suit in accordance with the provisions of the new Limitation Act, after the passing of the amendment and there the amendment would apply. Now, applying this rule to the present case there cannot be any doubt that the plaintiff might have made his application within the period of limitation, prescribed under Act 9 of 1908. The time when the right accrued was September 1908 and three years would expire in September 1911. Therefore, the mortgagee had about two years nine months' time after the passing of the Act of 1908 to make his application and hence there was no hardship which was discussed in the cases of *Towler* v. *Chatterton* (4) and *R.* v. *Leeds* and *Bradford Ry. Co.* (3). It is not necessary in this case to lay any stress upon the fact that the Limitation Act of 1908 was passed in August 1908 and it was to come into operation on 1st January 1909. That fact might have been important if the position of the plaintiff was such that he would have no time under the new law to make any application after the Act came into operation. But as a matter of fact, as I have already pointed out, he had two years nine months under the new law within which he could make his application. Therefore, in my judgment, it cannot be doubted that the rule of limitation applicable to the present case should be that laid down by Act 9 of 1908.

Reliance has been placed by the respondent on the case of *Promotha Nath* v. *Sourav Dasi* (9), and particularly on the observations in the judgment at 469 in support of the contention that the old law of limitation (Act 15 of 1877) should apply to the present case. That is, however, a case quite different from the present. There the plaintiff had brought a suit against an assignee of a purchaser at an auction sale. Such a suit was not prohibited under the Civil Procedure Code of 1882. The plaintiff had a subsisting right to sue such an assignee. Under S. 66, Civil P. C. of 1908 such a suit is not maintainable. The learned Judges held that S. 66 of the Code had no retrospective operation as it actually took away a right of suit which is a vested right. Reliance has also been placed on the case of *Fazal Karim* v. *Annada Mohan Roy* (10). There a judgment-debtor made an application for setting aside an auction sale. The sale was held in 1903 when the old Limitation Act (15 of 1877) was in operation. He had a right to make his application within three years after the attainment of majority under that Act. But under the Limitation Act of 1908 he would have to apply within three years of the accrual of the right to make the application. The judgment-debtor made his application in January

(8) [1914] 41 Cal. 1125=19 C. L. J. 549=24 I. C. 87=18 C. W. N. 804 (F.B.).

(9) [1920] 31 C. L. J. 463=58 I. C. 327 = 24 C. W. N. 1011.

(10) [1911] 15 C. W. N. 845=11 I. C. 401.

1909 when he was still a minor. That case was decided before the decision of the Judicial Committee in *Soni Ram* v. *Kanhaiya Lal* (2). The judgment-debtor could have made his application after the passing of the Limitation Act of 1908 and before it came into operation in January 1909, but he did not do so. He did not avail himself of the opportunity. His case does not fall within the exception formulated in the Special Bench case of *Gopeswar Pal* v. *Jiban Chandra* (8), referred to above. In my opinion that case should be considered as no longer law after the decision of the cases referred to above.

Reliance was next placed on the Special Bench case of *Sadar Ali* v. *Dolilud-din* (11), where it was held, following the well known case of *Colonial Sugar Refining Co.*, v. *Irving* (12), that a right of appeal is a substantive right which could not be taken away without an express provision for it. This was also held to be so in the case of *Delhi Cloth and General Mills Co.* v. *Income-Tax Commissioner, Delhi* (13), decided by their Lordships of the Judicial Committee. Those cases dealt with a substantive right and not with a question of procedure such as limitation of suits and have no bearing on the question before us. The real position in the present case is as summarised in Maxwell's 'Interpretation of Statutes' 6th Edition, at p. 399 while dealing with the cases of *Towler* v. *Chatterton* (4) and *R.* v. *Leeds* and *Bradford Ry. Co.* (3). The learned author says :

"in both of the above cases, however, the construction, though fatal to the enforcement of a vested right, by shortening the time for enforcing it, did not in terms take away any such right ; and in both it seems to fall within the general principle that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts, even where the alteration which the statute makes has been disadvantageous to one of the parties. Although to make a law for punishing that which, at the time when it was done, was not punishable, is contrary to sound principle ; a law which merely alters the procedure may, with perfect propriety, be made applicable to past as well as future transactions ; and no secondary meaning is to be sought for an enactment of such a kind. No person has a vested right in any course of procedure."

What the enactment of 1908 did was to cut down the period within which the infant was entitled to exercise his vested right and did not as a matter of fact take away that right.

On these grounds I am of opinion that the appeal must be allowed, the judgment and decree of the learned Subordinate Judge set aside and the application of the mortgagee dismissed with costs in both the Courts.

Panton, J.—I agree.

V.B./R.K. *Appeal allowed.*

(11) A. I. R. 1928 Cal. 640 (F.B).
(12) [1905] A. C. 369=74 L. J. P. C. 77 = 21 T. L. R. 513=92 L. T. 738.
(13) A. I. R. 1927 P.C. 242=9 Lah. 284 = 54 I. A. 121 (P.C.).

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PAGE AND PATTERSON, JJ.

Narayan Chandra Dutt — Plaintiff—Appellant.

v.

Chairman, Municipal Commrs. Panihati—Defendant—Respondent.

Appeal No. 2169 of 1927, Decided on 30th July 1929, from appellate decree of First Addl. Dist. Judge, 24 Parganas, D/- 18th May 1927.

(a) Bengal Municipal Act (3 of 1884), Ss. 85 (b) and 101—Meaning and effect.

Meaning and the effect of Ss. 85 (b) and 101 is that in every case the rate is to be imposed on the annual value of the holding which is deemed to be the gross annual rent at which the holding may be reasonably expected to let, and the proviso is inserted in aid of the assessee, to lay down a maximum to prevent excessive assessments being made : *West Derby Union* v. *Metropolitan Life Assurance Society* (1897) *A. C.* 647, *Ref.* [P 40 C 1]

(b) Bengal Municipal Act (3 of 1884), Ss. 85 (b) and 101—Commissioners' accepting valuation made by guess and in entire disregard of S. 101 is ultra vires and such assessment cannot be sustained.

If no attempt is made to ascertain the value of the holding and Commissioners accept the valuation officer's method of valuation knowing full well that it was based on the estimated cost of the building in entire disregard of principles which the valuation officers were bound by law to adopt, the Commissioners must be deemed to have acted ultra vires and the assessment cannot be sustained : 11 *Cal.* 275 at p. 281 and 37 *Cal.* 374, *Foll.* [P 40 C 2]

A holding in suit was debuttar property held by the plaintiff as shebait. It was occupied by temples and some buildings which were not let. Holdings of similar nature in the vicinity had been let and some of them changed hands. At the time of the valuation of the holding for the purpose of S. 85 (b) all that the valuation officer did was to estimate by guess what he conceived to be the cost of erecting the buildings that he found on the holding and settled the valuation on the estimate

so made. Commissioner accepted the valuation officer's basis of valuation.

Held : that the Commissioners were not justified in departing from rule of assessment laid down in S. 101 and the holding ought to have been assessed according to the provision of the Act on the gross annual rent at which the holding may be reasonably expected to let. [P 41 C 1]

(c) Bengal Municipal Act (3 of 1884), S. 101—Measure of rateable value.

Measure of rate able value is definedby statute as the rent which may reasonably be expected ; interests on costs or on capital value cannot be substituted for the statutory measure but can be looked at as prima facie evidence in order to answer the question of fact, what rent a tenant may reasonably be expected to pay. And where the hereditament is incapable of being compared with other hereditaments which form the subject of letting the amount of capital expended is admissible in evidence as a criterion ny which to estimate the rent : *The Queen* v. *School Board for London* 55 *L. J. M. C.* 55 *and on appeal* 17 *Q. B. D.* 738 ; *Liverpool Corporation* v. *Llanfyllin Assessment Committee*, (1839) 8 *Q. B.* 14 ; *Liverpool Corporation* v. *Chorley Assessment Committee and Whitnell Overseers*,(1912) *K. B.* 270 *on appeal* 1913 *A. C.* 197 and *Metropolitan Water Board* v. *Chertsay Union*, (1916) 1 *A. C.* 337, *Ref.* [P 41 C 1]

Bijan Kumar Mukherjee—for Appellant.

Sarat Chandra Basak and *Gopendra Nath Das*—for Respondent.

Page, J.—This a suit for a declaration that the assessment of a rate under S. 85 (b), Bengal Municipal Act (3 of 1884) on the annual value of the plaintiff-appellant's holding by the Commissioners of the Panihati Municipality was ultra vires and illegal.

The decision turns upon the true construction of S. 101 of the Act which runs as follows :

"101. The gross annual rent at which any holding may be reasonably expected to let shall be deemed to be the annual value thereof and such value shall accordingly be determined by the Commissioner, and entered in the valuation list ; provided that (except in the Darjeeling Municipality) if there be on a holding any building or buildings the actual cost of erection of which can be ascertained or estimated the annual value of such holding shall in no case be deemed to exceed an amount which would be equal to seven and a half per centum on such cost, in addition to a reasonable ground rent for the land comprised in the holding."

It appears that the holding in suit is debuttar property held by the plaintiff as shebait. The area of the holding is about 13 bighas, of which half consists of a fruit orchard ; upon 3 bighas there are 12 Shiva mandirs, and upon the remainder of the holding stand the three-storied dwelling house and offices forming the residence of the plaintiff. The property is situate on the east bank of the Hooghly about eleven miles up the river from Calcutta, with a pucca ghat leading to the river.

In 1921 for the purposes of a latrine tax imposed under S. 86 of the Act the annual value of the holding was assessed under S. 96 at Rs. 3,750 and in 1924, when the rate in question was imposed under S. 85 (b), it is conceded that no separate or further valuation of the holding was made, and that the assessment was based upon the annual value that had been ascertained for the purpose of the latrine tax in 1921.

Now, the holding in suit is of a similar nature to that of numerous other properties on the banks of the Hooghly that are used as the residences or pleasure houses of prosperous citizens of Calcutta. The plaintiff's son in the course of his evidence at the trial stated that houses of this type in the neighbourhood of the plaintiff's holding rarely were let, and usually were occupied by the owners who had built or acquired them. But there was evidence that specific holdings of a similar nature in the vicinity had been let, and that such properties from time to time changed hands, and passed from one owner to another.

Nevertheless, it appears that in 1921 when the valuation list was prepared no attempt was made by the officer appointed to value the holdings to ascertain the annual rent at which the plaintiff's holding might reasonably be expected to let, or to obtain information as to the cost of the construction of the buildings that had been erected on the holding. All that the valuation officer purported to do was to estimate "by guess" what he conceived to be the cost of erecting the buildings that he found on the holding and to settle the valuation upon the estimate thus made. The Commissioners appear to have accepted the basis of the valuation officer's estimate and assessment was fixed at 3 per cent on an annual value of Rs. 3,750.

If the assessment as made was ultra vires and illegal it cannot be sustained and the plaintiff is entitled to the relief that he seeks : *Chairman, Municipa*

Board, Chapra v. *Basudeo Narain Singh* (1).

On behalf of the respondents it is contended that the assessment can be supported upon the footing that S. 101 and proviso 1 thereto contain alternative modes of assessment, and that it is open to the municipality to assess a holding either upon the annual value ascertained as set out in S. 101 or upon a percentage basis under the proviso.

In my opinion the construction which the respondents urge upon the Court cannot be accepted. The general rule for construing provisos was explained by the House of Lords in *West Derby Union* v. *Metropolitan Life Assurance Society* (2) in which case Lord Herschell observed :

"I decline to read into any enactment words which are not to be found there and which would alter its operative effect because of provisos to be found in any provision. Of course, a proviso may be used to guide you in the selection of one or other of two possible constructions of the words to be found in the enactment, and show when there is doubt about its scope, when it may reasonably admit of doubt as to its having this scope or that, what is the proper view to take of it but to find in it an enacting provision which enables something to be done which is not to be found in the enactment itself on any reasonable construction of it, simply because otherwise the proviso would be meaningless and senseless would, as I have said, be in the highest decree dangerous: ibid p. 655."

and Lord Davey added :

"It seems to me that the whole argument of the appellants really comes to the old and apparently ineradicable fallacy of importing into an enactment which is expressed in clear and unambiguous language something which is not contained in it, by what is called implication from the language of a proviso which may or may not have a meaning of its own: ibid, p. 657."

The meaning and effect of S. 85(b) and S. 101, however, in my opinion, is clear and in accordance with the general principles of rating, and these sections provide that in every case the rate is to be imposed on the annual value of the holding which is deemed to be the gross annual rent at which the holding "may be reasonably expected to let," while the proviso was inserted in aid of the assessee, and to lay down a maximum to prevent excessive assessments being made. In the present case no attempt was made to ascertain the annual value of the plaintiff's holding as provided by S. 101, and in my opinion the Commissioners were acting ultra vires in accepting the valuation officer's method of valuation

"based as they knew it was, upon a percentage of the estimated cost of the building in entire disregard of the principle which they were bound by law to adopt as the basis of their assessment:" see Per Garth, C. J. in *Nundo Lal Bose* v. *Corporation of Calcutta* (3) (at p. 281).

I am not unaware that since *Nundo Lal Bose's* case was decided on 19th February 1885 by S. 151 (b), Calcutta Municipal Act (3 of 1899), for the purpose of assessing land and buildings to the consolidated rate

"the annual value of any building not erected for letting purposes and not ordinarily let shall be deemd to be"

a sum ascertained with reference to a percentage on the costs of construction as therein provided, and that since the judgment of Cave and Wills, JJ. in *Queen* v. *School Board for London* (4) delivered on 21st December 1885, although

"a certain rate of interest on the capital expended in creating the hereditament is by no means to be taken as necessarily equivalent to the rent which a hypothetical tenant would give . . . . the amount of capital expended is admissible in evidence as a criterion by which to estimste that rent in the case of works like these (i. e., a public reservoir) which are incapable of being compared with other hereditaments which form the subject of letting:." Per A. L. Smith, L. J. in *Liverpool Corporation* v. *Llanfyllin Assessment Committee* (5) (at p. 21): see also Per Buckley, L. J. in *Liverpool Corporation* v. *Chorely Assessment Committee and Whitnell Overseers* (6), *Metropolitan Water Board* v. *Chertsey Union* (7).

No doubt in exceptional cases where the rent that a hypothetical tenant might reasonably be expected to pay for the holding cannot be ascertained by methods which would be efficaious in normal and ordinary cases, for example, where the holding consists of land upon

(1) [1910) 37 Cal. 374=11 C. L. J. 400=5 I. C. 321=14 C. W. N. 437.
(2) [1897] A. C. 647=66 L. J. Ch. 726=61 J. P. 820=77 L. T. 284.
(3) [1885] 11 Cal. 275.
(4) [1885] 55 L. J. M. C. 55 on appeal 17Q. B. D. 738.
(5) [1899] 2 Q. B. 14=68 L. J. Q. B. 762=15 T. L. R. 349=63 J. P. 452=80 L. T. 667.
(6) [1912] 1 K. B. 270=8 1 L. J. K. B. 426 on. appeal (1913) A. C. 197=82 L. J. K. B. 555=29 T. L. R. 246=57 S. J. 263=11 L. G. R. 182=77 J. P. 185=108 L. T. 82.
(7) [1916] 1 A. C. 337=85 L. J. K. B. 296=32 T. L. R. 168=60 S. J. 208=14 L. G. R. 217=80 J. P. 137=114 L. T. 380.

which a railway a gas works, a catchment area or a building such as the Bodleian Library at Oxford is situate, rough and and ready tests alone may be available for ascertaining the annual rent that a hypothetical tenant of the holding might reasonably be expected to pay, but in every case the annual rental value is the basis of the assessment, and in such exceptional cases, as Mr. Ryde points out in his work on Rating (Edn. 2 at p. 176)

"a great part, if not the whole, of the difficulty will disappear if the rule be thus stated; the measure of rateable value is defined by statute as the rent which may reasonably be expected; interest on cost, or on capital value cannot be substituted for the statutory measure but can be looked at as prima facie evidence in order to answer the question of fact what rent a tenant may reasonably be expected to pay."

Now, applying these principles to the facts of the present case I am of opinion that the plaintiff's holding is not to be regarded or treated as though it were of an exceptional or abnormal type, for as Garth, C. J. pointed out :

"the principle of rating upon which the Commissioners are directed to proceed is the same as that which is adopted in England, and similar difficulties arise there in the case of gentlemen's parks and mansions which are laid out for residential purposes, and not for letting. But such properties are, nevertheless, constantly rated upon the basis of their annual letting value, *Nundo Lal's* case (3)."

In my opinion in the present case the Commissioners were not justified in departing from the basis assessment laid down in S. 101, and, while it is not the duty of this Court to instruct the Commissioners as to how assessments should be made provided they adopt the methods prescribed in the Act, it appears to me that if the persons authorized to make the assessment apply their minds to the matter in hand no difficulty ought to be experienced in ascertaining according to the provisions of the Act "the gross annual rent at which the plaintiff's holding "may be reasonably expected to let."

For these reasons, in my opinion, the decrees of the lower Courts must be set aside and a decree passed for a declaration that the assessment on the appellant's holding was ultra vires and illegal as prayed. The appellant is entitled to his costs in all the Courts.

Patterson, J.—I agree.

V.B./R.K. *Appeal allowed.*

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GRAHAM AND MITTER, JJ.

Manik Chandra Sarma—Plaintiff—Petitioner.

v.

Dambharudhar Sarma and *others*—Opposite Parties.

Civil Rule No. 80 of 1929, Decided on 2nd August 1929, from order of Addl. Dist. Judge, Assam Valley Districts, D/- 13th August 1927.

Court-fees Act, S. 7 (iv) (c) and (d)—Suit for declaration of right to office of Bara Thakur and permanent injunction restraining defendants from interfering with right—Plaint is to be valued at value of debuttar property or so much of it as is not in plaintiff's possession.

In a suit for declaration of right to office of the shebait of a temple and also for permanent injunction rerestraining defendant from interfering with that right, the plaint is to be valued for purposes of jurisdiction and court-fee at the value of the debuttar property or such portion of it from which the plaintiff is dispossessed : 28 *Bom.* 567, *Dist.* [P 42 C 2]

Panchanan Ghose and *Sitangsu Bhusan Bose*—for Petitioner.

Probodh Chunder Chatterji and *Pannalal Chatterjee*—for Opposite Parties.

Mitter, J.—The question raised by this rule is whether the Munsiff of Sibsagar had declined jurisdiction in refusing to entertain the suit of the plaintiff for declaration of his right to the office of Bara Thakur of the temple of Siva and for a permanent injunction restraining the defendants from interfering with the plaintiff's right as Bara Thakur on the ground that the suit was valued at Rs. 4,600 and was beyond the pecuniary jurisdiction of the Munsif. This order which is challenged was made so far back as 22nd April 1926.

An appeal was taken against this order to the Additional District Judge who held that as the relief was valued at Rs. 130 by the plaintiff the Munsiff was wrong in returning the plaint, but he thought that the suit was one under S. 92, Civil P. C. and it was desirable that the matter should be heard by the District Judge.

The District Judge in whose Court the plaint was filed, however, took the view that the suit was not one under S. 92 and could not be entertained by him and held that the proper Court was that of the Subordinate Judge of Jorehat.

The plaintiff who is the petitioner was advised that the opinion of the

District Judge that the proper Court was the Court of the Subordinate Judge Jorehat could not be binding on him.

The present rule is directed against the orders of the Munsiff of Sibsagar dated 22nd April 1926 and the order of the Additional District Judge dated 13th August 1927, and that of the District Judge dated 31st August 1928.

The petitioner has been bandied about from Court to Court and the question now is whether the Munsiff had jurisdiction to entertain the suit. The plaintiff contends that the suit is for declaration of his right as Bara Thakur and for permanent injunction and under S. 7, Cl. (iv), (c) and (d), Court-fees Act, the valuation put by the plaintiff on his plaint is the valuation both for the purpose of court-fees as well as for purposes of jursidiction. It is said that the value of the temple properties cannot be the criterion for the purposes of jurisdiction for plaintiff claims a right not to the moveable and immovable properties of the deity but to his office as shebait and he values his relief at Rs. 130. Reliance is placed on the decision on the case of *Mahendra Sundar Thakur* v. *Dinabandhu Thakur* (1), in support of this contention. The opposite party on the other hand relies on the decision of *Raj Krishna Dey* v. *Bepin Behari Dey* (2) for supporting his case that as the value of the properties in suit as put by the plaintiff is more than 4,600, that is the value of the relief sought by the plaintiff and distinguishes the present case from the case in 19 *C. L. J.* (1) on the ground that here plaintiff on his own showing has been dispossessed by defendants 1, 2, 3 and 4 who have forcibly occupied half the debuttar land of the deity.

The petitioner, however, relies on the decision of Sir Lawrence Jenkins, Chief Justice of Bombay in the case of *Kunj Behari* v. *Purshottam Prasadji* (3), and contends that it is not necessary in this case to pray for recovery of possession. In the Bombay case, however, it appears that the defendants were in possession of the Gadi on the basis of a will purporting to be that of the previous Gadipati. In the present case there is a clear allegation in paragraph six of the plaint of the dispossession from half of the debuttar properties and the petitioner cannot evade the payment of court-fees by praying ostensibly for an injunction which may really mean a prayer for recovery of possession.

The value of the temple properties have been found to be Rs. 4,600 : the value of the half would be about Rs. 2,300. The Munsiff would have no jurisdiction to entertain such a suit. In the circumstances we think the rule must be discharged and the plaintiff must file his suit in a proper Court.

Let the original plaint be returned to the petitioner by this office for presentation to the proper Court.

There will be no order as to costs.

Graham, J.—I agree.

V.B./R.K. *Rule discharged.*

(1) [1914] 19 C. L. J. 15=21 I. C. 771.
(2) [1913] 40 Cal. 245=16 C. L. J. 194=17 I. C. 162=17 C. W. N. 591.
(3) [1904] 28 Bom. 567=6 Bom. L. R. 475.

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SUHRAWARDY AND JACK, JJ.

Govinda Kumar Sur and *others* — Plaintiffs—Appellants.

v.

Mohini Mohan Sen and *others* — Defendants—Respondents.

Appeal No. 2552 of 1928, Decided on 10th April 1929, against appellate decree of Addl. Sub-Judge, Dacca, D/- 4th August 1928.

(a) Court-fees Act, S. 7, Cl. (xi) (cc) — "Tenant" means ex-tenant.

The word "tenant" means an ex-tenant that is a person who was a tenant but has now ceased to be so. The words "including a tenant etc.," after the word "tenant" amplify the meaning of the word "tenant" rather than restrict it : *A. I. R.* 1923 *P. C.* 227 ; *A. I. R.* 1923 *Pat.* 380, *Ref.* [P 43 C 2, P 44 C 1]

*** (b) Court-fees Act, S. 7, Cl. (xi) (cc)— Suit for ejectment of tenant after notice to quit—Section applies.**

A suit for ejectment after notice to quit has been served upon the tenant, although the suit may involve the determination of the title, and the tenancy may have been determined, is governed by S. 7, Cl. (xi) (cc) and should be valued at the amount of the rent of the immovable property to which the suit refers, payable for the year next before the date of presenting the suit.

Per *Jack, J.*—The claim in a suit must be regarded with reference to the facts existing when the cause of action accrued, not to the state of things when the suit was filed. Up to the moment he gives rise to the cause of action by refusing to quit on demand, a tenant is still a tenant and that is the point of time to which the suit for his ejectment in conse-

quence of that refusal must be referred. If it were correct to look at the facts as they stood when the suit was filed in this connexion there could be no such thing as a suit for the ejectment of a tenant and Cl. (xi) (cc) which was added in 1905 would be futile along with practically all the provisions of law in regard to the ejectment of tenants : *A. I. R.* 1923 *Pat.* 380 ; 13 *O. L. J.* 473 ; *A. I. R.* 1927 *Mad.* 331 and *A. I. R.* 1925 *All.* 142, *Foll.* [P 47 C 1]

(c) Ejectment—Tenant—Question of title.

In a suit for ejectment of tenant by a landlord question of title can only be gone into for the purpose of determining the main question in the suit about the relationship between the landlord and the tenant. [P 46 C 2]

(d) Precedent—Application of decision.

Per *Suhrawardy, J.*—Every decision must be examined with reference to and is an authority on the facts of that particular case. [P 44 C 2]

(e) Civil P. C., O. 1, R. 9—Suit between landlord and tenant—Suit not defeated if person not tenant added as defendant.

Per *Suhrawardy, J.*—In a suit for ejectment of a tenant if the Court holds that there is no relationship of landlord and tenant between the plaintiff and any of the defendants, the proper course is to dismiss the suit as against that defendant. But there is no provision which will entitle the Court to compel the plaintiff to change his suit into one of another nature. The defendants who are tenants cannot object to the suit being continued on the ground that one of the defendants was not a tenant. [P 46 C 1]

Brojo Lal Chakravarty and *Ramendra Chandra Roy*—for Appellants.

Sarat Chandra Basak and *Monmotho Nath Das Gupta*—for Respondents.

Suhrawardy, J.—This is an action in ejectment by the plaintiff-appellants after service of notice to quit on the tenant-defendants. The case is that defendants 1 to 3 were holding under the plaintiffs as monthly tenants-at-will a building in the town of Dacca, described in the plaint. Defendant 4 was a sub-tenant under the tenant-defendants. The plaintiffs served a notice to quit upon them but the tenant-defendants refused to vacate and hence the present suit. The suit was valued at Rs. 456 being the twelve months' rent payable by the tenant defendants at the rate of Rs. 38 a month. It was tried by the Munsif and decreed in favour of the plaintiffs. Defendants 1 to 3 appealed and an application was made before the Subordinate Judge who heard the appeal to formulate an issue and to try it as a preliminary issue regarding the valuation of the suit and the jurisdiction of the Munsif in the trial Conrt. The learned Subordinate Judge gave effect to this plea in bar and held that the suit was undervalued, that it should have been valued according to the market value of the property in suit and that it was possible that on a proper valuation of the property in suit the Munsif would have had no jurisdiction to try it. In this view he remanded the case to the trial Court for determination of the allied questions of valuation and jurisdiction.

The plaintiffs have appealed and it is argued on their behalf that the view of the law taken by the learned Subordinate Judge as regards the valuation of the suit is wrong. Objections are also raised with regard to the legality of the order of remand and the propriety of the objection as to the valuation and jurisdiction taken at the appellate stage of the suit. It is not necessary to consider the other objections as in my judgment the appeal succeeds on the main question in the case relating to valuation and jurisdiction.

The learned Subordinate Judge has held that in a suit as the present it is necessary that the suit should be valued according to the market price of the property, his reasons being that as soon as the notice to quit was served upon the tenants, the tenancy was determined and the tenants became trespassers ; and the suit against trespassers should bear ad valorem fees under S. 7, Cl. 5, Court-fees Act. It is contended on behalf of the appellants that the valuation put by them is correct under S. 7, Cl. 11 (cc).

The learned Subordinate Judge appears to have been greatly influenced by a decision which was not then properly reported and which had appeared in the short notes of *Govinda Ram Agarwalla* v. *Dulu Pada Dutt* (1). Before considering the decision I should like to refer to the words of S. 7, Cl. 11 (cc). They are :

"for the recovery of immovable property from a tenant including a tenant holding over after the determination of a tenancy, the suit should be valued according to the amount of the rent of the property to which the suit refers payable for the year next before the date of presenting the plaint."

This clause contemplates a suit by the landlord against a tenant. The words "including a tenant etc.," after the word "tenant" amplify the meaning of the

(1) A. I. R. 1928 Cal. 753=32 C. W. N. 1113.

term "tenant" rather than restrict it. But it has been held by the Subordinate Judge that as soon as a notice to quit is served upon the tenant he ceases to be a tenant and therefore this clause does not apply to a case like this. This argument seems to be absurd on the face of it. So long as a person remains a tenant, the landlord has no right to recover immovable property from him. His right to do so arises only when the relationship between him and the tenant has ceased and the tenant has lost his right to remain in possession of the property. I can conceive of no case in which the landlord can recover immovable property from the tenant *qua* tenant i.e., when the tenancy subsists. It is half heartedly argued on behalf of the respondents that there may be a case in which a tenant encroaches upon the landlord's land and the landlord brings a suit for recovery of that land from the tenant. Such a case according to the respondent would be covered by S. 7, Cl. 11 (cc). In such a case the suit will be a suit for recovery of possession of property and has to be valued at its market price. It cannot be governed by Cl. 11 (cc), as a suit under that clause is to be valued at the rent payable for the year next before the date of presenting the plaint. It is evident that in the case of an encroachment by a tenant there will be no rent payable to the landlord in respect of that land. It is therefore clear that the word "tenant" in that clause means an ex-tenant, that is, a person who was a tenant but has now ceased to be so. This view is supported by a decision of the Judicial Committee with reference to the word used in the Calcutta Rent Act. Under S. 15 of that Act a certificate should be granted by the Controller on the application made to him by 'any landlord or tenant.' It was argued before their Lordships that the appellant bank having ceased to be tenants at the time when they made the paplication as their term had expired by forfeiture or effluxion of time, they were not competent to make an application under that law. Their Lordships observe :

> "Their Lordships are of opinion that this adopts a too narrow construction of the words. In order to give any working effect to the Act it is necessary that the words 'landlord' and 'tenant' must include, as they often do in ordinary parlance, ex-landlord and ex-tenant. An action by an ex-landlord against an ex-tenant might ordinarily be described as an action of the landlord against the tenant." *Karnani Industrial Bank* v. *Satya Niranjan Shaw* (2).

Such also is the law in England where summary procedure has been provided for recovery of property from a tenant who has ceased to be a tenant. To put any other meaning to the word 'tenant' as used in that clause will be to impute to the legislature the futile work of passing a law which can never be applied to any concrete case. In my judgment the question seems to be so clear that no authority is required in support of it. This view has also appealed to other Courts where the question came up for consideration. In *Ram Charan Singh* v. *Seodutt Singh* (3) the learned Chief Justice held that the word 'tenant' in S. 7, Cl. 11 (cc) includes a person to whom that description would apply immediately before the commencement of the suit but who is liable to ejectment by reason of the termination of the tenancy.

Now to come to the case on which the learned Judge has relied for the view that he adopted, reported in the short notes as *Govinda Ram Agarwala* v. *Dulupada Dutt* (1). That case has since the judgment of the Sudordinate Judge appeared in the reports portion of the *Calcutta Weekly notes* as *Govinda Ram Agarwalla* v. *Dulupada Dutt* (1) decided by Cammiade, J. sitting singly in which the learned Judge is reported to have held that a suit for recovery of property from a person whose tenancy has been terminated by notice is not covered by S. 7, Cl. 11, sub-Cl. (cc), Court-fees Act. According to the accepted canon of interpretation of judicial decisions every decision must be examined with reference to, and is an authority on the facts of, that particular case. In that case the suit was brought against the defendant by a person claiming to be the landlord of the tenant defendant and the suit was valued according to S. 7 Cl. 11 (cc). The plaintiff was a transferee from the original landlord. The defence was that the plaintiff's vendor had entered into a contract for the sale of that property to the tenant before the sale to the plaintiff and that a suit for specific performance of that contract was then pending.

(2) A. I. R. 1928 P. C. 227=56 Cal. 80=55 I. A. 344 (P.C.).
(3) A. I. R. 1923 Pat. 380=2 Pat. 260.

Further, the plaintiff in that suit had brought a rent suit against the tenant which had failed up to the High Court on the objection of the tenant. In these circumstances the plaintiff could not bring a suit for ejecting the defendants after notice to quit. The decision therefore of that case that the suit was not covered by S. 7, Cl. 11 (cc) may be justified, though, in may opinion, the proper course would have been to dismiss the suit when it was found that there had been no contract of tenancy between the parties and not to convert it to a suit of another nature a declaratory and possessory suit: the causes of action in the two suits being different giving rise to different issues. But the learned Judge in his judgment has not confined himself to the facts of the particular case though it must be assumed that they were before his mind's eye when he pronounced his judgment. He observes:

"Once the tenancy has been determined, the person who was a tenant becomes a trespasser holding over and he could only be a tenant holding over provided that such holding over was with the consent express or implied of the landlord,"

Further on he adds:

"It seems that there can be no room for holding that the legislature intended under the term "tenant" persons who had ceased to be tenants altogether."

If these words were intended to be of general application I respectfully disagree from the view taken by the learned Judge. As I have already discussed this question I need not repeat the arguments in support of my view. The learned Judge has also referred to the words "including the tenant holding over" in that clause as indicating that the word "tenant" used therein means only the person who still bears the character of a tenant. It is not necessary to consider why these words are put there and for what purpose; but it appears that it was to clear a general impression that on the expiration of the term the tenant ceases to be a tenant and becomes a trespasser. The law of landlord and tenant, however, allows some rights and privileges to a tenant holding over after the termination of the term including rights and liabilities under the expired lease if the holding over is recognized by the landlord. But the clause as it stands is to be interpreted according to the simple words used therein, namely, it includes all sorts of tenants including a tenant who continues to be in occupation after the termination of his tenancy. In that sense the expression holding over may not carry its technical meaning as given to it by law. It will be disastrous if the law is held to be that the landlord whenever his tenant refuses to vacate has to bring a suit for declaration of title and possession for in that view, a person as owner will be involved in constant litigations with his tenants refusing to vacate. As the facts in *Govind Ram's* case (1), may justify the decision of that case, it is neither necessary nor desirable to refer the question raised in this suit to a Full Bench. I am accordingly of opinion that the suit as brought by the plaintiff was properly and correctly valued and that the Munsif who tried the suit had jurisdiction to try it.

I now proceed to deal with the contentions urged before us on behalf of the respondents. The first point argued is that a portion of the property in the occupation of the defendants was not according to the plaintiff included in the original tenancy and, therefore, the plaintiffs must bring a suit for declaration of title and possession. The plaintiffs' case is that defendants 1, 2 and 3 were successors of their tenant who was in occupation of the building described in schedule kha. The tenant had included within his tenancy rooms described in Sch. ga. The plaintiffs, therefore, claim to eject the defendants not only from the property mentioned in Sch. kha, but also from that mentioned in Sch. ga which formed by the act of his tenant a part of the tenancy. It is not the defendant's case that the old tenant or the defendants set up any right in themselves with with regard to the property in Sch. ga. The learned Munsif in dealing with this point has remarked:

"Although the plaintiffs do not in so many words call the defendants tenants over Sch. ga property the effect of the entire plaint is that they admit the defendants to be tenants over both Sch. ga and kha lands together, the case as made in the plaint being that the room in Sch. ga was possessed by the old tenant as included in her tenancy and there was no question of title raised with regard to that schedule."

The second contention is that as defendant 4 was made a defendant in the suit it cannot be said to be a suit governed by S. 7, Cl. 11, sub-Cl. (cc). It

is not necessary to discuss in this case the effect on the frame of the suit of the inclusion of defendant 4 in the category of defendants. In view of the decisions in the case of *D. E. D. Ezra* v. *J. E. Gubbay* (4) and *Ram Kissen Das* v. *Binjraj Choudhury* (5), the question might assume some importance if it were urged in a proper case in a proper manner. In this case defendant 4 did not enter appearance either in the trial Court or in the lower appellate Court; nor is he present before us at the hearing of the appeal. He has taken no interest in this matter probably under the idea that a decision against the tenant-defendants will be binding upon him, as has been held in the case of *Ramkissen Das* v. *Binjraj Choudhuri* (5). But assuming that defendant 4 is not a proper party in this litigation, what is the effect of joining him as a defendant? The most that the defendant could claim was to have the suit dismissed as against him. But he could not compel the plaintiff to convert his suit into a suit for declaration of title and possession. The suit as framed must stand or fall on the allegations made therein and the character given to it by the plaintiff. It is a suit brought by the landlord against his tenants. If the Court holds that there is no relationship of landlord and tenant between the plaintiff and any of the defendants the proper course is to dismiss the suit as against that defendant. But there is no provision in the law that I am aware of which will entitled the Court to compel the plaintiff to change his suit into one of another nature. Moreover it does not sound proper in the mouth of defendants 1 to 3 who have been found to be the tenants of the plaintiffs to say that there is a defendant in the suit who is not a tenant and therefore the suit cannot proceed in its present form.

The third point raised by Dr. Basak on behalf of the respondents is that in this case the plaintiffs raise the question of title to the property and therefore it should be valued as a title suit. The plaintiffs no doubt have given a detail of their title in the plaint and they thought it necessary to do so as the defendants or their predecessors had not attorned to them but to the persons from whom they derived their title. In the prayer portion, however, they did not pray for declaration of title or recovery of possession on such declaration but confined their claim to the eviction of the defendants. As has been held in *Balasidhantam* v. *Perumal Chetti* (6) in a suit brought under S. 7, Cl. 11 (cc), a Court cannot enter into the question of title and give a decree on the basis thereof. What the Court is entitled to do under that clause, is to find if there was relationship of landlord and tenant between the plaintiff and the defendant and if the defendant's tenancy has been validly terminated. If it finds any of these elements non-existent, the suit must be dismissed. If any question of title is raised in the suit it can only be gone into for the purpose of determining the main question in the suit about the relationship between the plaintiff and the defendant.

It is also contended that the defendants having set up a title in themselves the suit must be treated as one for establishment of title and possession. The nature of a suit depends on the case made in the plaint and not on the defence taken. In suits for rent or actions in ejectment, questions of title are often raised and determined, but that is done for the purpose of deciding the main issue relating to the relationship of landlord and tenant between the parties. If the defence succeeds in showing title in itself, the suit fails as the relationship is not proved; if it fails that relationship is established.

A preliminary objection is taken by Dr. Basak on behalf of the respondents that no appeal lies from the order of remand by the lower appellate Court. It is not necessary to determine this question which has not yet been finally settled because if no appeal lies we can interfere with the wrong order of remand under S. 115, Civil P. C.

The result of all these considerations is that this appeal must be allowed, the decree of the lower appellate Court set aside and the case remanded to that Court for determination on the merits. The appellants are entitled to their costs in this Court but the costs of the lower Courts will abide the result.

(4) [1920] 47 Cal. 907=60 I. C. 969.
(5) A. I. R. 1923 Cal. 691=50 Cal. 419.
(6) [1914] 27 M. L. J. 475=27 I. C. 162=1 M. L. W. 641.

Jack, J.—I agree with the judgment which has just been delivered by my learned brother. Another point of view from which we arrive at the same result, has been well put by the Judicial Commissioners in the case of *Vithaldas* v. *Ghulam Ahmed* (7) as follows :

"The claim in a suit must be regarded with reference to the facts existing when the cause of action accrued, not to the state of things when the suit was filed. Up to the moment he gives rise to a cause of action by refusing to quit on demaned, a tenant is still a tenant, and that is the point of time to which the suit for his ejectment in consequence of that refusal must be referred. If it were correct to look at the facts as they stood when the suit was filed in this connexion, there could be no such thing as a suit for the ejectment of a tenant and Cl. 11 (cc), S. 7, Court-fees Act, which was added to it in 1905, would be futile along with practically all the provisions of the law in regard to the ejectment of tenants."

It has been pointed out to us by the learned advocate for the appellants that the word "tenant" is similarly used in S. 108, T. P. Act, and in S. 139, Lim. Act, with reference to a man who has ceased to be a tenant if the alleged facts are established.

The view taken in the case of *Govinda Ram Agarwala* v. *Dulu Pada Dutt* (1) by Camniade, J. that, in such cases, S. 7 (v), Court-fees Act, is applicable, was also adopted in the cases of *Narayan* v. *Tukaram*, *A. I. R.* 1923 *Nag.* 310 and *Champat* v. *Balak Das* (*A. I. R.* 1925 *Nag.* 131) but the view we have taken was followed in *Ramcharan Singh* v. *Sheodutta Singh* (3), *Sree Ram* v. *Jagat Narain* (8), *Venkata Ratlamma* v. *Sree Ramulu* (9) and *Mohan Lall* v. *Bhuteswar*, (*A. I. R.* 1925 *All.* 142).

V.B./R.K. *Case remanded.*

(7) A. I. R. 1927 Nag. 156=23 N. L. R. 5.
(8) [1926] 13 O. L. J. 473.
(9) A. I. R. 1927 Mad. 331.

* A. I. R. 1930 Calcutta 47

MUKERJI AND MALLIK, JJ.

Abdul Gani and *another*—Defendants—Appellants.

v.

Nabendra Kishore Roy and *others*—Plaintiffs—Respondents.

Appeal No. 2426 of 1927, Decided on 20th March 1929, against appellate decree of Dist. Judge, Zillah Noakhali, D/- 30th July 1927.

(a) Civil P.C., S. 11 "Litigating under the same title"—Meaning.

The word "litigating under the same title" mean that the demand should have been of the same quality in the second suit as in the first. [P 49 C 2]

(b) Civil P. C., S. 11—"Matter in issue" explained—Matter in issue and not "subject matter of suit," forms essential test of res judicata.

"Matter in issue" in S. 11 of the Code is distinct from the subject matter and the object of the suit as well as from the relief that may be asked for in it and the cause of action on which it is based, and the rule of res judicata requiring the identity of the matter in issue will apply even when the subject matter, the object, the relief and the cause of action are different. It is the matter in issue and not the subject matter of the suit that forms the essential test of res judicata: *Bras* v. *Jackson*, 1 *Phil.* 582; 6 *Cal.* 715; 13 *Bom.* 25; 15 *Mad.* 494; 4 *All.* 55; 11 *All.* 148; 8 *Mad.* 219; 24 *All.* 112; 30 *All.* 470, and *A. I. R.* 1923 *All.* 613 *Ref.* [P 50 C 1,2]

*** (c) Evidence Act, S. 115—Admission in previous suit.**

An admission in previous suit cannot operate as estoppel in a subsequent suit unless the decision in the previous suit is based upon the admission: 11 *M. I. A.* 50 (*P. C.*), *Dist.* [P 50 C 2]

Syed Nasim Ali and *Bhagirath Chandra Das*—Appellants.

Ramesh Chandra Sen and *Bankim Chandra Banerjee*—for Respondents.

Judgment.—This appeal has arisen out of a suit for setting aside an order passed in a claim case releasing certain property from attachment, for a declaration of defendant 1's title thereto and for a further declaration that the property is liable to be sold in execution of a decree against the said defendant 1. The Courts below have decreed the suit. Defendants 1 and 2 have appealed to this Court.

The plaintiff's case was that defendants 1 and 2 inherited the property in equal shares from their father Kamar Ali Bepari. He attached a half share of defendant 1 in the said property in execution of a decree he held against the said defendant, but, defendant 1 having raised an objection that he was possessing it as mutwalli the property was released from attachment. Hence the present suit under O. 24, R. 63, Civil P.C

The property in suit are some lands in a taluk named Sitaram. In 1894 Kamar Ali created a wakf in respect of five taluks of which Sitaram was one, the other four taluks being Joykrishna, Manwar Khan, Durgaram and Mohamed Mokim. Kamar Ali died in the same year.

In 1898, one Emdad Ali attached taluk Sitaram in execution of a decree. The defendants setting up the wakf got the taluk released from attachment.

In 1897 the plaintiffs purchased the 4 annas Pahali zemindari at a revenue sale and in 1907 they brought a suit for khas possession of two of the taluks viz., Joykrishna and Manwar Khan on the ground that they had been annulled by the revenue sale. Defendant 1 in the present suit was one of the defendants (being No. 10) in that suit. The suit was decreed ex parte in 1908 the plaintiff being awarded khas possession, mesne profits and costs. As a result of proceedings taken by defendant 1 this ex parte decree was eventually set aside in so far as it was against the said defendant 1. Defendant 1 then entered appearance and contested the suit with the result that in 1914 it was decreed on contest as regards taluk Joykrishna, the plaintiffs getting khas possession of the lands of that taluk with costs, while it was dismissed as regards taluk Manwar Khan as it was found to have been created before the Permanent Settlement.

While defendant 1 was contesting the ex parte decree of 1908 in the aforesaid way the said decree in so far as it was for mesne profits and costs was executed by the plaintiffs and in such execution the plaintiffs attached the lands of taluk Sitaram, i. e. the property in the present suit. Defendant 1 started a claim case on the allegation that it was wakf property. The plaintiffs subsequently filed a petition in which they admitted that taluk Sitaram was wakf property and consented to its being released from attachment. This was sometime in 1910.

Then, when after contest with defendant 1 the plaintiffs in 1914 obtained a partial decree in respect of taluk Joykrishna with costs, they started execution in respect of the decree for costs and attached the share of defendant 1 in taluk Manwar Khan and having put it up to sale purchased it himself.

In 1915 the plaintiffs instituted two rent suits against certain tenants of taluk Manwar Khan making defendant 1 a pro forma defendant therein. Defendant 1 as such pro forma defendant took the plea that the properties were wakf and the rent suits were dismissed in 1916, the dismissal being finally upheld on appeal in 1918.

One of the taluks, namely, Durgaram was sold for arrears of rent by the Maharaja of Tipperah, the superior landlord, and was purchased by the plaintiffs, after which in 1915 the plaintiffs instituted a suit in which defendant 1 pleaded that the rent decree had not been obtained against the mutwallis but only against one of them in his personal capacity and so the tenure did not pass at the sale. The suit was dismissed in 1918, but the dismissal was reversed on appeal in 1919 and ultimately on a second appeal to this Court the trial Court's decree dismissing the suit was upheld in 1921.

In 1916, while the suit last mentioned was pending the mutwallis including defendant 1 brought a suit against the plaintiffs for a declaration that two of the taluks Manwar Khan and Joykrishna were wakf properties. The suit was decreed by the trial Court in 1919, but the decision was reversed on appeal by the Court of first appeal in 1921, and in 1923 this Court on second appeal upheld the reversal.

The above, in short, is a history of the taluks in so far as it is necessary to be said for our present purposes.

The contentions that have been urged before us are four in number of which the first three are the following: 1st, that the plaintiffs are under a personal bar they having in 1910 admitted that taluk Sitaram was wakf and consented to the release thereof from attachment; 2nd, that the decision of 1921 operates as res judicata in defendant's favour and 3rd, that the decision of 1923 cannot operate as res judicata.

The first contention above set out is founded upon a petition marked as Ex. D in the case. In it the plaintiffs merely stated that it appeared that the property (meaning taluk Sitaram) was included in the wakf and they had no objection to its being released from attachment. Now, in the first place, there was no admission as regards the validity of the wakf which is the question in the present suit, but merely an admission to the effect that taluk Sitaram was included in the wakf. Nextly even if it be regarded as an admission as to the validity of the wakf there is nothing that may make this admission operate as an estoppel is present in the case. The decision in the case of *Rajah Moottoo*

Vijaya Ranganadha v. *Katama Natchiar* (1) upon which the appellant relies, in our judgment, has no application to the case upon the ground, amongst others, that there was here no decision based upon the admission as there was in that case.

The second contention is based upon the decision of 1921. This decision is Ex. H. We agree with the learned District Judge in the view that he has taken of it and hold that the question of the validity of the wakf did not and could not legitimately arise in that suit and was not either expressly or even by implication decided therein.

The third contention relates to the decision of 1923. The suit in which this decision was passed related to two of the taluks, namely Manwar Khan and Joykrishna. Defendants 1 and 2 were the plaintiffs in that suit. They sued for declaration of their title therein as mutwallis of the wakf and for other reliefs. The trial Court decreed the suit but on appeal the decree was reversed, the reversal being upheld by the High Court on second appeal, the suit being ultimately dismissed. The case of defendants 1 and 2, as plaintiffs in that suit, was that the two taluks existed from before the Permanent Settlement, that their father possessed the properties in taluki right and made a wakf of those properties and dedicated them to a mosque and appointed them as mutwallis, that the plaintiffs in the present suit on the strength of their revenue sale purchase had obtained khas possession of some of the properties and in execution of the decree for costs had purchased the rest, but that their title as mutwallis was not affected. The present plaintiffs, as defendants in that suit, contended that the wakf set up was a collusive and paper transaction and had never been acted upon. The issue was:

"Have the plaintiffs, defendants 1 and 2 in, the present suit then alleged mutwalli right in the disputed properties? Was the wakf nama set up a valid and genuine document? Was it acted upon"?

The Additional Judge held:

"The wakf was a collusive paper transaction intended to keep the properties covered by the wakfnama safe from the claim of any possible future creditor or other claims of other persons. It is clear that the disputed property was never treated as wakf property and it was treated as secular property of Kamar Ali Patari and after his death it descended to his heirs as secular property and treated by them as secular property. . . . There can be no doubt that the wakfnama created by Kamar Ali Patari was a sham, colourable transaction and it was not intended to be acted upon and it was not given effect to by Kamar Ali or by plaintiffs and they all treated the properties covered by the deed of wakf as their secular properties and enjoyed them as such and not for the upkeep and maintenance of the mosque. The properties covered by the deed of wakf were treated as personal properties both by Kamar Ali and his heirs."

This decision was upheld on appeal by the High Court. Now it is urged on behalf of the appellants that it does not operate as res judicata for two reasons: 1st because whereas in that suit the present plaintiffs as defendants challenged the validity of the wakf in their capacity as revenue sale purchasers and were setting up a title paramount and were not claiming through the settlor; in the present suit they are challenging the validity of the wakf in their capacity of persons claiming through the settlor; and 2nd because the subject-matters of the two suits are different; in the former suit it was the lands of taluks Joy Krishna and Manwar Khan and in the present it is the lands of taluk Sitaram. As regards the first of these reasons, it appears that the present plaintiffs were resisting the earlier suit not merely as purchasers at a revenue sale, but also as purchasers at a sale in execution of the decree for cost. They were defending as revenue sale purchasers the khas possession of taluk Joy Krishna that they had obtained as such. But they were also defending their purchase of taluk Manwar Khan at the sale in execution of the decree which they had obtained for costs, and this they could not have done merely as revenue sale purchasers and unless as persons claiming adversely to the endowment and through the settlor, which is exactly their position in the present suit. The words "litigating under the same title" mean that the demand should have been of the same quality in the second suit as in the first one. In the present case both the demands were of the same quality, both in the character of judgment-creditors seeking to enforce their claim adversely to the endowment. No new title has accrued to the plaintiffs in the meantime and we are of opinion that in both these suits the plaintiffs and for the matter of that both the parties have

(1) [1866] 11 M. I. A. 50=W. R. P. C. 1= 2 Sar. 212 (P. C.).

litigated under the same title within the meaning of S. 11, of the Code. As regards the second reason, it is true that the subject-matter in the former litigation was the lands of taluk Joy Krishna and Manwar Khan and in the present suit it is the lands of taluk Sitaram but the expression "matter in issue" in S. 11 of the Code:

"is distinct from the subject-matter and the object of the suit as well as from the relief that may be asked for in it, and the cause of action on which it is based; and the rule of res judicata requiring the identity of the matter in issue will apply even when the subject-matter, the object, the relief and the cause of action are different."

In *Bars* v. *Jackson* (2), the subjects of the two suits were different, the two claims being perfectly distinct from each other, one for obtaining letters of administration and the other for taking a share of the property. In the case of *Sandhyamala* v. *Debi Churn* (3), it was ruled that a suit for certain portion of *A* on the ground of *A* having been leased to the plaintiff would be barred by a decision as to *A* having not been leased to the plaintiff but to the defendant, in a previous suit by the plaintiff for another portion of *A*, with the same allegation of its having been leased to him. Similarly in *Ananta Balacharya* v. *Damodhar* (4), it was said:

"It is true that in those suits the dispute was as to a piece of land other than the land now in suit. The plaintiffs there, as now, merely alleged that there had been a partition and that they had a separate share; the defendants there, as now, merely contended that there had been no partition. In the present case it cannot be held that the decision regarding the question of partition affected only the particular piece of land then in dispute, and left the defendants free to urge again in any subsequent suit that the family was joint in all other respects and as to all other property."

There are, it is true, decisions here and there in which a different view has been taken, but the generality of the cases have taken the view that where the whole title was in issue in a previous litigation, the same cannot again be agitated in a subsequent suit e. g., *Kunji Amma* v. *Raman Menon* (5). In the case of *Pahlwan Singh* v. *Risal Singh* (6), both the suits were by the obligee for several instalments of the amount of a bond and the interests thereon from the date of the bond. In the former suit, the defendants' contention as to the interest being payable only from the date of the bond was overruled and the interest from the date of the bond decreed, and that decree was held to be res judicata in regard to the same contention raised in the second suit. This is clear authority for the proposition that it is the matter in issue, and not the subject matter of the suit that forms the essential test of res judicata. In *Bal Kishen* v. *Kishan Lal* (7), it was said:

"There can be no doubt that for the purposes of res judicata it is not essential that the subject-matter of the litigation should be identical with the subject-matter of the previous suit of which the adjudication is made the foundation of the plea."

Their Lordships of the Judicial Committee in *Pittapur Raja* v. *B. Sitayya* (8), observed:

"It was contended on the part of the plaintiff that the cases do not establish that an estoppel is binding unless the suit relates to the same subject-matter, but it appears to their Lordships that the cases which have been referred to do not establish that position."

Therefore even if the subject-matter of the second suit may be entirely different from the subject-matter of the first yet if the validity of the wakfnama and the lists of defendants 1 and 2 thereunder was in issue, as it was in the former litigation, the decision on that question could not be reopened and the issue reagitated in the present suit. The proposition receives ample support from the cases of *Chandi Prosad* v. *Mahendra Singh* (9), *Dwarka Das* v. *Akhay Singh* (10), *Kedar Nath* v. *Sheosankar* (11). We are of opinion, therefore, that the decision of 1923 does operate as res judicata and that the view taken by the learned District Judge was right.

The fourth contention relates to the question that would have arisen if we were of opinion the decisions of 1921 and 1923 had both decided the issue that arises in the present suit on the question of the validity of the wakf. We have already stated that in our opinion the decision of 1921 had not that

(2) 1 Phil. 582.
(3) [1881] 6 Cal. 715.
(4) [1899] 13 Bom. 25.
(5) [1892] 15 Mad. 494=2 M. L. J. 262.
(6) [1882] 4 All. 55=(1882) A. W. N. 110.
(7) [1889] 11 All. 148=(1889) A. W. N. 42.
(8) [1885] 8 Mad. 219=12 I. A. 16=4 Sar. 598 (P.C.).
(9) [1902] 24 All. 112=(1902) A. W. N. 177.
(10) [1903] 30 All. 470=5 A. L. J. 407=(1908) A. W. N. 192.
(11) A. I. R. 1923 All. 613=45 All. 515.

effect, and we accordingly do not consider it necessary to go into this matter.

The appeal is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Calcutta 51

LORT-WILLIAMS, J.

Radhakissen Dhanuka—Defendant.

v.

Bombay Co. Ltd.—Plaintiff.

Original Civil Suit No. 22792 of 1928, Decided on 14th January 1929.

*** (a) Arbitration Act, Ss. 19 and 2—High Court has power to stay proceedings pending in Presidency Small Causes Court in spite of Cl. 12, Letters Patent, Calcutta—Civil P. C., Sch. 2, para. 8.**

The words "Presidency town" in S. 12 include suits instituted in the Presidency Court of Small Causes and although Cl. 12, Letters Patent (Calcutta), provides that the High Court shall not have original jurisdiction in cases falling within the jurisdiction of the Presidency Small Causes Court, in which the debt or damage does not exceed one hundred rupees, nevertheless the legislature intended and deliberately provided that application for stay of a suit pending in the Presidency Small Causes Court arising out of a contract which contains an agreement to refer all disputes to arbitration, should be made to the High Court. The High Court, therefore, has jurisdiction to allow the application for stay of such a suit : 31 *Bom.* 36, *Foll.* ; *A. I. R.* 1921 *Bom.* 185 ; *A. I. R.* 1921 *All.* 219 and *A. I. R.* 1928 *Bom.* 275, *not Foll.*; *Morrison Tinplate Co.* v. *Brooker and Co.*, (1908) 1 *K. B.* 403, *Ref.* [P 52 C 1,2]

(b) Arbitration Act, S. 19—Section 19 cannot be reconciled with the Calcutta Small Causes Court R. 43 — Application under S. 19 should be made promptly before costs are thrown away — Application in High Court is sufficient appearance—Memorandum in Small Causes Court is not necessary.

Section 19 and R. 43, cannot be reconciled and a defendant cannot obey both. The object of the legislature in providing that the application under S. 19 shall be made after appearance and before taking any steps in the proceedings, is to ensure that such applications shall be made promptly before costs are thrown away in the suit memorandum in Small Causes Court is not necessary. Application in the High Court is a sufficient appearance to satisfy the terms of S. 19, and when such an application is intended, no further costs need be thrown away by unnecessary proceedings in the Small Cause Court : 12 *S. L. R.* 34, *Ref.* [P 53 C 1]

Westmacott—for Defendant.

K. P. Khaitan—for Plaintiff.

Judgment.—In this case the defendants ask for stay of a suit pending in the Calcutta Court of Small Causes, in which the plaintiffs claim the sum of Rs. 92-8-0 as an allowance arising out of a written contract, which contains an agreement to refer all disputes to arbitration.

Section 89 (1), Civil P. C., is as follows :

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899 or by any other law for the time being in force, all reference to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in Sch. 2.

and para. 18 of Sch. 2 provides that an application to stay a suit must be made to the Court at the earliest possible opportunity. It is clear that this para has been adapted from S. 19, Arbitration Act 1899, which itself was as clearly adapted from S. 4, English Arbitration Act 1889. The Para and Sections are as follows:

Para. 18

"Where any party to any agreement to refer to arbitration or any person claiming under him, institutes any suit against any other party to the agreement, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the suit ; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the suit."

Section 19 :

"Where any party to a submission to which this Act applies or any person claiming under him, commences any legal proceedings against any other party to the submission, or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings ; and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceeding."

Section 4 :

"If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any

time after appearance, and before delivering any pleadings or taking any other step in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

In the English Act the word "Court" is defined as meaning the High Court of Justice, unless the contrary intention appears and having regard to the words "legal proceedings in any Court" and "apply to that Court" in S. 4, it is clear that it was intended that such applications under the English Act should be made to the Court of trial, and it has been so held. Thus "Court" in the section includes a County Court as was settled after some doubt in *Morrison Tinplate Co.* v. *Brooker and Co.* (1), and other cases. But it will be noticed immediately that these or similar words have been deliberately omitted from S. 19 by the draftsman of the Indian Act whereas "the Court" is defined in S. 4, Indian Act, as meaning in the presidency towns, the High Court and elsewhere, the Court of the District Judge. In para.18, Sch.2, Civil P.C., the distinctive words of the English section have been again omitted. But the Code contains no definition of the word "Court". Presumably, therefore, applications under para. 18 should be made to the Court of trial, as in England. S. 2, Indian Act, provides as follows :

"Subject to the provisions of S. 23, this Act shall apply only in cases where, if the subject matter submitted to arbitration were the subject of a suit, the suit, could, whether with leave or otherwise, be instituted in a Presidency town."

It is to be noted in the first place that the words used are "Presidency town" and not the "High Court in a Presidency town". Therefore they include suits instituted in the Calcutta Court of Small Causes, and although Cl. 12 Letters Patent (1865), provides that the High Court shall not have original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, does not exceed one hundred rupees, (which is the case with which I am dealing), nevertheless I am satisfied that the legislature intended and deliberately provided that such applications for stay, interfering with and denying as they do, the ordinary right to litigate in the Courts of the Crown should be made to the High Court or to the Court of the District Judge. This was the view expressed by Davar, J., in the case of *Lucas Ralli* v. *Noor Mahomed* (2) with whose reasoning and decision I agree and which was approved by C. C. Ghose, J., in the unreported case of *Pannalal Sagoremull* v. *Tilakchand Joychandlal* decided in this Court on 18th May 1925. I am unable to concur in the decisions expressed *In re, Babaldas Khemchand* (3), *Sitaram Nathmull* v. *Sushil Chandra Das & Co.* (4) and *Tatya Rowji* v. *Hathibhai Bulakidas* (5).

In my opinion the learned Judges who decided those cases misdirected themselves by trying to apply the analogy of English law and practice and the decisions thereon.

Thus in *Babaldas Khemchadn* (3) Pratt, J., has put on the various sections of the Indian Act what in my view are most strained constructions, because he seems to think that there is only one Indian Arbitration Act for the whole country as in England and has overlooked the fact that the Code provides for all the gaps and omissions and difficulties which he foresaw.

In the Allahabad case, this obsession has completely misled the Court, whose decision is based upon the entirely false premises that "S. 19 is a mere repitition of S. 4, English Arbitration Act", and that English Case law applies. The learned Judges in *Tatya Rowji's* case have simply followed these two decisions and rejected the decision in *Lucas Ralil* v. *Noor Mahomed* (2) without making any very careful analysis or scrutiny of the reasoning applied by the learned Judges who decided them.

For these reasons I am of opinion that the application for stay in this case is properly made to the High Court. Whether there is concurrent jurisdiction in the Small Causes Court to hear such an application, I do not at present decide.

The law on this subject is very confusing, and many of the sections are

(1) [1908] 1 K. B. 403.

(2) [1907] 31 Bom. 236=8 Bom. L. R. 955.
(3) A. I. R. 1921 Bom. 185=45 Bom. 1.
(4) A. I. R. 1921 All. 219=43 All. 553.
(5) A. I. R. 1928 Bom. 275=52 Bom. 420.

loosely drawn and difficult to reconcile and to construe.

The provisions made in the Civil Procedure Code 1908 were relegated temporarily to Sch. 2 in anticipation that the whole matter would be dealt with at an early date. That is 20 years ago and it is high time that this branch of the law was overhauled and consolidated.

One further point remains to be decided.

Section 19 requires that the application should be made :

"after appearance and before filing a written statement or taking any other steps in the proceedings."

The procedure in the Calcutta Small Causes Court R. 43 requires that a defendant shall appear by filing a document called a memorandum of appearance which shall also contain the pleas upon which the defendant intends to rely at the hearing.

It is clear that this rule and S. 19, Arbitration Act cannot be reconciled and that a defendant cannot obey both.

In these circumstances it is necessary to have regard to the object of the legislature in providing that the application shall be made after appearance and before taking any steps in the proceedings. That object is to ensure that such applications shall be made promptly before costs are thrown away in the suit and before the defendant has accepted and recognized the jurisdiction of the Court.

I am of opinion, therefore, that it is unnecessary to file any memorandum in the Small Cause Court. The application in the High Court is a sufficient appearance to satisfy the terms of the section and when such an application is intended, no further costs need be thrown away by unnecessary proceedings in the Small Cause Court *Kodumal Kalumal* v. *Volkart Bros.* (6).

The petition is allowed with costs.

V.S./R.K. *Petition allowed.*

(6) [1918] 12 S. L. R. 31=48 I. C. 484.

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* A. I. R. 1930 Calcutta 53

REMFRY, J.

Chhattoo Lal Misser & Co.—Plaintiff.

v.

Naraindas Baijnath Prasad—Defendant.

Original Civil Suit No. 1168 of 1927, Decided on 4th September 1928.

*** (a) Civil P. C., O. 21, R. 50 (2)—Execution of decree against alleged partner who had entered appearance in suit under protest stating he was not partner—Decree made in his absence and subsequently sought to be executed against him—Alleged partner offering defence that he was not partner—Defence held legitimate.**

In a proceeding under O. 21, R. 50 (2) a person having obtained a decree against a firm in its firm name sought to make one *B.* liable under the decree on the allegation that he was partner of the said firm. In the suit *B* was summoned and he entered appearance under protest stating that he was not partner, and so the decree was made in his absence. In the proceedings under O. 21, R. 50 (2) he sought to defend himself on the ground that he was not a partner of the firm.

Held : that the defence being merely personal defence it was legitimate. *Davis* v. *Hyman*:, 1 *K. B.* 854, *Foll.* [P 54 C 1]

(b) United Provinces Court of Wards Act (4 of 1912)—Application.

United Provinces Court of Wards Act being a local legislature has local validity and special procedural validity in its own sphere and its provisions cannot be enforced beyond the jurisdiction of its own legislature. [P 54 C 2]

(c) Jurisdiction—Local legislation.

A local legislature has no jurisdiction to legislate save for its own province and can have no effect beyond the jurisdiction of its own legislature. [P 54 C 1]

(d) Practice—Pleadings—D efences.

Defences cannot be excluded from the province of procedure unless they negative the rule of procedure. [P 54 C 1]

A. K. Roy and *P. C. Ghose*—for Plaintiff.

T. Ameer Ali and *T. Chatterji*—for Manager of United Provinces Court of Wards.

Judgment. — This is a proceeding under O. 21, R. 50 (2), in which the plaintiff firm, having obtained a decree against a firm in its firm name, seeks to make one Bhagwatdas liable under that decree, on the allegation that he is a partner in the said firm.

Bhagwatdas was served with a summons in the suit and entered appearance under protest, stating that he was not a partner in the firm and was a ward under the Court of Wards of the United Provinces. The decree was made in his absence, for, according to the practice of this Court, he could not appear to contest the liability of the firm unless he admitted that he was a partner.

He now seeks to defend this proceeding on two grounds, first, that he is a ward under the United Provinces Court of Wards Act, 1912, and that this Court is not competent to hear a case against him, or to decree it unless the provi-

sions of that Act have been observed, and, secondly, that he was not a partner in the defendant firm.

A preliminary objection was taken on the ground that in a proceeding under O. 21, R. 50 (2) the only question was yes or no—was the defendant a partner in the firm?

Now, it appears that in certain judgments observations have been made which seem to support this contention. But in *Davis* v. *Hyman* (1), Sterling, L. J., said that the question was a general one of liability and that any proper defence could be raised and in *Jagat Chandra* v. *Gunny Hajee Ahmed* (2) Buckland, J. appears to have adopted the same view. I do not think the observations of the then Chief Justice were intended to mean that the only possible question was whether the defendant was a partner or not. Similar remarks in *Weir & Co.* v. *Mc Vicar & Co.* (3) by Scrutton, L. J., in my opinion, were not intended to disagree with Sterling, L. J's. view—and if they were, I must follow Sterling, L. J., on a point of this kind.

It has long since ceased to be the province of procedure to exclude defences, and it is to be presumed that no defence is excluded unless that is the only possible construction of a rule. The common sense of the matter is that the party sought to be charged can raise any personal defence and is generally precluded from challenging the decree, though, if that were obtained by collusion and fraud, that would not bind him, for he can only be bound, if found to be a partner, by admissions made by his partners and their conduct within the scope of their authority as such.

Therefore, as the defendant merely seeks to raise a personal defence, that is legitimate.

The next question is whether the fact that he is a ward, under an Act passed by the local legislature of the United Provinces, affords a defence or bar to this application.

That local legislature has no jurisdiction to legislate save for its own provinces and the Act does not purport to extend beyond those provinces. It is not contended that the Act alters the status of a ward or affects his capacity to contract. In my opinion, this Act, like the Acts of many other local legislatures, dealing with the local Courts of Wards, can have no effect beyond the jurisdiction of its own legislature.

It is contended that the validity of this Act is preserved by S. 4, Civil P. C., but that section gives a local act local validity, and special procedure validity in its own sphere. The Act does not purport to affect any court save the courts in the Uuited Provinces, and the result is that this Court is asked not to enforce the Act, but to extend it beyond its declared sphere. It may be that if execution is sought in any Court to which the decree, if any, is sent for execution, that Court may be bound by the Act, and it seems to me that this is the intention of the Act, and that the Act is within S. 4, Civil P. C. for that purpose.

But, in my opinion, no local legislature can prescribe procedure for any Court beyond its territorial jurisdiction, and any Act passed by a local legislature for its own Courts cannot be enforced beyond those territories. As far as this Court is concerned, the Act is in the same position as the legislation of a foreign country, and though such legislation can define the status of its own citizens and such status will be recognized by foreign Courts, when the actual status of a person is not affected, the municipal law of a foreign country cannot control or affect in any way the procedure of a Court of another country. As Bhagwatdas has the status of an ordinary British subject, he cannot be allowed to set up the special procedure of a local Act as a defence to this proceeding.

It is unnecessary to decide whether this proceeding is a proceeding in execution, though it seems to me that as there is no decree at present against Bhagwatdas, the contention that this is a proceeding in execution is untenable. I find that the Act pleaded is no bar to these proceedings.

This issue was tried first, as that course seemed more convenient and the second issue as to whether Bhagwatdas is a partner in the defendant firm remains to be tried.

(1) [1903] 1 K. B. 854=72 L. J. K. B. 426=19 T. L. R. 348=51 W. R. 598=88 L. T. 284.
(2) A. I. R. 1926 Cal. 271=53 Cal. 214.
(3) [1925] 2 K. B. 127.

The plaintiff will have the costs of the hearing of this issue, on scale No. 1 against the defendant Bhagwatdas.

V.P./R.K. *Order accordingly.*

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JACK AND MITTER, JJ.

Rajendra Narayan Basu and *others*—Defendants 2 to 4—Appellants.

v.

Debendra Nath Mukhopadhya and *others*—Plaintiffs—Respondents.

Appeal No. 524 of 1927, Decided on 28th February 1929, from appellate decree of Sub-Judge, Murshidabad, D/- 7th September 1926.

(a) Executor—Property acquired with assets of testator is assets.

Property acquired with assets, that come into the hands of the executor at the the time of the death of the testator, is as much assets of the testator as that which was in his possession at the time of his death: *Abbott* v. *Parfitt*, 6 *Q. B.* 346, *Ref.* [P 56 C 1]

(b) Executor — Right of the executor to be indemnified.

If a property is purchased by the executor in the ordinary course of his management of the testator's estate and the property did bring some income during the period when it was in possession of executor, the executor is entitled to be indemnified out of the testator's estate against liabilities which he has properly incurred and that indemnity is not limited to the property acquired: *Dowse* v. *Gorton*, (1891) *A. C.* 190, *Ref.* [P 56 C 2]

(c) Executor—Executor purchasing testator's putni with testator's assets in execution of money decree—Rent falling in arrears—Zamindar bringing suit for rent—Zamindar is entitled to rent and if executor is discharged, testator's property is liable for it.

A putni was sold in execution of money decree against a putnidar testator. The executor appointed by the testator putnidar under the will, purchased it with assets that came into his hands on the death of the testator. The proprietor of the zamindari under which the putni in question was held brought a suit for recovery of arrears of rent due to default in payment of the same for years 1328 and 1329 B. S. The proprietors had already purchased the putni at a sale held under Regn. 8 of 1819, for arrears of rent for 1330 B. S. So he could not execute the rent decree by sale of putni and was therefore compelled to execute it against the assets. During the period for which the rent was claimed the estate was under the management of executorship but the executor was discharged before the institution of the suit. It was contended that the heirs of the testator were not liable for rent as the rent for which the suit was instituted accrued due during the period when the estate was under the management of the executor and as the putni was already sold the executor was personally liable, It was not shown that the putni did not bring any income during the period when it was in possession of executor.

Held: (1) that the executor was entitled to be indemnified out of the testator's estate against the liabilities which he had properly incurred and (ii) that the proprietor with whom the executor had contracted to pay rent stood in the shoe of executor and would have the same ndemnity as the executor had against the testator's estate and could realise his dues out of the assets of the testator: *Raybold* v. *Turner*, 1 *Ch.* 199 and *Dowse* v. *Gorton*, (1891) *A. C.* 190, *Ref.* [P 56 C 2]

Sarat Chunder Basak, *Dinesh Chunder Roy* and *Haridas Gupta*—for Appellants.

Probodh Chunder Chatterji, *Bireswar Chatterjee* and *Bijoy Coomar Chatterji*—for Respondents.

Mitter, J.—The suit in which this appeal arises was brought by the plaintiffs, now respondents, for recovery of arrears of rent for the years 1328 and 1329 B. S. in respect of a certain putni tenure held by defendants 1 to 4 under them. The case made in the plaint is that Narendra who was a brother of defendant 1, and the father of defendants 2 to 4 was the proprietor of the zemindari under which the putni in question is held; that he sold the zemindari to the plaintiff and took the putni settlement from them in the benami of defendant 6 in 1319 B. S.; that the putni was sold in execution of a money decree against Narendra and it was purchased by defendant 1 to 4 in the name of defendant 5, wife of defendant 1 in the year 1917; that Narendra made a will by which he appointed defendant 1 as executor, that the money execution sale took place after the death of Narendra and the purchase was made by defendant 1 for self and as executor to the estate of Narendra, father of defendants 2 to 4; that shortly after the auction purchase defendant 5 executed a deed of release in favour of defendant 1, that the deed of release stated that the release was in favour of defendant 1 in his personal capacity as well as in his capacity as executor to the estate of Narendra, that defendants 1 to 4 defaulted in the payment of putni rent for the years in suit and hence the suit. The plaintiffs further alleged that they purchased the putni at a sale held under Regn. 8 of 1819 in 1331 for arrears of rent for 1330 B. S.

Defendant 1 did not contest the suit. Defendants 2 to 4 by their defence denied the relationship of the landlord and tenant with the plaintiffs, they contended that the putni in respect of which the present rent suit was brought was the stridhan property of defendant 5.

The Munsiff held that defendants 1 to 4 were the real owners of the putni and as defendant 1 was discharged from his position as executor before the institusion of the suit the plaintiffs' proper remedy was against defendants 1 to 4 personally. He accordingly decreed the suit against defendants 1 to 4, dismissing plaintiffs' claim against defendants 5 and 6 on the ground of want of cause of action.

Against this decision an appeal was taken by the defendants 2 to 4 to the Court of the Subordinate Judge of Murshidabad who has affirmed the decision of the Munsiff.

An appeal has been taken to this Court by defendants 2 to 4 against the decision of the Subordinate Judge and it has been argued by their learned advocate that as the rent for which the suit has been instituted accrued due during the period when defendant 1 was in charge of the estate as executor, he, defendant 1, was personally liable for the rent and as such the decision of the Courts below making the appellants liable for rent cannot possibly be sustained in law; and in support of this contention reliance has been placed on the case of *Farshall* v. *Farshall* (1). The case of *Farshall* v. *Farshall* (1) is obviously distinguishable. There the executrix borrowed money from a certain bank for the purpose of paying the debts of the estate but she did not do so and in these circumstances it was held that the executrix was personally liable. The true footing on which this case should be decided is this: The putni in question was purchased with assets which came into the hands of the executor at the time of death of the testator. The putni so acquired is as much assets of the testator Narendra as that which was in his possession at the time of his death: see *Abbott* v. *Parfitt* (2). The putni was purchased by the executor defendant 1 in the ordinary course of his management of the testator's estate. It is not shown that the putni did not bring any income during the period when it was in possession of defendant 1 as executor. In these circumstances 'the executor defendant 1 is entitled to be indemnified out of the testator's estate against the liabilities which he has properly incurred.

It is contended that the indemnity should be limited to the putni acquired by the executor and as the putni has already been sold the executor should be held personally liable for the entire rent. This contention is not, in our opinion, a sound one in view of the decision of the House of Lords in the case of *Dowse* v. *Gorton* (3). In that case a testator's business was carried on for about three years by his executors after his death in accordance with the provisions of the will and with the assent of the testator's creditors in the interest of the creditors as well as of the beneficiaries and was properly carried on and it was held that the executors were entitled (in priority to claims by the testator's creditors) to be indemnified out of the testators' estate against the liabilities which they had properly incurred, and that the indemnity was not limited to that portion of the assets which had come into existence or changed its form since the testator's death. It is not said in the present case that in purchasing the putni the executor was doing any act which he was not entitled to do under any provision of the will of Narendra. I think the principle underlying the decision of *Dowse* v. *Gorton* (3), above referred to, applies to the facts of the present case. The plaintiffs with whom the executor contracted to pay rent stand in the shoes of the executor and have the same indemnity as the executor has against the testator's estate and the executor has a right to an indemnity out of the assets of the testator's estate which includes the after-acquired assets, namely, the putni. Once it is shown that the executor is entitled to be indemnified out of the estate of the testator, plaintiffs who have recovered judgment against the executor should have the benefit of this right to indemnity and should realise their dues from the assets of the testator. In this

(1) [1871] 7 Ch. 123=41 L. J. Ch. 146=20 W. R. 157=25 L. T. 685.

(2) [1871] 6 Q. B. 346=40 L. J. Q. B. 115=19 W. R. 718=24 L. T. 469.

(3) [1891] A. C. 190=60 L. J. Ch. 745=40 W. R. 17=64 L. T. 809.

connexion the following observations of Byrne, J., in the case of *Raybold* v. *Turner* (4), may be usefully referred to:

"But the authority of *Benett* v. *Wyndham* (5), goes to show that if a trustee in the course of the ordinary management of his testator's estate, either by himself or his agent, does some act whereby some third person is injured, and that third person recovers damages against the trustee in an action for tort, the trustee, if he has acted with due diligence and reasonably is entitled to be indemnified out of his testator's estate. When once a trustee is entitled to be thus indemnified out of his trust estate, I cannot myself see why the person who has recovered judgment against the trustee should not have the benefit of this right to indemnity and go direct against the trust estate or the assets, as the case may be, just as an ordinary creditor of a business carried on by a trustee or executor has been allowed to do, instead of having to go through the double process of suing the trustee, recovering the damages from him, and leaving the trustee to recoup himself out of the trust estate. I have the parties interested in defending the trusts estate before me, and I have also the trustee, and he claims indemnity, and, assuming that a proper case for indemnifying him is made out by the evidence, I think his claim should be allowed."

It is true that this was a case of tort by a trustee in the course of management of the trust estate. But we think the same principle ought to apply to a case where liabilities are incurred on the basis of a contract entered into with a third person in the course of management of the testator's estate, by the executor. It is also to be noticed that defendant 1 was discharged from executorship at the date of the institution of the suit and that prior to the suit the rights of defendant 1 and the appealing defendants had been adjusted by a partition deed. In this view we think that the Courts below have arrived at a right conclusion and this appeal must be dismissed with costs.

Jack, J.—I agree.

V.B./R.K. *Appeal dismissed.*

(4) [1900] 1 Ch. 199=69 L. J. Ch. 249=48 W. R. 305=82 L. T. 46.

(5) [1862] 4 De. G. F. & J. 259.

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CUMING AND PEARSON, JJ.

Adwaita Das Bairagi—Appellants,

v.

Lalit Mohan Mohanti—Respondent.

Appear No. 373 of 1927, Decided on 20th March 1929.

Hindu Law—Ascetics — Marriage—Formal admittance to sect not necessary preliminary on part of woman to constitute valid marriage.

Owing to their belief in the efficacy of ritual observances, choice in matrimony among the Bairagis is very little fettered. And so unless it is shown to the satisfaction of the Court that a formal admittance to the sect is a necessary preliminary on the part of the woman to constitute a legal marriage among the Bairagis, the marriage of a Bairagi with a female of a different sect cannot be anulled. (P 58 C 1)

Radha Binode Pal and *Bhupendra Kishore Basu*—for Appellants.

Cuming, J.—This appeal arises out of a suit for partition after declaration of the plaintiff's title to an eight annas share in the properties in suit. The properties in dispute belonged to one Raj Kumar Banerji. Defendant 1 is the son of Raj Kumar by his wife, defendant 2. The plaintiff claimed an eight annas share being a son of Raj Kumar by another wife. The defendants resisted the plaintiff's claim on the ground that he was not a legitimate son of Raj Kumar and hence he was not his heir. The first Court hold that the plaintiff's mother was not a legally married wife of Raj Kumar and hence the plaintiff was not an heir of Raj Kumar and on these findings he dismissed the suit. The plaintiff appealed to the District Court and the learned Subordinate Judge held that the plaintiff was a legitimate son of Raj Kumar, that Raj Kumar and the plaintiff's mother had been legally married according to the rites of the Bairagi sect and hence he was entitled to an eight annas share of the properties. On these findings he set aside the judgment of the lower Court and made a preliminary decree for partition. The defendants have appealed to this Court.

It is somewhat unforunate that in deciding a matter affecting a marriage by custom amongst a sect of the Hindus we have not the assistance of any pleader on behalf of the respondent.

The appellant has argued that the lower appellate Court is wrong in holding that as Durga was united to Raj Kumar in Patri form it must be presumed that she did become a Bairagi when the marriage was celebrated. It has not, however, been shown that any formal conversion is necessary to validate a marriage in Patri form. Any case law on the question is conspicuous by its absence.

In the case of *Dial Das* v. *Dhianum* (1) it was held that in Kulu a Bairagi may marry an agriculturist woman by

(1) [1914] 86 P. R. 1914.

Ganesh Puja and that the minor restriction rules of Hindu Law such as the naming of certain classes with which a Bairagi may or may not marry cannot with propriety be applied in that district in the absence of proof of special custom. There is no suggestion in this decision that the woman must formally be admitted as a Bairagi as a preliminary to the marriage. In this decision it was pointed out that any one becomes a Bairagi by submitting to the rules of the order. Further bearing in mind that the Bairagi as a sect appears to repudiate ceremonies and forms as much as possible this would be probably unlikely. The presumption is always in favour of the legality of a mariage and it has not been shown to my satisfaction that a formal admittance to the sect is a necessary preliminary on the part of the woman to constitute a legal marriage among the Bairagis. Strictly speaking a Bhairagi is vowed to a life of celibacy though that does not necessarily make the marriage illegal. Sir Guroo Das Banerji in his Tagore Lecture (p. 249) said that owing to their belief in the inefficacy of ritual observances choice in matrimony among the Bairagis is very little fettered.

The learned commentator points out that among the Gossains, a Bombay branch of the Saiva sect a Gossain can only marry a female Gossain but that if he does marry any other woman the marriage is not annulled. In the circumstances of the case I am not prepared to hold that the learned Judge is wrong in the conclusion to which he has come. The appeal stands dismissed. As there has been no appearance on behalf of the respondent there will be no order as to costs.

Pearson, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 58

B. B. GHOSE AND S. K. GHOSE, JJ.

Tiku Kahar—Appellant.

v.

Equitable Coal Co. Ltd. — Respondents.

Appeal No. 515 of 1928, Decided on 23rd August 1929, from order of Commr, Workmen's Compensation Bengal, D/- 8th October 1928.

(a) Workmen's Compensation Act (8 of 1923), S. 3 (b) (ii)—"Wilfully"—Meaning.

A man does a thing wilfully when he does it intentionally because he expects some benefit to himself, either some convenience or an easy way of doing a piece of work and so forth. [P 59 C 1]

(b) Workmen's Compensation Act (8 of 1923), S. 30—Finding as to "wilful disobedience".

A finding as to wilful disobedience is a finding of fact which might be arrived at on evidence and hence it cannot be interfered with in appeal by the High Court. [P 59 C 1]

Purna Chandra Chatterji—for Appellant.

Lalit Mohan Sanyal and *Amarendra Narayan Bagchi*—for Respondents.

B. B. Ghose, J.—The objection that has been taken in this case on behalf of the respondents is that there is no substantial question of law involved in the appeal and that being so no appeal lies to the High Court from the order of the Commissioner under S. 30, Proviso. (2), sub-S. 1, Workmen's Compensation Act, (8 of1923). The learned Commissioner has found that the accident, which was a very unfortunate one by which the appellant lost his right arm was due to the wilful disobedience of the order expressly given to him as well as to the other workmen by the night Sirdar of the Colliery.

The case of the defendants-respondents was that the Sirdar actually made a cross over an old hole and he told the applicant and the other men not to drill there. The applicant gave his own evidence in support of his case. His evidence was that he saw no cross mark. The Commissioner has found that the version on behalf of the employers was true so that it must be taken as a fact that there was a cross mark and the workmen were forbidden to drill at the place. The next finding of the Commissioner was that there was wilful disobedience. It may be that upon the evidence in the case the Commissioner might reasonably have come to the conclusion that the facts do not show wilful disobedience. The evidence is that it does not matter how many holes are drilled by a workman in the course of the day. They are not paid by piece work but the applicant among others received a daily pay. There was no inducement on his part to wilfully disobey an order that had been made. The evidence of Jagannath Mondal on behalf of the opposite

party is that a workman would get the same daily pay whether he drilled one hole or 20 holes even if the gallery had beed cleared. Under such circumstances it might have been inferred quite reasonably that although the applicant drilled a hole at a place where there was a cross mark, it might have been due to forgetfulness or negligence or for any other reason but not as an act of wilful disobedience. A man does a thing wilfully when he does it intentionally because he expects some benefit to himself, either some convenience or an easy way of doing a piece of work and so forth. But it seems to me that the finding is one of fact which might be arrived at on the evidence. It is unfortunate that such a finding has been arrived at by the learned commissioner with which we cannot interfere in appeal having regard to the provisions of S. 30 of the Act. I hope, however, that the employers will find their way to make some compensation to the unfortunate workman, although he has failed in his appeal.

The appeal will stand dismissed but we make no order as to costs.

S. K. Ghose, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 59

SUHRAWARDY AND GRAHAM, JJ.

Sashi Bhusan Choudhury and *others*—Party 1—Petitioners.

v.

Debendra Gati Roy and *others*—Opposite Parties.

Criminal Revn. No. 987 of 1928, Decided on 7th February 1929.

Criminal P. C., S. 145—Dispute regarding complete and existing bund and not right to erect one falls under S. 145.

Where the subject matter of dispute is possession of a complete and existing bund and not a right to erect a bund, the case falls within S. 145 : 15 *C. L. J.* 267 and 4 *C. W. N.* 779, *Dist.* [P 60 C 1]

Girija Prasanna Sanyal and *Sourendra Nath Ghose*—for Petitioners.

Protodh Chandra Chatterji and *Bireswar Bagchi*—for Opposite Parties.

Suhrawardy, J.—This rule has been issued on the ground that S. 145, Criminal P. C., does not apply in this case. The dispute is with regard to a complete bund on the south west of the Rainagar Bil measuring about 40 feet in length with a top of about 4 cubits. Mr. Sanyal on behalf of the petitioners argues that the right claimed by his clients (the first party) is a right of easement or a right in the nature of an easement. The first party, he says, admits the land under the bund belongs to the second party but they claimed the right to put up a bund over the land of the second party to avoid overflow of water into their land. The case as it was tried before the Deputy Magistrate was not what it is now attempted to be. The subject matter of the dispute there was a complete bund then in existence.

The first party claimed that the bund was theirs and that they had the right to repair it from time immemorial. The second party's case was that the bund was recently erected on their land by the first party. The dispute between the parties therefore was in respect of the bund at the time of the proceedings as to whether the bund with the land underneath should be allowed to the first party or to the second party. The contention put forward before us on behalf of the first party loses sight of the difference between a bund and the right to erect a bund. Reference has been made in support of the contention of the first party to the case of *Dowlat Koer* v. *Siva Pershad* (1). There the dispute was with regard to the right of a party to flow water over the land of another and whether the other party had the right to put up a bund for obstructing the flow. There it was held that proceedings under S. 147, Criminal P. C., which were taken were properly started. That case is not relevant for our present purposes. Reference has also been made to the case of *Empress* v. *Ganpat Kulwar* (2). There the dispute was between landlord and tenant. The tenant claimed the right to put up a Gola on the land which he had leased from the landlord and the landlord claimed the right to prevent him from doing so. There the right claimed was an incorporal and intangible right unconnected with the possession of land. In the present case the order passed by the trial Magistrate declaring the possession of the second party of the disputed place brings the case within S. 145, Criminal P. C. The

(1) [1912] 15 C. L. J. 267=10 I. C. 615=12 Cr. L. J. 319.

(2) [1900] 4 C. W. N. 779.

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subject matter of the dispute was the bund and not the right to erect a bund and we think that the proceedings are quite regular. The rule is accordingly discharged.

Graham, J.—I agree. In my opinion the case comes within the purview of S. 145, Criminal P. C. I may also observe that the point which has been raised before us that the proper section is S. 147 of the Code and not S. 145, was not raised before the Magistrate at the time when the enquiry was made. That being so, I do not think that we ought to entertain it in revision.

V.B./R.K. *Rule discharged.*

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* A. I. R. 1930 Calcutta 60 (1)

SUHRAWARDY AND GRAHAM, JJ.

Kailashpati Upadhya and *another*—Accused—Petitioners.

v.

Gopi Koeri—Complainant — Opposite Party.

Criminal Revn. No. 1276 of 1928, Decided on 8th March 1929, against order of Dist. Magistrate, Howrah.

*** Criminal P. C., S. 403—Trial for offence under Act other than Penal Code—Sentence enhanced in view of offence under Penal Code for which no charge framed—Subsequent trial for that offence is barred.**

If in a previous trial for offence under a different Act a person is convicted and the sentence enhanced in view of another offence under Penal Code for which no charge was framed, there cannot be subsequent trial for that offence inasmuch as the Court has taken account of the same previously though indirectly. [P 60 C 2]

Sashi Sekhar Basu and *Tarapada Banerjee*—for Petitioners.

Judgment.—This rule was issued to show cause why the order of the learned District Magistrate of Howrah rejecting the application made by the petitioners for the quashing of an order issuing processes against them under S. 323 should not be set aside. The main ground urged is that the petitioners had already previously been tried for an offence under the Railways Act and had been convicted and fined, and that being so, they ought not to be again placed in peril in respect of another offence arising out of the same facts for which they might have been tried and convicted at the former trial. The trying Magistrate relying upon S. 403 (2), Criminal P. C., held that the trial was competent and the learned District Magistrate has endorsed that view. The point involved is not altogether free from doubt; but we do not think that we are called upon to decide it in this case inasmuch as it seems to be clear that while there was no charge of assault in the previous case, and which the accused were not on that occasion asked to plead in respect of that offence, the Court nevertheless took into accounted the fact that the accused had committed an assault upon the complainant, and in consideration thereof inflicted heavier fines upon them than upon the other two accused who had not committed any assault. That being so, we do not think that it would be just or proper that the petitioners having already been punished although indirectly on this account, should be again tried in respect of the same matter since that would involve punishment twice over for the same offence. In this view of the case we make the rule absolute and set aside the order complained of.

V.B./R.K. *Rule made absolute.*

A. I. R. 1930 Calcutta 60 (2)

SUHRAWARDY AND GRAHAM, JJ.

Dwarika Malo—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 19 of 1928 and Appeal No. 954 of 1928, Decided on 8th February 1929, against judgment of Addl. Sess. Judge, Dacca, D/- 8th December 1928.

Criminal P. C., S. 274—S. 274 not strictly enforced in murder case—Jury is deemed to be illegally constituted — Criminal P. C. S. 326.

In a murder case only fourteen jurors were summoned of whom eleven attended and seven were empanelled.

Held: that not less than eighteen jurors ought to have been summoned and hence the trial was vitiated because the jury was illegally constituted, there being a breach of the statutory provisions: *A. I. R.* 1928 *Cal.* 645, *Rel. on.* [P 61 C 1]

Surajit Chandra Lahiri — for Appellant.

Ashrafali—for the Crown.

Order.—This is a reference by the Additional Sessions Judge of Dacca under S. 374, Criminal P. C., submitting for confirmation the proceedings in a case under S. 302, I. P. C., in which sentence of death has been passed upon the accused. The accused Dwarika Malo has

also appealed against his conviction and sentence.

A preliminary point has been raised on behalf of the appellant that the jury, before which the case was tried was not properly or legally constituted, and that as a consequence the conviction and sentence are bad in law. We think that this contention is well founded and must prevail.

The sections of the Code which bear upon the point are Ss. 274 and 326 of the Code. S. 274 lays down that in trials before the Court of Sessions the Jury shall consist of such uneven number, not being less than five, or more than nine, as the Local Government, by order applicable to any particular district, or to any particular class of offences in that district, may direct; and the proviso to this section, which was added by Act 12 of 1923, states that where any accused person is charged with an offence punishable with death, the jury shall consist of not less then seven persons and, if practicable, of nine persons.

Section 326, which deals with the summoning of jurors and assessors, requires inter alia that the number to be summoned should be not less than double the number required for the trial.

Applying these provisions of the law to the present case it is clear that being a murder case not less than eighteen jurors should have been summoned. As a matter of fact only fourteen were summoned, and there was therefore to commence with a failure to comply with S. 326. It appears, however, that S. 274 could still have been complied with since eleven jurors are shown as having been in attendance. For some reason however, only seven of these were empanelled and the trial proceeded. In the circumstances stated it cannot be said that it was not practicable to empanel a jury of nine as required by S. 274 and, as there was a breach of this statutory provision, the jury must be held to have been illegally constituted. This view of the matter is supported by recent authority in this Court reported in *Serajul Islam* v. *Emperor* (1). In that case twelve persons were summoned and seven persons were selected as jurors out of eight who attended. It was held that the tribunal was illegally constituted, the proceedings were set aside, and the case remitted for retrial. We regret that we have no alternative but to follow the same course in the present case. We accordingly allow the appeal, set aside the conviction and sentence and direct that the case be retried according to law.

We draw the attention of the Additional Sessions Judge to the importance of seeing that the sections of the Code to which reference has been made above are in future carefully complied with.

P.R./R.K. *Retrial ordered.*

(1) A. I. R. 1928 Cal. 645=55 Cal. 794.

A. I. R. 1930 Calcutta 61

SUHRAWARDY AND GRAHAM, JJ.

Debidas Karmakar and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1090 of 1928, Decided on 27th March 1929, from an order of Sess. Judge, Burdwan, D/- 29th September 1928.

(a) Criminal P. C., S. 437—Order of commitment by Sessions Judge who had previously rejected application for setting aside of order of discharge is not without jurisdiction.

An order of commitment made by a Sessions Judge under S. 437, when already he had at previous stage rejected an application for setting aside an order discharging the accused is not without jurisdiction : 26 *Mad.* 126 (*F.B.*).; 28 *Cal.* 652 (*F.B.*) & 10 *Cal.* 1047, *Ref.* [P61 C 2]

(b) Criminal P. C., S. 369—Order of discharge under S. 209 or 203 is not judgment.

Order of discharge under S. 209 or 203 is not judgment within the meaning of S. 369. [P 62 C 1, 2]

Probodh Chandra Chatterjee and *Bireswar Chatterjee*—for Petitioners.

Graham, J.—This rule was issued calling upon the District Magistrate of Burdwan to show cause why an order of the Sessions Judge of Burdwan directing that the petitioners should be committed for trial to the Court of Sessions on a charge of murder should not be set aside. The main ground upon which the order has been assailed is that inasmuch as the learned Sessions Judge had already at a previous stage rejected an application for setting aside an order dicharging the petitioners under S. 409, Criminal P. C., he had exhausted his revisional power, and could not make the order now complained of under S. 437, Criminal P. C., the contention being that that order is, practically speaking, a review of his previous order, and therefore not sustainable in law. In my opinion there

is no substance in this contention. The facts are shortly these:

The two petitioners and a woman named Tarubala were sent up for inquiry before Mr. A. Hossain, Deputy Magistrate of Burdwan under Ss. 307 and 326, I. P. C. The petitioners were discharged under S. 209, Criminal P. C., the Magistrate being of opinion that the evidence against them was so meagre and wretched that no jury could possibly convict upon it. Before the commencement of the trial an application was made before the Sessions Judge by the father of the woman Tarubala praying that the order of discharge should be set aside and that the present petitioners should be ordered to be committed for trial also. That application was summarily rejected on 10th July 1925 apparently upon a perusal of the commitment order. At a later stage with all the evidence before him the learned Sessions Judge came to the conclusion that the present petitioners had been improperly discharged and recorded the order which forms the subject matter of this rule.

The question is whether he had jurisdiction to make the order. In my judgment the contention that he had no such jurisdiction, because he had made the previous order rejecting a similar application, is without substance. Jurisdiction to make an order of this description, is a continuing jurisdiction, and is not barred merely because an application may have been previously refused upon different materials. An order of this nature is not a final order but is open to reconsideration upon proper materials. The case is analogous to the case of an order of dismissal or discharge. Such orders do not take away the jurisdiction of the Magistrate. A Court is competent to take cognizance of a complaint which it has already dismissed under S. 203, Criminal P. C., without any order for further inquiry by a superior tribunal: *Emperor* v. *Chinna* (1) following *Dwarknath* v. *Benimadhab* (2). The position is the same as regards an order of discharge, though there may be some doubt where such an order has been passed upon a consideration of the full materials. S. 369, Criminal P. C., which was apparently relied upon by the petitioners before the Sessions Judge certainly has no application, since an order of this nature is not a judgment. It is also in my opinion, a material fact in the present case that the subsequent order directing commitment was made upon fresh materials when the entire evidence was before the Judge, whereas his first order was a summary one based merely on a perusal of the commitment order, which was all that was before him at that stage. If the Judge with these fresh materials before him was of opinion that there had been an improper discharge, it seems to me that it was his duty to make the order, and that if he failed to to do so, a miscarriage of justice might result.

It was next argued that, whatever view may be taken as to the legality of the order, the learned Sessions Judge ought not to have made the order, since the case now made against the petitioners is not the case which was made out at the trial, and because there is not the remotest chance of a conviction being had. As to this the most material fact seems to be that the learned Judge with all the evidence before him was of opinion that there was a sufficient case to go to a jury. There is moreover another circumstance of importance, and it is this that at the trial, which has already taken place, the jury unanimously found the woman Tarubala guilty under Ss. 326 and 109, I. P. C. This in itself gives rise to the inference that the jury believed the story that the woman merely abetted the crime, and that the injuries were inflicted by some other person or persons presumably the present petitioners. In short it furnishes a good reason for holding that the Judge was right in ordering the commitment of the petitioners. There was further the evidence of two witnesses who deposed to having seen the petitioners running away about the time of the occurrence with weapons in their hands. There may be reasons why that evidence should not be accepted. But it is evidence which ought to go before a jury.

For the reasons stated I am of opinion that the order was in accordance with law, and that it was in the circumstances a right and proper order. I would therefore discharge the Rule.

Suhrawardy, J.—I agree. The real controversy in this case turns upon the meaning of the words " on examining the

(1) [1903] 26 Mad. 126=16 M.L.J. 79 (F.B.).
(2) [1901] 28 Cal. 652=5 C. W. N. 457 (F.B.).

record of any case under S. 435 or otherwise." It is argued that the learned Sessions Judge having refused to interfere with the order of commitment on an application made by the father of the woman is precluded from considering the matter under S. 437, Criminal P. C. I do not think that this contention should prevail upon the facts of this case. The first application was made by the father of the woman invoking the Court's jurisdiction under S. 435 and inviting it to call the record of the case and to pass orders thereon. This the Court refused to do. This was not in my opinion an order under S. 435 which says that the Sessions Judge may call for and examine the record of any proceeding before any inferior criminal Court, etc., etc. It cannot therefore be said that on the previous occasion the Court exercised any power given to it under S. 437 which says that when on examining the record called up under S. 435 the Sessions Judge considers that such case is triable exclusively by the Court of Sessions, etc., etc. Then again with regard to meaning of the words " or otherwise, " I am inclined to give them a wider meaning than confining them to the provisions of S. 435. In *Nobin Krishna Mookerji* v. *Rasik Lal Laha* (3) the words 'or otherwise' were considered and interpreted. The learned Judges held they must mean not "in another way whatsoever" but in any other way provided by the Code. In the present case the Sessions Judge on reading the judgment of the enquiring Magistrate refused to call up the record. Then subsequently in the course of the trial against the other accused he thought that it was a proper case for him to interfere under S. 437, Criminal P. C. This is exactly the procedure which was considered to be within the meaning of the words 'or otherwise' in *Nabin Krishna Mookerji's* case (3) where it was held that the Court may exercise the power under this section if it acts in an appellate Court under S. 423. If the Sessions Judge had called up the record and on perusing the same had refused to interfere, there might have been room for controversy that he had no power to revive or vary his order under S. 369.

The next ground upon which this rule was obtained is that the petitions were deprived of the right of having their cases examined again before commitment. There does not seem to be any substance in this contention as the petitioners were tried by the Magistrate who thought that it was not a case for commitment, but the learned Sessions Judge is of a different opinion. S. 437 does not provide that there should be a fresh enquiry before commitment is ordered by the superior Court, under that section. I agree that the rule should be discharged.

V.B./R.K. *Rule discharged.*

(3) [1884] 10 Cal 1047.

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PEARSON AND MALLIK, JJ.

Satya Charan De and *another* —Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1322 of 1928, Decided on 26th April 1929, from order of Sub-Deputy Magistrate, Noakhali, D/- 17th August 1928.

(a) Criminal P. C., S. 145—Order under S. 145 is not confined to actual parties but may extend to others.

The binding character of an order passed under S. 145 is not under all circumstances to be confined to persons who were actually made parties to the proceedings but may under certain circumstances extend to persons other than the parties themselves : 11 *Bom. L.R.* 377, *Rel. on.* [P 64 C 2]

(b) Criminal P. C., S. 145—Person aware of proceedings under S. 145 and colluding with one party to deprive other of fruits of success—Person held bound by order under S. 145,—Penal Code, S. 188.

Where a person was not only aware of proceedings under S. 145 but has acted in collusion with one party in order to deprive the other party of the fruits of their success in S. 145 case.

Held : that the order under S. 145 was binding on such person and any resistance to execution of the order will justify conviction under S. 188. [P 64 C 2]

Suresh Chunder Taluqdar and *Raj Coomar Chakravarty*—for Petitioners.

Debendra Narain Bhattacharjee for *Khondkar*—for the Crown.

Mallik, J.—The facts which have given rise to the present rule are briefly these: There was a proceeding under S. 145, Criminal P. C., between one Mon Mohun Chakravarty and others, first party, and Naba Chandra Chakravarty and others, second party. This proceeding under S. 145, Criminal P. C. was on 16th January 1928, decided in favour of the first party and the first party were declared entitled to maintain possession

of the property in dispute and it was also ordered that there must not be any interference with their possession. When the Daroga went to the spot on 1st April 1928, he found the present petitioners in occupation of the property and, when he asked them to vacate it, the petitioners declined to do so. On these facts, the two petitioners were put on their trial under S. 188, I. P. C., and both of them were ultimately convicted and sentenced under that section. Against this order of conviction and sentence, the petitioners went up to the Sessions Judge but without any success. Thereafter, they came up to this Court and obtained the present rule on the District Magistrate to show cause why their conviction and sentence should not be set aside. The rule was issued on two grounds: (1) that the trial Court had acted illegally in rejecting the petition of the accused persons praying for time for issue of process upon their witnesses and (2) that the conviction and sentence of the petitioners under S. 188, I. P. C., was bad in law, inasmuch as neither of them had been a party to the proceedings under S. 145, Criminal P. C.

As regards the first ground, I do not think that there is much substance in it. It appears that, when the case for the prosecution was closed, the petitioners applied to the trying Magistrate for an adjournment of the case for 15 days in order to call defence witnesses. The learned Magistrate without adjourning the case for 15 days granted only a day's time and, when the case was taken upon the next day, namely, the 14th August 1928, seven witnesses for the accused were produced and all of them were examined. There is nothing to show that the petitioners wanted to examine any witnesses other than the seven who were produced in Court on 14th August and were, as a matter of fact, examined by the Magistrate. That being so, it cannot be contended that the petitioners were in any way prejudiced by the Magistrate's refusal to adjourn the case for 15 days.

The second ground on which this rule was issued was that the conviction of the petitioners was wrong in law, inasmuch as the petitioners had not been any party to the proceedings under S. 145, Criminal P. C., and it was contended that, as they were no parties to the proceedings under S. 145, Criminal P. C., the order passed by the Magistrate under that section was not binding on them. The question that arises for consideration in connexion with this point is whether the binding character of an order under S. 145, Criminal P. C. is under all circumstances to be confined to the persons who were actually parties to the proceeding. I am inclined to think that this question should be answered in the negative. Sub-S. (3), S., 145 lays down that at least one copy of the order passed under sub-S. (1) must be published by affixing it in some conspicuous place at or near the subject of dispute. This, to my mind, is an indication that the binding character of an order passed under S. 145 is not, under all circumstances, to be confined to the persons who were actually made parties to the proceeding but may, under certain circumstances, extend to persons other than the parties themselves. This view has been adopted by the Bombay High Court *In re, Nathubhai Brijlal* (1) where it has been held that an order under S. 145, Criminal P. C. is binding not only on the actual parties to the proceedings but also on persons who may have notice of the proceedings.

In the present case, the two petitioners were not only aware of the proceedings under S. 145 but they have been found to have acted in collusion with the second party in order to deprive the first party of the fruits of their success in the S. 145 case. Having regard, therefore, to the provisions of S. 145 (3), Criminal P. C., and the findings of fact arrived at by the Courts below, I am of opinion that the order under S. 145, Criminal P. C. was binding on the present petitioners as well. That being so, their conviction under S. 188, I. P. C. cannot be successfully challenged on the ground that they were not bound thereby.

The result, therefore, is that the Rule is discharged.

Pearson, J.—I agree.

V.B./R.K. *Rule discharged.*

(1) [1909] 11 Bom. L. R. 377=2 I. C. 513=11 Cr. L. J. 64.

A. I. R. 1930 Calcutta 65

RANKIN, C. J., AND MUKERJI, J.

Jalekha Bibi and *another*—Plaintiffs—Appellants.

v.

Danis Mahommad and *others*—Defendants—Respondents.

Appeal No. 1205 of 1927, Decided on 29th May 1929, from the appellate decree of Dist. Judge, Tipperah, D/- 25th January 1927.

(a) Court-fees Act, S. 12 — Under-valuation of property in dispute—Plaintiff or appellant cannot be required to prove the correct valuation before plaint or memorandum can be registered—Civil P. C., O. 7, R. 2.

If it is not clear from the plaint or the document itself that there has been an undervaluation, the reasonable course whether one looks to the Civil P. C., or to the Court-fees Act is to register the plaint or the memorandum and take appropriate steps thereafter for enquiring into any matter that calls for enquiry. The power to reject a plaint arises only upon it being seen that the plaint is undervalued. The correct valuation of the property in dispute is not the condition precedent to admission of a plaint or memo of appeal and it is not intended that before the plaint or memorandum of appeal is registered, the plaintiff should be called upon to give evidence on the question of valuation merely in order to get his document on file. [P 67 C 1]

(b) Court-fees Act, S. 9—Plaint or memorandum of appeal if undervalued proper course is to admit plaint or memorandum and take steps under S. 9.

In a case depending upon valuation of property in dispute the proper course if the plaint is undervalued is to admit the plaint or memorandum and take steps under S. 9. [P 67 C 1, 2]

(c) Court-fees Act, S. 9 — Commission not ordered at plaintiff's instance — Plaintiff cannot be compelled to deposit costs of commission.

If a commission is ordered under S. 9 not at the instance of the plaintiff there is no power to make the plaintiff deposit the costs of the commission. [P 68 C 1]

(d) Court-fees Act, S. 12—If plaint undervalued matter may be gone into in appeal but not before admitting memorandum of appeal.

Where it is found that the document in the lower Court is undervalued, the better practice is to go into the matter of undervaluation on acceptance and registration of memorandum of appeal. *A. I. R.* 1927 *Cal.* 775, *Foll.* [P 68 C 2]

(e) Court-fees Act, S. 7—Charts issued by District Judge setting out valuation of land is not evidence against parties.

Charts issued by District Judge setting out minimum values of lands in different parts of the district must not be put upon the parties as though they were evidence in themselves and any judicial officer acting in judicial matters upon such charts is acting without evidence before him.. [P 69 C 1]

Ram Doyal Dey—for Appellants.

Md. Nurul Haq Choudhuri—for Respondents.

Rankin, C. J. — In this case, the plaintiff brought his suit before the third Munsiff at Comilla for possession of certain land exceeding 3 kanis in area. He valued the land at Rs. 100. When the matter came before the officer of the Munsif's Court dealing with the reception of plaints, that officer compared the valuation with the valuation appearing on a certain chart of land values with which apparently the Munsif's office had been provided as a guide to the question whether plaints were being properly valued or not. This document is referred to as the suits valuation chart. It is not a document which is in any way evidence but it would appear to be a document with which the officers of the Courts in Tipperah are provided by way of administrative assistance in the discharge of their duties. The Munsif on the matter being drawn to his attention found that the valuation of Rs. 100 was low ; but, on the ground that the land was said to be an accretion to the river Goomti and to be submerged, he ordered the plaintiff to increase the valuation to Rs. 150 and, on that being done and the deficit court-fee being paid, the plaint was duly registered. Thereafter, the case went to trial and the plaintiff's suit was dismissed, the Munsif holding that the plaintiff had not shown title to the land claimed. No question was raised by the defendant as to the sufficiency of the valuation. Thereupon, the plaintiff appealed to the learned District Judge of Tipperah and, upon that appeal being presented, the learned District Judge appears to have examined into the question of the valuation. The plaintiff valued the appeal as he had valued his suit in the trial Court at Rs. 150. The learned District Judge recorded the following order before he registered the memorandum of appeal :

"Plaintiff-appellant must show nature o land filing map and khatian. Ask lower Court to explain valuation by 5th January 1927."

On 5th January, the Judge recorded:

"Read lower Court's explanation. Appellant explains valuation with production of a kabala but without the copies of map and khatian. The land is said to be a new formation ; but I have not been given the help I asked for, namely, the map and khatian. I do not think that the kabala of 1328 is a safe guide. I raise the valuation to Rs. 300 and deficit fees must be paid on that for both Courts by 25th January 1927."

Again, on 25th January, the following order was recorded :

"Appellant submitted a further explanation ; the court-fees have not been paid. The appeal is dismissed."

The plaintiff now appeals from this order of dismissal.

It may be as well to deal with this matter logically. One has to ask oneself what is the duty imposed by this fiscal legislation upon the plaintiff. The first thing is that, by S. 6, Court-fees Act, it is provided that no document of any of the kinds specified as chargeable in Sch. 1 or 2 shall be filed, exhibited or recorded in any Court of Justice unless there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee. In Art. 1, Sch. 1, we find that memorandum of appeal not otherwise provided for in the Act is mentioned as one of the documents which are charged with payment of a court-fee and, in Col. 2 of that Article, various amounts are specified. When the amount or value of the subject matter in dispute does not exceed so much then a certain fee is to be paid and when it does exceed that figure but does not exceed a larger figure mentioned, then another fee is to be paid. Having got so far, we find that the document cannot be filed or registered in default of payment of court-fee because it is a document on which a fee is to be paid according to the amount or value of the subject matter in dispute. That takes us at once to S. 7, Court-fees Act. Section 7 is a section which tells us, both with regard to plaint and also with regard to memorandum of appeal, how are we to arrive at the value of the subject matter in dispute. It explains, in the case of suits for possession of land as the present is, that the subject matter is to be valued according to the market value and the fee is to be computed according to the market value. It is clear enough that it does not always happen that the matter in dispute is the same in the trial Court as in the Court of appeal because sometimes the appeal is against a part only of the original claim. But, even so, in cases like the present, it is S. 7 which determines the computation of the value of the matter in dispute for the purpose of court-fee. Having got so far, we know, therefore, that a memorandum of appeal should not be filed or exhibited unless it contains a proper fee computed upon the market value of the subject matter in dispute. There are many cases in which it is possible to say that the plaint or the memorandum of appeal is undervalued without having to take evidence or to consider extraneous facts. It may be that a claim for possession of land is valued as though it were a mere declaration and there are all sorts of other ways in which without going outside the plaint itself or the memorandum of appeal it is possible to say that the value has been underestimated; and, in all such cases, no doubt, it is the clear duty of the Court to whom the document is presented to refuse to accept it until the proper fee has been paid. In cases, however, where the sufficiency of the fee depends upon the market value of certain property, it is impossible to tell without travelling outside the plaint or the memorandum itself whether the fee is sufficient or not. Now, the provisions of the law make a difference, as it seems to me, with regard to those cases which I have last referred to because S. 9 and the consequential sections are particular provisions in the Court-fees Act which deal with this very class of cases, the class of cases, namely, where the sufficiency of the fee depends upon matters which require a certain amount of external investigation. Section 9 says that when the Court sees reason to think that the annual nett profits or the market value of any such land as is mentioned in S. 7, paras. 5 and 6 have or has been wrongly estimated, then the Court may take certain steps. Now, in the ordinary way, a Court to which a document such as a plaint or a memorandum of appeal is presented will not reject the document unless it has proof that the document is insufficiently stamped. Under O. 7, R. 11, Civil P. C., it is provided that the plaint shall be rejected in the case where the relief claimed is undervalued and the plaintiff on being required by the Court to correct the valuation within a time to be fixed by the Court fails to do so. So, in such a case as is there contemplated, the Court has to be satisfied that the relief is undervalued. When that is the case, it may require a further payment and, on the further payment not being made, it may reject the plaint.

In the present case, what happened was that the learned Judge to whom the memorandum of appeal was presented was, to begin with, desirous of requiring the plaintiff to prove that the memorandum was sufficiently valued. He required the plaintiff to show the nature of the land by filing a map and khatian. He asked the lower Court to explain its valuation. The appellant produced a kabala which as evidence of value did not satisfy the learned Judge. Because the appellant did not give evidence of the sufficiency or correctness of his valuation, the learned Judge raised the valuation to Rs. 300 both for the purpose of the memorandum of appeal and for the purpose of the plaint. The learned Judge did that, it is clear, without there being any evidence before him at all on which he was entitled so to act.

In my opinion, there is more than one mistake in the course adopted by the learned Judge. If it is not clear from the plaint or the document itself that there has been an undervaluation, the reasonable course, whether one looks to the Code of Civil Procedure or to the Court-fees Act, is to register the plaint or the memorandum and take appropriate steps thereafter for enquiring into any matter that calls for enquiry. It is clear enough under O. 7, Civil P. C., that the power to reject a plaint arises only upon it being seen that the plaint is undervalued. In my judgment, it never was intended in a case of this class that, before a plaint or a memorandum of appeal could be registered, the plaintiff should be called upon to give evidence on the question of value merely in order to get his document upon the file. In this case, the learned Judge had no evidence at all as to the value of the land in dispute. He refused to let the memorandum of appeal be filed not because he had come to a decision upon evidence that there had been an undervaluation but because he tried to put upon the plaintiff a preliminary burden of proving to his satisfaction that the valuation was sufficient and the plaintiff had failed to do so. Having done that, his next step was, being dissatisfied with the plaintiff's evidence, to act without evidence in holding that the valuation was insufficient. In my opinion, for cases of this class which depend upon valuation, the particular and appropriate provisions of S. 9, Court-fees Act should always be used. That, it will be observed, begins with the words :

"If the Court sees reason to think that the market value of any land has been wrongly estimated."

Now, for the purpose of these opening words, there is no illegality in any reference to a chart or to a gazetteer or to anything else that will assist. This is not a question of judicial decision. The Court merely sees reason to think that the suit is undervalued and that by itself will hurt nobody. But if the Court wants this matter to be pursued and it is a matter upon which evidence of external facts is plainly necessary the Court must undertake the investigation in a judicial manner. Section 9 points out one manner. It says that the Court may issue a commission to any proper person directing him to make a local or other investigation and to report to it. If that commission is issued and if a report is made, it is clear that then the learned Judge has a judicial duty to come to a decision on the basis of the commissioner's report. Such a commission is a commission under the Civil Procedure Code and what the commissioner may do and what the duty of the learned Judge is, is laid down quite clearly by the Civil Procedure Code. In the case of *Hari Ram* v. *Akbar Husain* (1), it has been pointed out by the learned Judges that the mere fact that a Court can issue a commission shows that the Court can make itself a judicial enquiry if it is so minded. On the whole, I think that that proposition is sound, though the opening words of S. 10, Court-fees Act, are rather against it. If, therefore, the learned Judge in this case having admitted the memorandum of appeal had taken steps under S. 9, Court-fees Act, I would have been prepared to say that he was within his rights, if he had held this judicial enquiry either himself or by means of a commission.

The learned Judge held no such judicial enquiry. He did not purport to use the section which is expressly adopted to these cases of valuation of land. In my opinion, it is very necessary that these investigations should not be embarked upon without due reason. It will obviously be a hardship to the

(1) [1907] 29 All. 749=4 A. L. J. 636=(1907) A. W. N. 253 (F.B.).

plaintiff that he should have an extra stage of litigation to go through before he can prosecute his suit. This Court has always discouraged, and I hope it always will discourage, the appointment of a commission under S. 9, Court-fees Act, for the reason that it is very apt to be oppresssive to the plaintiff. In particular, I would point out that, if a commission is ordered under this section not at the instance of the plaintiff, there is no power to make the plaintiff deposit the costs of the commission. In the same way, if an investigation is undertaken by the Judge himself, it is in my judgment, entirely wrong to suppose that the plaintiff has first to give evidence to satisfy the Court of the propriety of his valuation before he is entitled to get his plaint or memorandum registered. The proper course in these cases is to deal with the matter when the plaint or the memorandum has been filed. If the result of the enquiry is to the effect that the plaintiff's valuation is insufficient, then the plaintiff may be called upon to make the necessary deposit, and S. 10 shows that the suit is at first to be stayed and if necessary later on dismissed. There is one other matter in this case that requires to be considered.

The learned Judge acted under S. 12, Court-fees Act, that is to say, he not only rejected the memorandum of appeal unless Rs. 300 was the valuation put upon that, but he rejected the memorandum of appeal unless the fee upon Rs. 300 was paid upon the plaint. That he had only jurisdiction to do under the second half of S. 12. In the first-half of S. 12, it is said that every question relating to valuation shall be decided by the Court in which the plaint or memorandum, as the case may be is filed, and that such decision shall be final as between the parties to the suit. This is modified by Cl. 2 which says:

> "Whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party to pay so much additional fee as would have been payable had the question been rightly decided."

In this Court, the decision in the case of *Shama Soondary* v. *Hurro Soondary* (2), has been acted upon for over 50 years and I desire to say nothing whatever by way of disturbing the authority of that decision. The practice in the High Court is that where it is found that a document in the lower Court was undervalued the appeal in the High Court is admitted, provided that the proper stamp is paid upon the memorandum of appeal here. The question under the second half of S. 12 as to making the party pay a greater sum as fee upon the document in the lower Court is dealt with after the appeal has been admitted and registered but before the appeal is allowed to be heard.

The practice on that point has been laid down by my learned brothers Mukerji, J., and Graham, J., in the case of *Bidhu Bhusan Bakshi* v. *Kala Chand* (3), which, in my opinion, deserves to be regarded as an authoritative statement of the practice of this Court and of the proper practice under S. 12. The word "filed" in S. 12 occurs only in the first half and not in the second half and even if there is room for the contention that the phrase "whenever any such suit comes before a Court of appeal" is satisfied when the memorandum is presented and before it has been accepted or registered even so it is plainly much the better practice that these contentious questions as to documents in the lower Courts should be dealt with when the memorandum of appeal has been accepted and registered and should not be dealt with as a condition of the acceptance or registration of the memorandum of appeal. In my opinion, the learned Judge in this case in refusing to permit this appeal to be filed unless the plaintiff paid further fees in respect of the document in the lower Court followed a practice which is not to be commended and which is of an extremely doubtful nature. In my judgment, this case has not been properly dealt with. The appeal must, therefore, be allowed and the case must be sent back to the District Court from which it comes and the learned Judge must be directed to proceed according to law; that is to say, he is directed to admit and register the memorandum of appeal on the fee which has been paid and, after he has done that, if he has any uneasiness as to the revenue having received its proper dues, he may take appropriate action under

(2) [1881] 7 Cal. 348=8 C. L. R. 528.

(3) A. I. R. 1927 Cal. 775.

the appropriate section, namely, S. 9, Court-fees Act, by appointing a commissioner if he thinks fit or, as I have explained, by holding a judicial enquiry himself. When that is done, if it turns out that the plaintiff has overvalued his claim, he will get the benefit. If it turns out that the plaint is undervalued the course prescribed by the statute will be followed.

I say nothing in this judgment as to the advisability of the practice of making out charts which are supposed to show minimum values of lands of different classes in different parts of the district. From what I have learnt of such charts in the case of two districts, I have the gravest doubt as to the advisability of such charts being employed, particularly when they are put together merely by persons appointed to that rather difficult task by the District Judge. That, however, is an administrative matter and I do not decide that such charts may not be used for the purpose of the opening words of S. 9, Court-fees Act, but I would draw the attention of all District Judges and Judicial Officers to this that such charts cannot and must not be put upon the parties as though they were evidence in themselves and any judicial officer acting in a judicial matter upon such charts is acting without evidence before him.

The appeal, therefore, must be allowed with costs.

Mukerji, J.—I agree.

V.S./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 69

B. B. GHOSE AND PANTON, JJ.

Manmohan Chowdhury — Plaintiff—Appellant.

v.

Turner, Morrison & Co. — Defendants—Respondents.

Appeal No. 80 of 1927, Decided on 22nd April 1929, from original decree of First Sub-Judge, Chittagong, D/- 14th February 1927.

(a) Bengal Revenue Sale Law (11 of 1859), S. 37— "Raiyat" means one who cultivates land or has acquired it for cultivation.

"Raiyat" means a person who actually cultivates the land or has acquired it for the purpose of cultivation. [P 72 C 2]

(b) Landlord and Tenant—Ejectment—Dag numbers of plots given fully but area understated—Ejectment is not from part and suit is not defeated if mistake would not mislead.

Where in a suit for ejectment the numbers of the plots in question are given fully, but the total area is understated, such understatement will not defeat the suit as one for ejectment from portion only, provided that it was a mistake which would not mislead anybody. [P 71 C 2]

(c) Bengal Revenue Sales Law (11 of 1859), S. 37 (4)—Masonry rivetments are not buildings.

Masonry rivetments cannot be considered to be buildings within the meaning of the words under S. 37, Cl. 4. [P 73 C 1]

(d) Bengal Revenue Sale Law (11 of 1859), S. 37—It is not necessary for purchaser at auction sale to serve notice on encumbrancer to avoid encumbrance—Expression of intention to do so by word or deed is sufficient.

The position of a purchaser at a revenue sale is analogous to that of a landlord whose tenant has incurred forfeiture. And so it is not necessary for the auction-purchaser under Revenue Sale Law to serve any notice on an incumbrancer for the exercise of his right to avoid incumbrance. It is sufficient if he brings a suit in ejectment which it must be held is an unequivocal expression of the intention of the auction purchaser to take possession of the property by annulling incumbrances. The only thing necessary for him to do is to express his intention by word or deed to avoid the incumbrance. Consequently to enable the auction purchaser at a revenue sale to take possession of a property on which there is an encumbrance which he is entitled to annul, it is sufficient for him to bring a suit against the person in actual possession, by which act he expresses his unequivocal intention to avoid all subsisting rights which he can annul, as he seeks to take direct possession of the property sued for. It is simply a feasible means of seeking direct possession. It is not necessary for him to find out if there is any other person, under whom the person in actual possession claims to hold. The person in actual possession can, however, resist by showing that he holds under a third person whose interest the purchaser must annul. But the suit cannot be defeated merely on the ground that the person in actual possession claims under a party who has not been made a party to the suit or on whom the purchaser did not serve any notice: 14 *C. W. N.* 352, *Dist.*; 42 *Cal.* 638 and *Commr. of Works* v. *Hull*, 1 *K. B.* 205, *Ref.* [P 75 C 1, 2]

(e) Bengal Revenue Sale Law (11 of 1859)—Purchaser at revenue sale buying off taluqdar intending to deposit revenue and to prevent sale—Purchase is not fraudulent.

There is nothing wrong in a third person who wants to purchase an estate at a revenue sale to buy off taluqdar who wanted to deposit the revenue in order to prevent the sale. If such person then purchases the property himself at the revenue sale this does not amount to any fraud or underhand dealing. [P 77 C 1]

(f) Practice — Pleadings — Statement in affidavit by minor at instigation of interested persons — Statement though true no finding can be based on it.

No finding can be based upon statements, however true, made in an affidavit by a person about 18 or 19 years of age, where the statement is made at the instigation of persons who have some interest to serve thereby. [P 78 C 1]

N. N. Sircar, S. C. Basak, Chandra Sekhar Sen, Benoyendra Nath Palit, Nikunja Behary Roy and *Upendra Chandra Roy*—for Appellant.

W. W. R. Page, Chandra Kumar Chatterjee and *Indu Bhusan Mukherji*—for Respondents.

B. B. Ghose, J.—This is an appeal by the plaintiff against tbe judgment and decree of the Subordinate Judge, First Court, Chittagong, dated 14th February 1927, dismissing his suit in ejectment against the defendants. The plaintiff alleged that touzi No. 61 of the Chittagong Collectorate was purchased by the executor of the will of his father on behalf of his estate on 19th May 1913. The name of the executor was Jogendra Lal Choudhuri who is now dead. The plaintiff claimed that he was entitled to khas possession of the plots of land mentioned in the plaint by ejectment of the defendants under the provisions of S. 37, Revenue Sale Law as these did not fall within the exceptions mentioned under that section. The lands in suit were comprised in several dags of the Record-of-Rights the numbers of which are given in the plaint. The total area of these dags, according to the Record-of-Rights would be 5.08 kanis. The estate No. 61 at one time belonged to two persons Paresh Mukherjee and Basanta Banerjee in equal shares. A seven and half annas out of Paresh's share was purchased by Jogendra Choudhury in his own name sometime prior to the year 1907 as it appears that in the land acquisition proceeding of February 1907 (Ex. M) the name of Jogendra Choudhuri appears as one of the owners of the touzi. The remaining half anna out of Paresh's eight annas share was purchased by one Rajani Karan.

The eight annas share of Basanta was purchased by one Ruhidas in 1911. Jogendra sold his seven and half annas share to one Sarat Pal in 1912 and Rajani sold the half anna share which he had purchased originally belonging to Paresh Mukherjee to one Paresh Nath Choudhuri. So before the revenue sale the recorded proprietors were Sarat Pal, Paresh Nath Choudhuri and Ruhidas. The plaintiff's father Aparna Choudhuri died about April 1912, when the plaintiff was only nine or ten years old. The present suit was brought in April 1923. The defence of the defendant company was mainly that the plaintiff's father Aparna himself was the owner of the property before the revenue sale and the persons who were the ostensible recorded owners were the benamidars of Aparna. Therefore, on the basis of the alleged revenue sale on 19th May 1913, the plaintiff is on no account entitled to claim ejectment against the defendants. The further plea was that the defendants were holding the lands under a tenancy which was created from before the permanent settlement and it fell within one of the exceptions under S. 37, Revenue Sale Law. In para. 6, of the written statement it was stated that the defendant's tenancies were held under different persons who hold directly under the proprietor and their tenures are also of a similar nature and the suit is not, therefore, maintainable: which means that those tenures were also permanent and were in existence from the time of the permanent settlement.

On the pleadings several issues were raised in the Court below. No attempt was made to establish that the tenancy of the defendants or the tenure under which the defendants claim to hold the lands was permanent or was held from the time of the permanent settlement. The learned Subordinate Judge has stated the questions for decision in the case on the pleadings which may be shortly recapitulated thus: (1) Whether the plaintiff's father Aparna was himself the proprietor of the estate Taraf Asad Mosad Khan before the revenue sale of 1913 and whether the recorded proprietors before the revenue sale were his benamidars as alleged by the defendants company; (2) Whether, as alleged by the defendant, any deliberate default was made on the part of the previous proprietors acting in concert with the intending purchaser with a view to annul all incumbrances so as to deprive the auction purchaser of the rights and privileges of a purchaser at a revenue sale; (3) Whether the defendants' holdings are comprised within a taluk or tenure which must be annulled before the defendant can be called upon to vacate the lands; (4) Whether the lands in suit are parts of holdings not com-

prising all the lands covered by the defendants' leases and if so, whether the suit is maintainable; (5) Whether the defendant or his predecessors-in-interest are raiyats having a right of occupancy at a fixed rent; and (6) Whether there are manufactories or other permanent buildings and tanks on the lands in suit.

The Subordinate Judge has decided the first question in favour of the plaintiff. He has held that it has not been substantiated that the plaintiff's father Aparna was the actual proprietor of the estate before the revenue sale. He has also held that it has not been established that the recorded proprietor were his benamidars. The Subordinate Judge has also found that there was no deliberate default made by the previous proprietors acting in concert with the auction purchaser. The second point has thus been decided in favour of the plaintiff.

The third point has been decided in favour of the defendant and it is mainly upon that ground that the suit has been dismissed. The Subordinate Judge has held that the defendants' holdings are comprised within a taluk and as the plaintiff has not annulled that taluk, he is not entitled to eject the defendants from the lands in suit.

The next point has also been decided in favour of the defendants, as the Subordinate Judge is of opinion that the suit is only for parts of holdings and in view of the authority of a case of this Court that parts of a holding cannot be annulled by a purchaser at an auction sale for revenue, he has decided the point against the plaintiff.

The next point has also been partly decided in favour of the defendants as the Subordinate Judge has held that with regard to some of the plots, the defendants' predecessors-in-interest were raiyats and, therefore, the plaintiff is not entitled to claim ejectment.

With regard to the last point, the Subordinate Judge has held that one plot consisted of a tauk but there are no manufactories or permanent buildings on the disputed land. On that ground he has held that the plaintiff is not entitled to ejectment with regard to the plot covered by the tank.

The main ground, as I have already stated, is whether the lands were comprised within a taluk which the plaintiff has not annulled and that being so, whether the plaintiff is entitled to maintain this action in ejectment.

Before I deal with that question, it is expedient to dispose of the minor points raised in the case, namely, whether the plaintiff has sued for ejectment from only portion of holdings and whether the defendants are protected from ejectment on the ground that their predecessors-in-interest were raiyats with regard to particular holdings. The plaintiff has mentioned, as I have already stated, the dag numbers of the Record-of-Rights which are the subject matter of the suit. After giving the dag numbers of the recent survey, he has stated the area in dispute to be 3 kanis 15 gandas. The actual area, as I have already stated is Rs. 5.08 kanis. The question is whether the statement of the area is a mistake and not the guiding factor to be considered in the suit or is it a fact that the plaintiff wanted to eject the defendants from only a portion of the holdings. Our attention has been drawn to the Bengali expression in the plaint and, in my opinion, it only shows the construction of the word which means "in all" before the word "area." In my opinion, it was a mere mistake in addition when the area was given as 3 kanias 15 gandas instead of 5 kanis odd and the suit cannot be defeated on the ground that the plaintiff wanted to eject the defendants from only a portion of the lands held by them. The guiding thing in the plaint is the number of dags given and it seems to me that it does not admit of any doubt that the plaintiff wanted to eject the defendants from the dags mentioned in the schedule to the plaint, and the area given is a misstatement which is not likely to mislead any one. I am, therefore, unable to agree with the view of the Subordinate Judge that the suit is liable to be dismissed on that ground.

The next point is whether the defendants' predecessors-in-interest were raiyats or not. The Subordinate Judge has held that the defendants have a protected interest in respect of the cadastral survey plots Nos. 2316, 2321, 2322 and 2338. The defendant company base their right upon an indenture between Turner Morrison & Co., and the defendants Turner Morrison and Co., Limited dated 3rd April 1914 Ex. G (4). The lands in question were previously in pos-

session of a company called Visram Ebrahim & Co. That company became insolvent and the right to the lands in suit vested in th Official Assignee of Bombay from whom Turner Morrison & Co., purchased them and that company, in its turn, conveyed it to the defendants a limited company, Turner Morrison & Co., Limited. In the schedule attached to that document the cadastral survey plots 2338 and 2316, are in items Nos. 8 and 10 therein, are described as permanent raiyati and it is contended on behalf of the appellant that with regard to these two only, the defendants may possibly claim the right to resist the ejectment. The other two plots viz., 2321 and 2322, which are in item 1 of the document, are described as permanent taluka right. Therefore, it is contended that unless the defendants can prove that this permanent taluka right was in existence from the time of the permanent settlement, the defendants are unable to resist eviction. It is urged that the Subordinate Judge is wrong in any event in dismissing the claim to plots 2321 and 2322 on the ground that the right to those plots is protected. Then it is contended that S. 37, Revenue Sale Law (Act 11 of 1859), by its proviso only protects a raiyat having a right of occupancy from ejectment. We have to consider whether the defendant company is protected from eviction under that proviso. The proviso thus :

"Provided always that nothing in this section contained shall be construed to entitle any such purchaser to eject any raiyat having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force etc., etc.

Defendant company cannot be described as raiyats. They are a limited company carrying on business on a large scale and it would be really a misapplication of the term to say that they can possibly fall within the description of a "raiyat." The Subordinate Judge has held with reference to the meaning of the word "raiyat" that the predecessors-in-interest of Visram Ebrahim & Co., from whom that company had purchased those plots were raiyats and, according to the meaning of the expression "raiyat" under S. 5, sub-S. (2), Ben. Ten. At, the term "raiyat" includes the successor-in-interest of persons who have acquired a right to hold land for the purpose of cultivation. In my opinion, the meaning of the word "raiyat" in this proviso of Act 11 of 1859 can hardly be the same as the meaning given to the term under S. 5, Ben. Ten. Act (8 of 1885). In my opinion it would not be right to construe the meaning of a word in an Act of 1859 with reference to an Act of 1885. The Rent Act 10 of 1859 which was passed immediately before the Revenue Sale Law did not give the same meaning to the term as in the Bengal Tenancy Act of 1885. The reasonable interpretation must, therefore, be that the term must be taken in its ordinary sense and that it means :

"a person who actually cultivates the land or has acquired it for the purpose of cultivation."

In my opinion the object of the proviso is that actual cultivators who have acquired a right of occupancy should not be disturbed in their possession. I think, therefore, the defendants who were in possession at the time of the revenue sale in 1913 could not by any stretch of the meaning of the word "raiyat" be described as raiyats and they cannot seek protection under the proviso of S. 37 of the Revenue Sale Law of 1859. I am therefore, unable to agree with the view of the Subordinate Judge that the defendants have a protected interest in plots 2316, 2321, 2322 and 2338 on this ground, apart from the contention of the appellant that two of the plots were not alleged to be raiyati in the document on which the defendants based their title.

The next question is with regard to plot 2312. Although it was contended on behalf of the appellant that the map prepared in this case shows that there was no tank in plot 2312, it is quite clear from the map that was attached to the conveyance (G-4) of 1914 that there was a tank at the time of that document and, therefore, at the time of the sale. Consequently the cadastral survey plot 2312 must be held to fall within the fourth exception under S. 37, Revenue Sale Law. The plaintiff is not entitled to ejectment of the defendants from this plot under any circumstance.

On behalf of the respondents it was urged that there were permanent structures on some of the plots in suit and those plots also should be held to fall within the exception under Cl. 4,

S. 37, Revenue Sale Law. Those two plots are described as 2316 and 2338 of the cadastral survey. There are, it is said, masonry structures on these plots which are of a permanent nature. But the exception is with reference to permanent "buildings" and the rivetments cannot be considered to be buildings according to the meaning of the word. This contention, therefore, of the respondents in support of a portion of the decree of the Subordinate Judge cannot be accepted.

It now remains to deal with the principal question found against the plaintiff by the Subordinate Judge. He has held that the suit must fail on the ground that the intermediate taluk under which the disputed lands are held have not been annulled. With reference to this point, the learned Advocate-General on behalf of the appellant drew our attention to the proceeding which took place in the Court below on 29th September 1926, that is, a few months before the delivery of judgment in this case. The defendants filed an application for adding two issues for trial in the case. The second of these issues was: Does the defendant hold the lands in suit under the holders of intermediate interest and can the plaintiff obtain khas possession without setting aside the holder's interest and can that be done partly? Among other things, the learned Subordinate Judge observed that it was not stated by the defendants to what intermediate tenure the lands in suit appertained and he was of opinion that "at this late stage the prayer could not be allowed." He held that the defendants sought to raise the issues by their petition, only because the learned Judge made an observation at the time the suit was about to be taken up for hearing, that the onus of proof was on the defendants. Upon that the defendants took time and made the application set forth above. On that ground the learned Judge rejected the application. The grievance made by the plaintiff is that although the learned Judge rejected the application of the defendants to raise this additional issue, he has decided the case against the plaintiff practically upon that issue alone and the fact that such an issue was not raised prevented the appellant from producing evidence for the purpose of showing that there was no intermediate tenure in existence. An application was presented to this Court on 11th August 1927 on which a Division Bench of this Court directed that it should be heard at the time of the hearing of the appeal and it was pressed before us that we should direct fresh evidence to be taken under the provisions of O. 41, R. 27, Civil P. C., for rebutting the evidence of the defendants that there was a taluk under which they held the lands in suit immediately subordinate to the proprietors of the estate. It is true that the plaintiff has some grievance; but I do not think that sufficient ground has been made out for admission of fresh evidence on the question referred to by the appellant. It would appear from the plaint itself that the plaintiff was referring to the cadastral survey dags within which the lands in suit are included. By a reference to the Record-of-Rights of the cadastral survey the plaintiff must have known that a taluk has been mentioned within which these cadastral survey dags are situate. Although the statement is not very definite, the defendants took the plea in para. 6 of their defence that they held the lands under different persons whose tenures are permanent. The plaintiff might have asked for particulars from the defendants if he was in any doubt as regards the meaning of the plea set up in that paragraph.

But apart from that when the plaintiff had knowledge of the fact that there was an intermediate taluk according to the Record-of-Rights, he might have stated in his plaint that although there was that record of an intermediate taluk as a matter of fact there was no such taluk in existence and he might have adduced evidence in support if his allegation was challenged. On that ground I do not think that we should at this stage allow the plaintiff to adduce fresh evidence for showing that Visram Ebrahim & Co., held the lands in question directly under the proprietors of the estate, Basanta Kumar Bandopadhya and others and not under any intermediate talukdar. I need only mention that the documents sought to be proved are purported to have been executed by either Paresh Nath or Basanta in favour of Visram Ebrahim & Co., or kabuliyats

purported to have been executed by that company. The application, therefore, made by the appellant for taking fresh evidence should in my opinion be rejected.

The question, however, decided by the learned Subordinate Judge remains to be considered. From the facts referred to by him it cannot be disputed that there was a subordinate taluk under the proprietors of the estate in question and the cadestral survey dags now in suit are included within that taluk. The question is whether the plaintiff is entitled to a decree for ejectment without annulling that taluk or making the owners of the taluk parties to this suit. The Subordinate Judge has held that as the superior tenure has not been annulled, the plaintiff is not entitled to possession of the lands under the provisions of S. 37, Act 11 of 1859. He refers to the case of *Mafizuddin* v. *Ashutosh* (1) in support of his view. That case was decided under the provisions of the Bengal Tenancy Act. A purchaser having power to annul an incumbrance under the provisions of Ss. 159 and 161, Ben. Ten. Act, desiring to annul the same has to present an application under the provisions of S. 167 of the Act to the Collector in writing, requesting him to serve a notice upon the incumbrancer declaring that the incumbrance is annulled.

Upon that application the Collector has to cause the notice to be served in a prescribed manner on the incumbrancer and the incumbrance shall be deemed to be annulled from the date from which it is so served. This application for service of notice by the purchaser must be made within one year from the date of the sale or the date on which he first has notice of the incumbrance. In the case of *Mafizudin* v. *Ashutosh* (1) above referred to, what the purchaser did was to cause a notice to be served not on the incumbrancer immediately under him but on a person holding an interest subordinate to that incumbrancer and it was held by this Court that by service of such notice the purchaser could not annul the subordinate interest while the right of the superior incumbrancer remained unaffected. The anomaly of such a state of things if allowed was pointed out by the learned Judges. The purchaser at the rent execution sale could not eject a person from the land who was holding under a person whose right remained unaffected by the sale because the only method by which that right could be annulled was not followed. In my opinion, the position of a purchaser with power to annul an incumbrance under a sale in execution of a rent decree under the Bengal Tenancy Act is analogous to the right of a landlord who can terminate a lease by a proper notice to quit.

In the case of a landlord who has a terminable tenancy under him by service of notice if the landlord does not choose to serve any notice on his tenant but serves a notice on the sub-tenant, it is obvious that the landlord cannot eject the sub-tenant without determining the tenancy of the tenant holding directly under him. In my judgment this principle is illustrated by the case cited above. That case has been approved in the case of *Monmotha Nath Mitter* v. *Anath Bhundhu Pal* (2), where the learned Judges held that it was sufficient for a purchaser under a sale under the Bengal Tenancy Act with power to annul incumbrances to apply for notice being served on the immediate subordinate incumbrancer without serving any notice on his sub-tenant; and this I think also supports me in my view that the position of such a purchaser is analogous to that of a landlord under whom there is a tenancy which is terminable by notice to quit. In such a case if the tenant sublets the land, it is sufficient for the landlord to serve a notice on his own tenant determining the tenancy in order to entitle him to recover possession and it is not necessary for him to serve notice on the holders of subordinate interests created by the tenant.

The question next to be considered is whether the right of a purchaser under the Bengal Tenancy Act with power to annul incumbrances is similar to the right of a purchaser under the Revenue Sale Law under S. 37, Act 11 of 1859. It is well settled that on a sale for arrears of revenue all incumbrances do not become ipso facto void. They are voidable at the option of the purchaser, or in other words, the auction-

(1) [1910] 14 C. W. N. 352=5 I. C. 189=11 C. L. J. 140.

(2) A. I. R. 1921 Cal. 754.

purchaser is entitled to continue the incumbrances, if he so chooses. This was laid down in the case of *Titu Bibi* v. *Mahesh Chandra Baychi* (3). The case of *Ranee Surnomoyee* v. *Sutesh Chunder* (4), may also be referred to. In the case of *Sahodora Mudiali* v. *Nabin Chandra* (5) the learned Judges affirmed this proposition and it was pointed out at pp. 646 and 647 that it is not necessary for the auction purchaser under the Revenue Sale Law to serve any notice on an incumbrancer for the exercise of the right to avoid an incumbrance. It is sufficient if he brings a suit in ejectment which it must be held is an unequivocal expression of the intention of the auction purchaser to take possession of the property by annulling incumbrances. The only thing necessary for him to do is, it may be repeated, to express his intention by word or deed to avoid the incumbrance. In my opinion the position of the auction-purchaser under the Revenue Sale Law is not analogous to the position of an auction purchaser under the Bengal Tenancy Act with power to annul incumbrances. But it may be compared with the position of a landlord whose tenant has incurred a forfeiture. When a tenant has incurred a forfeiture, the landlord must express his desire to take advantage of the forfeiture in order to obtain possession of the property. If he can peacefully obtain possession from the person in occupation, that is quite sufficient; if not, the institution of a suit would be a sufficient expression of his desire to take advantage of the forfeiture.

The question, therefore, is, where a tenancy has been created and the tenant has created a subordinate interest and a forfeiture has been incurred by the tenant, is it necessary for the landlord to regain possession of the land demised to express his intention to take advantage of the forfeiture to his tenant, or is it sufficient if he brings an action in ejectment as against the person whom he finds in possession of the land demised, although he may be a person claiming under a sublease from the tenant? This question has been decided in the case of *Commissioners of Works* v. v. *Hull* (6). At p. 209, after reciting the following observations of Parke B. in the case of *Jones* v. *Carter* (7).

"We think that the bringing of an ejectment for a forfeiture and serving it on the lessee in possession, must be considered as the exercise of the lessor's option."

Shearman, J. says:

"I think that the whole meaning of that is, that it is sufficient if you serve it, not on the original lessee but on the under-lessee who claims to be in possession under the lessee, because it is simply a peaceable means of effecting re-entry."

It seems to me, therefore, that in order to enable the auction-purchaser at a revenue sale to get possession of the property on which there is an "incumbrance" which he is entitled to annul, it is sufficient for him to bring a suit against the person in actual possession, by which act he expresses his unequivocal intention to avoid all subsisting rights which he can annul as he seeks to take direct possession of the property sued for. It is simply a peaceable means of seeking direct possession. It is not necessary for him to find out if there is any other person under whom the defendant in possession claims to hold. The defendant, however, can resist the plaintiff by showing that he holds under a third person whose interest the plaintiff cannot annul. But the suit cannot be defeated merely on the ground that the defendant claims under a third person who has not been made a party to the suit or on whom the plaintiff did not serve any notice. I am, therefore, unable to agree in the view of the Subordinate Judge that the plaintiff's suit must fail, because he has not expressly annulled the taluk within which the lands are situate previous to the suit.

In this case, however, there is an admission of the talukdar from which it may be clearly inferred that the auction purchaser did actually express his intention not to keep any incumbrance intact. The talukdar Jatra Mohan Chaudhury has been examined on behalf of the defendants as witness 2. He stated:

"After the sale the moharir of the plaintiff demanded nazar from us and asked us to take a fresh settlement but I refused. Since then no rent is taken from us. I offered Rs. 50 as nazar for a re-settlement. Plaintiff demanded Rs. 300."

(3) [1883] 9 Cal 683 (F.B.).
(4) [1864] 10 M. I. A. 123=2 W. R. 13=1 Suther 549=2 Sar. 60 (P.C.).
(5) [1915] 42 Cal. 686=20 C. L. J. 494=27 I. C. 258=19 C. W. N. 1030.
(6) [1922] 1 K. B. 205.
(7) 15 M. & W. 718.

This is a clear indication of the intention not to continue the previous taluk after the revenue purchase, when the talukdar was asked to take a fresh settlement on payment of nazar and this demand was followed by refusal to accept rent from him. It is, however, contended on behalf of the respondent that the plaintiff himself stated that he did not know anything about the existence of the taluk, and therefore, it cannot stand to reason to say that he expressed an intention to avoid the taluk. Now, it should be remembered that at the time of the revenue sale the plaintiff himself was about 10 or 11 years of age. His affairs were conducted by the executor of his father's will.

That executor must have sent the moharir of the plaintiff asking the talukdar to take a re-settlement on payment of a nazar. That was a sufficient expression of the intention on the part of the auction purchaser to avoid the taluk. On both these grounds I hold that the opinion of the Subordinate Judge that the plaintiff cannot seek to eject the defendants on account of the existence of the taluka right of Jatra Mohan cannot be maintained.

It now remains to discuss one important point found by the Subordinate Judge against the defendants but which it was argued by the learned advocate for the defendants, that, the Subordinote Judge has wrongly decided on that ground he sought to support the decree made by the Subordinate Judge. That point is that plaintiff's father Aparna Choudhury was the real owner of the estate and the three recorded proprietors just before the revenue sale were his benamidars. The Subordinate Judge has dealt with the question with sufficient elaboration. But it is argued on behalf of the defendants that the circumstances show very strongly that all those persons were really benamidars of Aparna. The learned advocate for the respondents cited the case of *Promode Kumar Roy* v. *Modan Mohan Saha* (8), wherein at p. 402, (of 36 *C. L. J.*) most of the cases relating to benami transactions have been recited. It is hardly necessary to point out that each case must be considered with regard to the evidence adduced by the parties. The question is first, whether Jogendra Chowdhury was a benamidar for Aparna, when he purchased the 7½ annas interest, or, as is alleged by the defendants, the whole 8 annas interest of Pareshnath. This purchase was made, as I have already said, before February 1907. Nothing has been shown why Aparna should purchase this property in the benami of Jogendra. It is in evidence and is found by the learned Judge below that Jogendra had property of his own and as a matter of fact he had some joint properties with Aparna and the plaintiff himself brought a suit, when, he fell out with Jogendra, for partition and accounts as against Jogendra. It is suggested that Aparna purchased this property in the benami of three different persons with the object of defaulting in the payment of revenue and repurchasing the property himself, and thus to acquire the property with the right to annul all incumbrances. If Aparna had purchased the property in the benami of Jogendra with that intention why was there such a long delay after the purchase in making a default in payment of revenue?

It will be remembered that there was no default in payment or revenue before 1912. Aparna died some time in April 1912. Jogendra sold his share to Sarat Pal. This sale is also said to be benami because the deed was executed in Akyab and a man said, whom the Subordinate nate Judge has disbelieved, that no money passed. Sarat Pal was a partner with Aparna in his business at Akyab. It appears that Sarat was a man of substance and that he was in a position to pay the price of the property. The mere fact that Sarat was a partner of Aparna cannot lead to the conclusion that Sarat was a mere benamidar; nor does it appear that the sale by Basanta in 1912 to Ruhidas was a sale to Aparna in the benami of Ruhidas. The first thing that would occur to one with reference to the allegation of this elaborate benami is there was no necessity for such a series of benami purchases when a benami purchase by one person would have sufficiently served its purpose. If the property had stood in the name of Jogendra and if it was the intention of Aparna to purchase the property at a revenue sale, Jogendra might have defaulted in payment some time

(8) A. I. R. 1923 Cal. 228.

between 1907 and 1913 and Aparna might have purchased the property in that interval. Instead of doing that, it is suggested that he asked Jogendra to execute a benami kabala in 1912 and Basanta to execute another benami kabala in favour of Ruhidas in 1911, and got a third kabala from Rajani in the name of Paresh Chowdhury. It seems to be a large assumption to make that all these transactions were benami in the absence of positive evidence or any circumstance which would lead to that clear inference. Suspicion is cast upon these transactions by one important circumstance. One Ram Lochan, a talukdar under the estate, who had deposited the revenue on two previous occasions in order to save his own taluk, asked for permission to deposit the revenue in this instance also, which permission was granted by the Collector on 1st May 1917. On 15th May 1913, however, a kabala was executed by Ram Lochan in favour of one Tripura of his taluk.

It may be conceded that Tripura was actually purchasing it in order to help Jogendra the executor of the estate of Aparna to purchase the property at the revenue sale although the learned Subordinate Judge has held otherwise. It is admitted by the learned advocate for the respondents that there would be nothing wrong in a third person who wants to purchase an estate at a revenue sale to buy off a talukdar who wanted to deposit the revenue in order to prevent the sale. If such a person then purchases the property himself at the revenue sale this does not amount to any fraud or underhand dealing; but it is argued that the plaintiff fights shy of the sale and instead of saying "yes, Tripura purchased the property for my interest", endeavours to prove that Tripura purchased the property four days before the revenue sale in his own interest. This method of hide and seek adds good ground for the inference that the whole transaction was an outcome of elaborate machinations which amount to fraud. The answer to this lies in the fact that the plaintiff himself was then quite an infant and was not aware what the executor had done; and it may be added that if the defendants thought it necessary to clear up the matter, they might have called Tripura as a witness and put the whole matter to him as to why he purchased the property only four days before the sale and then allowed the estate to be sold for arrears of revenue. I do not think that in the absence of any clear evidence that all the three recorded proprietors prior to the revenue sale were benamidars of Aparna, it can be held as a matter of fact that Aparna was the real owner of the property before the revenue sale. I, therefore, agree with the Subordinate Judge in the view he has taken on the question. It was urged on behalf of the defendants that Sarat, Ruhidas and Tripura are all alive and that the plaintiff has not called them as witnesses, and that it is a circumstance which goes against the bona fides of the plaintiff's case. It may, however, be pointed out that Sarat was cited as a witness for the defence. It does not appear that Sarat, Ruhidas and Tripura are now in any way under the influence of the plaintiff and it was quite open to the defendants to examine them and to establish the fact whether Aparna was really the owner and they were only the benamidars. This the defendants omitted to do.

There remains now to deal with the affidavit of the plaintiff on which great reliance was placed on behalf of the respondents. The plaintiff, it appears, brought a suit against the executor of his father's will, and in that suit he filed an affidavit which it must be admitted contains many strange and scurrilous allegations against the executor who also happened to be his maternal uncle. In answer to the allegation of the plaintiff that the executor had mismanaged the estate, the executor had stated in his affidavit that he had purchased this valuable estate for the plaintiff during the course of his management and that the charge of mismanagement was untenable. In para. 38 of plaintiff's affidavit in reply he says:

"My paternal property, Taraf Asad Masadkhan was purchased benami in the name of the executor. For better management the said Mahal was again put up to auction sale under Act 11 of 1859 and was purchased simply in the name of the executor. It is not a new property acquired by him. If he has appropriated the surplus sale proceeds of that auction sale, that amounts to criminal misappropriation."

It is urged on behalf of the respondents that this statement should be used against the plaintiff. Taken with all

the other circumstances it should be held that the allegation is true. The plaintiff, however, stated in his evidence that he made the statement at the instance of two persons, one Saroda Kripa Lala and a pleader named Mohim Chandra Guha. Saroda is a person who held certain taluks under the estate. In para. 30 of the plaintiff's affidavit, he charges the executor with making spiteful statements against the pleader Babu Mohim Chandra Guha ; and this affidavit in other particulars contains statements quite irrelevant against the moral character of the executor. It is quite clear that this plaintiff who was then about 18 or 19 years of age made his statements at the instigation of some person or other. It was made he says at the instance of Saroda. It was quite possible that it was the object of Saroda to get a statement from the plaintiff which would prevent him from annulling the taluk which Saroda had under the estate. No finding can be based upon this statement of the plaintiff under such circumstances. The Subordinate Judge is, therefore, right in holding that Aparna was neither the real owner of the property before the revenue sale, nor was there any conspiracy by his executor with the proprietors in order to bring about the sale of the property and to purchase it in order to avoid incumbrancers.

As there is no other ground upon which defendants can resist ejectment, as they have not been able to prove that the lands fell within any of the exceptions under S. 37, the plaintiff would be entitled to ejectment. But we are informed that the land has already been acquired during the pendency of the suit under the Land Acquisition Act. The question is now only with reference to the compensation money.

The plaintiff is entitled to a decree in this suit and also for mesne profits which should be assessed in proceedings subsequently under O. 20, R. 12, Civil P. C., that is, for three years before the date of the suit until the acquisition of the property in this case. The appeal and the suit is, therefore, decreed. The decree of the Subordinate Judge is affirmed only to this extent that the plaintiff's claim to cadastral survey plot 2312 should stand dismissed and the rest of his decree is set aside and a decree made in favour of the plaintiff. As the plaintiff has succeeded in the main portion of his claim, he will get his costs both in this Court as well as in the Court below.

Panton, J.—I agree.

V.B./R.K. *Suit decreed.*

* * A. I. R. 1930 Calcutta 78

B. B. GHOSE AND S. K. GHOSE, JJ.

Surendra Kumar—Appellant.

v.

Abhay Kumar Das and *others* — Respondents.

Appeal No. 280 of 1927, Decided on 18th July 1929, from original order of Offg. Second Sub-Judge, Sylhet, D/- 21st March 1927.

*** * Civil P. C., O. 21, R. 2—Joint decree for costs—Payment out of Court to some decree-holders—Application by others for entire amount is not maintainable and judgment-debtor is not protected for excess of share paid to other decree-holders.**

When there is a joint decree payment to one decree-holder does not amount to an acquittance by all the decree-holders. So where a joint decree for costs does not specify shares of the decree-holder inter se and the judgment-debtor pays some amount to some decree-holders out of the Court the application by others for entire amount is not maintainable. The Court should ascertain the shares of the decree-holders in execution proceedings, and the decree-holders receiving more than their due share of the decretal amount cannot certify the amount in excess and the judgment-debtor is not protected in respect of excess paid. 4 *C.L.R.* 70; 9 *Cal.* 831 and *A.I.R.* 1923 *All.* 494, *Rel. on.* [P 79 C 2]

Hemendra Kumar Das—for Appellant.

Priyanath Dutt, S. C. Talukdar and *Mahendra Kumar Ghose* — for Respondents.

B. B. Ghose, J.—One of sixteen decree-holders is the appellant in this case. All the decree-holders obtained a decree for costs against the judgment-debtors. The appellant applied for execution of the entire decree making the other decree-holders parties to his application under O. 21, R. 15, Civil P. C. The judgment-debtors appeared and they alleged that they had paid a certain sum of money to the other decree-holders as their shares of the decretal amount. The other decree-holders admitted that they had received that sum, which is said to be Rs. 575. The appellant contended that the other 15 decree-holders were not entitled to so much of the decretal amount in their shares and he asked the Court to decide what his share of the decretal amount was and to execute the decree as against the

judgment-debtors for that amount. The judgment-debtors deposited the balance of the decretal amount and they alleged that they had paid Rs. 575 bona fide to the other decree-holders and were depositing the balance of the decretal amount and therefore the appellant petitioner cannot pursue them further but if he is entitled to get more in his share than what has been deposited he can pursue his remedy against the other decree-holders.

The learned Subordinate Judge has accepted that plea and has allowed execution to proceed for the balance of the decretal amount after crediting the judgment-debtors for the amount certified as paid to the other decree-holders. The petitioning decree-holder appeals against that order and his contention is that the Court ought to have decided what his legitimate share was in the decretal amount and to allow him to execute the decree for his share as against the judgment-debtors. It seems to me that his contention is supported by a series of authorities. A judgment-debtor cannot claim to be exonerated from his liability to pay the actual amount due to a joint decree-holder for his share by payment of either the whole or a part of the decretal amount to some other of the joint decree-holders. The cases to which our attention has been drawn by the learned advocate for the appellant are *Mt. Bibee Budhun* v. *Mt. Hafezah* (1), *Tarruck Chunder* v. *Divendro Nath* (2) and *Umrao Beg* v. *Mukhtar Beg* (3). The principle which an be derived from these cases is that when there is a joint decree, payment to one decree-holder does not amount to an acquittance by all the decree-holders and this principle is reasonable having regard to the provisions of O. 21, R. 1, Civil P. C., under which a judgment-debtor can always pay the decretal amount into Court whose duty it is to execute the decree. If the judgment-debtor chooses to pay any one of the several decree-holders out of Court he seeks trouble for himself and cannot complain if he has to pay twice over. It is not sufficient for the judgment-debtor to say that a joint decree-holder may sue the other-decree-holder for recovery of his own share of the decretal amount, as the joint decree-holder can execute the decree for his own share of the decretal amount.

The order of the learned Subordinate Judge must, therefore, be set aside and the case sent back to the lower Court for an enquiry as to the share of the decretal amount due to the petitioning decree-holder. After that is found he will be entitled to execute the decree for the full amount due to him as against the judgment-debtors. If the judgment-debtors had paid more than what was due to the other decree-holders, that is their affair. If it is found that the appellant is entitled to execute the decree for a larger sum than the amount for which execution has been allowed by the lower Court he would be entitled to his costs of this appeal, otherwise each party will bear his own costs. We assess the hearing fee of this appeal at three gold mohurs.

S. K. Ghose, J.—I agree.

V.B./R.K. *Case remanded.*

(1) 4 C. L. R. 70.
(2) [1883] 9 Cal. 891=12 C. L. R. 566.
(3) A. I. R. 1923 All. 494=45 All. 401.

✻ A. I. R. 1930 Calcutta 79

CUMING AND MALLIK, JJ.

Rajani Kanta Nath Bhoumik — Defendant—Appellant.

v.

Ali Noaz and *others*—Plaintiffs—Respondents.

Appeal No. 2636 of 1926, Decided on 17th December 1928, from appellate decree of Sub-Judge, Tippera, D/- 28th July 1926.

✻ **Registration Act, S. 17 (b) — Document by usufructuary mortgagee admitting satisfaction and releasing property does not require registration.**

A document, by which a usufructuary mortgagee admits that his claim has been satisfied and releases the property to the possession of the mortgagor, does not require registration. [P 80 C 1, 2]

Birendrachandra Das—for Appellant.

Akhilchandra Datta — for Respondents.

Mallik, J.—The suit that has given rise to this appeal was one brought by a tenant for recovery of possession of some land from defendant 1, who is the landlord. The allegations on which the suit was brought were that the plaintiff held the land as a raiyat under defendant 1; that he gave a usufructuary mortgage of the property to the pro-forma defendants and subsequently in Agrahanyan,

1330 B. S., got back possession of his property on the whole amount of the mortgagee's dues being satisfied from the usufructs of the property and that the plaintiff was thereafter in possession of the property till 10th Baisakh, 1331, B. S., when he was dispossessed by his landlord, defendant 1. The plaintiff's claim was resisted by the landlord defendant on the allegation that there had been no usufructuary mortgage as alleged by the plaintiff, but that the transaction between the plaintiff and the pro forma defendant was an out and out sale, and that, as the plaintiff by that sale abandoned the holding without making any arrangement for payment of rent, the landlord took possession of the property as he was entitled to do. The Court of first instance believed the defendant's story of abandonment and dismissed the plaintiff's suit. On appeal, the lower appellate Court, holding that the transaction was an usufructuary mortgage and not an out and out sale, and, therefore there had been no abandonment, reversed the decision of the trial Court and gave a decree to the plaintiff. The defendant landlord has appealed to this Court.

The principal point that was taken before us, on behalf of the appellant, was that the lower appellate Court was wrong in law in admitting in evidence a certain document, Ex. (1), which was not admissible in evidence on the ground that the document was not registered. Ex. (1) is a document, whereby the usufructuary mortgagee admitted that his claim had been paid off and that he released the property to the plaintiff's mortgagor's possession. The contention on behalf of the appellant was that, under S. 17, Registration Act, registration of this document was compulsory and that, inasmuch as this document was not registered, it was under S. 49, Registration Act, inadmissible in evidence. I do not think this contention is sustainable. In the first place, it is to be observed that for the plaintiff mortgagor to get possession of his property, execution of a document Ex. (1) was not at all necessary. It is contended that by this document, Ex. (1) which purports to release the land to the possession of the plaintiff, the right of the mortgagee to remain in possession of the property was extinguished and, that being so the document under S. 17 (b) required registration. But when it appears, according to the mortgagee's own admission, that his dues were all fully paid off, the mortgagee had no longer any right to possess the land subsisting in him and, if there was no right subsisting, there was nothing that could be either transferred or extinguished. In this view of the matter. I am of opinion that Ex. (1) is a document which does not require registration under the Registration Act, and the learned Subordinate Judge was not wrong when he admitted it as evidence in the case.

Another point that was taken before us was that the learned Subordinate Judge had been wrong in law in relying on the recital in a judgment in a criminal case and in using that recital against the defendant. If the learned Subordinate Judge used the recital in this judgment of the criminal Court, he used it for the purpose of showing that the story of a usufructuary mortgage as set up by the plaintiff was not an afterthought. But before making any use of the recital in that way, the learned Subordinate Judge had, after a consideration of the evidence and circumstances of the case, come to a definite finding that the case was a case of mortgage or poshani and not an out and out sale. If the learned Subordinate Judge referred to the recital in the judgment in the criminal case, apparently he did so, not for the purpose of arriving at his finding on the point, but for the pūrpose of giving to it an additional strength as it were.

The third contention was that the lower appellate Court had not considered the presumption that would arise from the settlement papers in favour of the defendants as fully as it ought to have done. A perusal of the judgment of the lower appellate Court will show that the learned Subordinate Judge had the settlement papers before him, and he did consider the entries that were to be found in it.

All the points that were urged before us therefore, fail. The appeal is accordingly dismissed with costs.

Cuming, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 81

B. B. GHOSE AND BOSE, JJ.

Arun Chandra Sinha — Defendant 1— Appellant.

v.

Rahim Baksh Jahgirdar — Respondent.

Appeals Nos. 224 of 1923 and 185 of 1924, Decided on 23rd August 1928, from decree of Sub-Judge, Noakhali, D/- 31st May 1923.

(a) Bengal Regulation (8 of 1819), Preamble—Grant of patni with condition of rent being altered on increase of area or on diminution of area is not contrary to law.

The grant of a patni connotes the idea that the rent is fixed in perpetuity but there is no reason why a tenure should cease to be anything but a putni if there is a provision in the kabuliyat that the rent should be increased in a certain manner if the area of the mouza demised is found to be in excess of what was granted. That provision does not make the rent reserved variable. The result of that provision simply is that if there is a measurement, rent should be increased at a certain rate, and if that is done the same rate will continue in perpetuity. Besides, the enumeration of the elements of a patni in the preamble of Regulation 8 of 1819 does not exclude the idea of rent being altered either for increase of area or for diminution of area : *A. I. R.* 1925 *P. C.* 226 : 13 *B. L. R.* 408, *Rel. on.* [P 82 C 2]

(b) Landlord and Tenant — Covenant in kabuliyat containing steps for realization of dues—Landlord is not bound to adopt one and not other.

If in a kabuliyat all the steps which the landlord might take for realizing his dues are stated, he is not bound to take one and not the other. He has a choice and he can proceed in one of the many ways stated in the kabuliyat. [P 83 C 2]

(c) Bengal Regulation (8 of 1819), Ss. 8 and 10—Publication of original petition is not necessary.

Publication of the original petition filed by the zamindar is not a substantial portion of the process to be observed by the zamindar and its non-publication does not affect the validity of the sale : 14 *Cal.* 365 (*P. C.*) and 20 *Cal.* 86 (*P.C.*), *Rel. on.* [P 84 C 1,2]

Charuchandra Biswas and *Manindrakumar Basu*—for Appellant.

Jitendrakumar Sen Gupta and *Induprakash Chatterji* and *Promodekumar Ghosh*— for Respondent.

Surjyakumar Aich — for Deputy Registrar.

B. B. Ghose, J.—These two appeals arise out of two suits brought by the plaintiffs as patnidars to set aside the sales of two patnis under Regulation 8 of 1819. The Subordinate Judge set aside the sales of both the patnis and the zamindar defendant has preferred these appeals. Both these suits were governed by the same judgment and the facts with regard to both were the same. The arguments addressed with regard to both these appeals before us are the same and one judgment will govern both these appeals.

The plea of the plaintiffs was principally that the tenures were not patnis so as to invoke the provisions of Regulation 8 of 1819 for holding a sale under that regulation ; secondly, that the requisite notices were not served as provided in S. 8, Regulation 8 of 1819. The sales in these cases were mid-year sales for the dues on account of the patnis for the first half year. The Subordinate Judge held that both the tenures were really patnis and the sale under Regulation 8 is, therefore, not incompetent. He also held that there was publication of the usual notices in the zamindar's kacheri and on the defaulters' land before 15th Kartik prior to the sale. There was another objection that the publication in the Collector's kacheri was after 15th Kartik, therefore, the sale was invalid on that ground. This argument the Subordinate Judge rejected on the authority of the case of *Niamat Ullah* v. *Forbes* (1). The Subordinate Judge, however, held that the sale was bad because there was no publication of the petition of the zamindar in the Collector's kacheri and, secondly, that the notice which was stuck up in the Collector's kacheri did not specify the informations required under S. 8, as the only information that was conveyed by the notice was the date of the sale. Ground 3 on which the Subordinate Judge held that the sale was bad was that the notice stuck up in the Collector's kacheri was not kept there up to the date of the sale as required by Ss. 8 and 10, Regulation 8 of 1819. He held that the notices published on 12th November 1920 were returned to the office on the following day, that is about three days before the date of sale. He held that apart from Ex. B, that is the return of the peon, who stuck up the notices in the Collector's kacheri, there was no other evidence to show how long the notice was kept stuck up on the Collector's notice board. On these

(1) [1898] 2 C. W. N. 459.

grounds the Subordinate Judge set aside the patni sales and decreed the suits.

On behalf of the zemindar defendant, it has been argued before us that the Subordinate Judge is in error on all the three points on which he held that the notice published in the kacheri of the Collector was bad. On behalf of the plaintiffs-respondents, it was argued that the Subordinate Judge was right on all these points, but he was wrong in holding that the tenures in the case were patni tenures and he ought to have held that Regulation 8 of 1819 did not apply to these tenures and, therefore, the sales are bad. On this ground the judgment and decree of the Subordinate Judge were sought to be supported by the plaintiffs-respondents in addition to the grounds which had been found in their favour by the Subordinate Judge.

I shall take up, first, the point which the respondents urge was erroneously decided by the Subordinate Judge, as it is a pure question of law based on the construction of the kabuliyats. The Subordinate Judge decided this question in issue 7 in his judgment. He held that there was no doubt that the properties in question were patnis and he referred to the dowl kabuliyats. One argument was addressed before him which was also addressed before us and that refers to only one of the tenures which was the subject matter of suit No. 1083, that the original rent had been increased to some extent and, therefore, the tenure was not saleable for the excess rent under Regulation 8 of 1819. The contention which was very elaborately argued before us on behalf of the patnidars, shortly stated, comes to this, that in the dowl kabuliyats it is stated that a certain area of land was included in the patni. It was, however, stipulated that if, on measurement, it was found that the area of the patnis exceeded the area mentioned in the kabuliyats, for that excess area the patnidars would be bound to pay rent at the rate payable by khodkast raiyats for lands throughout the pargana. It is contended that this provision shows that the rent of the land was not fixed in perpetuity and, therefore, although the tenures are described as patnis in the dowl kabuliyats executed by the original lessees, the tenures are not really patnis as described in Regulation 8 of 1819; and although there are provisions in both the kabuliyats that the landlord would be entitled to realize arrears of rent by having recourse to Regulation 8 of 1819 amongst other reliefs under different regulations, as a matter of fact the zemindar would not be entitled to sell the tenures under the provisions of Regulation 8 of 1819. It is necessary here to state that in the dowl kabuliyat dated 17th Falgun, 1263 corresponding to 27th February 1857 (Ex. A-1) the provisions entitling the landlord to have recourse to Regulation 8 of 1819 for recovery of arrears appearing in the original document has by mistake been omitted from the translation of the document. The first question, therefore, for consideration is whether, notwithstanding the provision referred to, the agreement that, if upon fresh measurement the quantity of land is found to be in excess, separate rent should be paid, renders the tenures anything other than patnis. It is true that a grant of a patni connotes the idea that the rent is fixed in perpetuity, but I do not see why a tenure should cease to be anything but a patni if there is a provision that the rent should be increased in a certain manner if the area of the mouza demised is found to be in excess of what was granted. That provision does not make the rent reserved variable. The result of of that provision simply is that if there is a measurement, rent should be increased at a certain rate, and if that is done the same rate will continue in perpetuity. The increase of rent for increase of area does not mean variation of the rent. Besides, the enumeration of the elements of a patni in the preamble of Regulation 8 of 1819 does not exclude the idea of the rent being altered either for increase of area or for diminution of area.

It is settled law that if the area is diminished of a patni mahal by reason of acquisition of land for public purposes, the patnidar would be entitled to diminution of the rent. Similarly, it is notorious that additional rent has been imposed upon patnidars where chaukidari chakran lands have been resumed within the patni and there has been fresh assessment of the land to which the patnidars were entitled under the patni grant, but for which they have been held liable to pay excess rent for being

put into possession of the resumed chaukidari chakran lands. In such cases it has never been suggested that the patni ceases to be a patni taluk within the meaning of Regulation 8 of 1819. As to the liability of the patnidars to pay additional rent for chaukidari chakran lands:see the case of *Bhupendra Narain Singh* v. *Narapat Singh* (2). It is hardly necessary to repeat, as the Subordinate Judge has pointed out, that the kabuliyats described both the tenures as patnis. It was stated in the case of *Brindabun Chunder* v. *Brindabun Chunder* (3) :

"In the preamble of that Regulation (8 of 1819) which, as contended for by the learned counsel, it must be admitted, is not an enactment but merely a recital, it is said, 'By the terms of the engagements interchanged it is, amongst other stipulations, provided that, in case of an arrear occurring, the tenure may be brought to sale by the zamindar, and if the sale do not yield a sufficient amount to make good the balance of rent at the time due, the remaining property of the defaulter shall be answerable for the demand. These tenures have usually been denominated patni taluks'. Their Lordships are of opinion that under the description 'patni taluk' and 'darpatni taluk' it must be prima facie intended that the tenure called a patni tenure was a tenure transferable by sale, and upon the creation of which it was stipulated by the terms of the engagements interchanged that, in case of an arrear occurring, the estate might be brought to sale. If so, according to the terms of Regulation 8 of 1819, the tenure might not only be brought to sale, but it might be sold free from incumbrances."

In that case no kabuliyat or patta was produced and there was no reference to Regn. 8 in the contract of lease. In this case in both the kabuliyats it is clearly stated that the landlord may have recourse to the provisions of Regn. 8 of 1819. The argument, therefore, that these tenures are not patnis so as to come within the operation of Regn.8 of 1819 must fail, and, as held by the Subordinate Judge, the additional rent assessed can also be recovered under the provisions of that regulation.

It is next contended that in the kabuliyats there is a provision that, in case of any arrears, the zemindar would be entitled to take possession of the taluk and realize the arrears by appointing a Krok Tehsildar. That is a condition precedent to a sale under Regn.8 of 1819. I do not think there is any substance in that argument. All the steps which the landlord might take for realising his dues are stated in the kabuliyat. He is not bound to take one and not the other. He might proceed under one or the other of the many ways stated in the kabuliyat for the recovery of his arrears. In my opinion, the Subordinate Judge was right in holding that the zemindar was competent to have the tenure sold under Regn. 8 of 1819.

I shall next proceed to discuss the questions found in favour of the plaintiffs by the Subordinate Judge. At the outset it should be stated that it does not appear that there is any evidence in support of the Subordinate Judge's finding that the notice was not kept stuck up in the Collectorate up to the date of the sale as required by Ss. 8 and 10 of the Regulation. The defendant has given evidence that the notice was there up to the 1st Agrahayan, that is the date of the sale. That evidence has been given amongst others by defendant 2 and there is no cross-examination on that point. The Subordinate Judge has held that the notice was returned to the office on the following day after its publication on 12th November, that is, about three days before the date of sale. This finding is not supported by any evidence whatsoever. The third objection stated by the Subordinate Judge as to the sufficiency of the publication of the notice at the Collectorate is, therefore, of no substance.

Then about the second objection, and it was that the notice did not specify any information other than the date of the sale. This also is erroneous on the face of it, because the notice (Ex. E) which according to the evidence is a copy of what was published in the Collectorate, distinctly says:

"if the defaulters fail to pay the arrears given in the schedule or the 12 annas demand up to Kartik, etc., the mahals in arrears will be sold at auction at the Noakhali Collectorate on the date fixed;"

and in the schedule, the name of the mahal and the arrears are mentioned. The second objection, therefore, is without any substance.

There remains the question with reference to the first objection. It was contended on behalf of the plaintiffs-respondents that the Subordinate Judge held that the original petition and notice

(2) A. I. R. 1925 P. C. 226 = 53 Cal. 6 = 52 I. A. 355 (P.C.).
(3) [1874] 13 B. L. R. 403=1 I. A. 178 = 21 W. R. 324=3 Sar. 365 (P.C.).

were not stuck up but some copies of them. That is not the meaning of what I understand the Subordinate Judge to have said. This contention was sought to be supported by the translation of Ex. B, which is the return of the peon for service of notice. There the words are "by affixing seven copies of the notice." The Bengali expression may be translated into "seven sets of notice." It seems to me that the idea of copies being published arises from the fact that the Subordinate Judge has cited the case of *Bejoy Chand* v. *Atulya Charan* (4), in support of his finding. But I think the Subordinate Judge really cited that case in support of his view that the petition of the zemindar was not published and that vitiated the sale. He states that:

"Ex. B, the return, does not disclose the publication of the petition in question; nor is there other evidence of that publication if any. The sale, therefore, cannot stand on this ground."

It is contended by the appellant that the Subordinate Judge is not right in saying that the petition was not stuck up at the Collector's kacheri. He refers to Ex. J, the notice signed by the Collector. It is stated there that an application having been filed by the zemindar under Regn.8 of 1819, owing to the rents of the patni taluk mentioned in the petition herein given and comprised within the zemindari, and so forth. From that it is argued that the petition was really stuck up in the Collectorate. This statement in the notice, with the signature of the Collector, no doubt raises a presumption, in favour of the petition having been stuck up with the notice. But it is contended on the authority of the case of *Ahsanulla Khan* v. *Hurri Churn* (5) that it is not essential that the petition should be published. The learned Judges made this observation at p. 480:

"It was further urged by Mr. Woodroffe that non-compliance with the provisions of the Regulation which require that the petition shall be stuck up in some conspicuous part of the kacheri was fatal to those proceedings. We think, to us the words of the Privy Council in the case of *Maharani of Burdwan* v. *Kishna Kamini Dasi* (6), that this publication of the petition is not a substantial portion of the process to be observed by the zamindar. No injury could result to the patnidar or any one holding under him by the non-publication of this petition, which, as I have already pointed out, is only the method prescribed by the Regulation for putting the executive machinery in force."

This decision was affirmed by Privy Council in the case of *Ahsanulla Khan* v. *Hari Charan* (7), and no observation was made by the Privy Couucil dissenting from the view expressed above. It seems to me, therefore, that the appellant is right in his contention that the non-publication of the petition is not fatal. It is no doubt true that the burden of proving that all the requisites of the regulation have been complied with in order to sustain the sale is upon the zamindar. In this case, the zamindar has given evidence that all the requisite notices were served. His witness 7 proved that the notices as well as the Lata istahar, which means the list of the patni mahals in serial numbers, was published along with the notice, and it was Abdul Khaleq who did it. The flaw in the evidence on behalf of the appellant is that Abdul Khaleq has not been examined and no explanation is given why he was not examined. Probably he was not available at the time. But the Subordinate Judge has allowed evidence to go in for the purpose of proving his signature on Ex. B. There is no counter evidence on behalf of the plaintiffs to disprove the evidence given on behalf of the zamindar. Under such circumstance, it is difficult to hold that the evidence that is given on behalf of the defendant should not be accepted.

On these grounds, in my opinion, the judgment and decree of the Subordinate Judge in both the cases are set aside and the suits dismissed with costs in both Courts, to be payable by the plaintiffs to defendant 1, zamindar. Defendant 2, the auction-purchaser in each case, will bear his own costs in both Courts.

The auction-purchaser, who is a respondent in appeal No. 224, preferred a cross-objection, because the Subordinate Judge, while indemnifying him in every manner, did not allow him any costs. But as, according to our view, the sales stand, the auction purchaser is not entitled to anything by way of indemnity. The cross-objection is dismissed without costs.

(4) [1905] 32 Cal. 953=3 C.L.J. 46.
(5) [1890] 17 Cal. 474.
(6) [1886] 14 Cal. 365=14 I. A. 30=4 Sar. 772 (P.C.).
(7) [1892] 20 Cal. 86=19 I.A. 191=6 Sar. 252 (P.C.).

We assess the hearing fee in appeal No. 185 at three gold mohurs.

Bose. J.—I agree.

V.B./R.K. *Appeal allowed.*

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B. B. GHOSE AND BOSE, JJ.

Gangaya Narottam Shastry—Plaintiff—Appellant.

v.

Ardeshar Dinashaw — Defendant—Respondent.

Appeal No. 161 of 1927, Decided on 30th May 1929, against original decree of Sub-Judge, Fourth Court, Alipur, 24-Parganas, D/- 21st May 1927.

Civil P. C., O. 2, R. 1—Suit on mortgage—Mortgagee also acting as managing agent of mortgagor's business—Mortgagor cannot in mortgage suit claim account of the agency—If mortgagee however received lump sum of money mortgagor can claim credit for that sum.

A mortgagor cannot in a simple mortgage suit claim for an elaborate account of the managing agency of the mortgagee of his business and say that the mortgagee has realized a certain amount of money on account of his business and that he (mortgagee), therefore, is bound to render an account of moneys realized as such agent and to credit that amount to his mortgage debt. Such a claim is foreign to a simple mortgage suit, and cannot be brought by way of a counter claim in a suit on mortgage. No doubt if the mortgagor can establish that the mortgagee received a lump sum of money from him or the goods for which he is indebted for a certain sum of money which according to their agreement ought to have been credited to the mortgage-bond, he can certainly maintain that position in a simple mortgage suit. [P 85 C 2, P 86 C 1]

S. C. Bose, Nagendra Nath Bose, Abinash Chandra Ghose and *Prafulla Chandra Ghosh*—for Appellant.

B. B. Ghose, J.—This is an appeal arising out of a suit on a mortgage. The learned Subordinate Judge has in this suit on a simple mortgage entered into an elaborate discussion as to the matter of an agreement previous to the mortgage between the parties, by which the plaintiff acted as the managing agent of some business carried on by the defendant; and by entering into an elaborate discussion as to the accounts of the managing agency the learned Subordinate Judge held that the suit on the mortgage was not maintainable. The mortgage-deed is to be found at p. 59, Vol. "A" of the paper book. It is a mortgage-bond for money advanced and for future advances to be made to the defendant up to a certain amount for the purpose of carrying on the business. The money actually advanced before the date of the mortgage was Rs. 14,400 odd, and after that date the future advances, according to the plaintiff's evidence, was Rs. 10,700, although the plaintiff stated in his plaint that it was something in excess of that amount. The defendant in his written statement admitted the execution of the bond. He has stated that the total advanced on the bond was Rs. 24,699-10-0. He further stated that Rs. 16,27-6-8 had been realized by the plaintiff in satisfaction of the mortgage-bond. Thereupon the defendant admitted that Rs. 8,423 for the principal and Rs. 900 for the interest was due to the plaintiff.

The learned Subordinate Judge after going into an elaborate discussion as to the account of the managing agency of the plaintiff gave a simple money decree for Rs. 3,821 to the plaintiff after setting off a cross claim of the defendant to the extent of Rs. 5,000. I cannot understand the decree made by the learned Subordinate Judge. He has directed the defendant to pay court-fees on Rs. 4,000. At the lowest he might have made a decree in favour of the plaintiff for the amount admitted by the defendant himself. But curiously enough he did not do even that. It seems that the learned Subordinate Judge is not familiar with mortgages for future advances, as he states in his judgment that if the suit had been for Rs. 14,400 on the mortgage-bond, he would have held that the suit was maintainable; but as it was for the amount actually advanced before the bond and for the amount advanced subsequently, he was under the impression that the suit was not maintainable in the form in which it was brought. This opinion, it is hardly necessary for me to say, cannot be supported. The real question is whether the defendant can in a simple mortgage suit claim for an elaborate account of the managing agency of the plaintiff of his business and say that the plaintiff had realized a certain amount of money on account of his business and that he, therefore, was bound to render an account of moneys realized as such agent and to credit that amount to his mortgage-debt.

In my opinion, that is a claim which is foreign to a simple mortgage suit. No doubt if the defendant can establish that the plaintiff received a lump sum of money from him or the goods for which he was indebted for a certain sum of money which according to their agreement ought to have been credited to the mortgage-bond, he could certainly maintain that position and that position can be maintained in my opinion with regard to one item of payment, that is, to the extent of of Rs. 4,358-10-3. The plaintiff obtained goods from the defendant's firm to the extent of that value. Although the plaintiff alleged that the price of the goods was set off against a different debt of the defendant, that different debt has not been proved and the learned Subordinate Judge has not accepted the story. This sum of money, therefore, must be deducted from the principal amount claimed. The learned advocate for the plaintiff accepts the principal amount as stated by the defendant in his written statement, that is, Rs. 24,699-10-9.

The next item with regard to which the defendant claimed credit is with regard to Rs. 3,182, which was paid by the E. B. Ry. administration for goods supplied to it. It is stated that it should be credited against the mortgage debt. The plaintiff on the other hand states that as the managing agent he realized that cheque, and he shows in the account book kept for the business that this sum was credited in the books for the defendant's business. It is said that the bills for the goods were first pledged with the Central Bank and money received on eredit. That amount was credited to the defendant's business accounts. Then when the cheque was received, that was credited to the business account and the debt due to the Central Bank was paid off. The learned Subordinate Judge made some remarks about the cash book. But it is difficult in these present proceedings to go into an account with regard to the managing agency of the plaintiff. If the defendant has any claim against the plaintiff with regard to his managing agency he is entitled to sue the plaintiff for that in proper proceedings. It cannot be done by way of a countar claim in a suit on a mortgage.

With regard to item 3 which the defendant wanted to have credited to the plaintiff's account, that is Rs. 8,000 odd the evidence is conflicting. The plaintiff admits that he realized as managing agent from different customers Rs. 6,000 odd. He says, however, that the amount was credited in the cash book. The learned Subordinate Judge found that he realized another sum of Rs. 1,000 from one Mr. Young. This amount, he found, the plaintiff had not credited in the defendant's account. This also is a matter for being taken into consideration as regards the liability of the plaintiff to the defendant for his managing agency and these matters are quite foreign in a simple suit on a mortgage.

The result, therefore, is that the decree of the learned Subordinate Judge should be modified and a decree should be made in favour of the plaintiff for Rs. 24,699 as principal minus Rs. 4,358, that is, Rs. 20,341 with interest at the bond rate of 10 per cent per annum from the last date of the advance, that is March 1925 till the date of realization. The decree which the learned Subordinate Judge has made to the extent of Rs. 5,000 for damages against the plaintiff in favour of the defendant must also be set aside and the defendant must be relegated to a separate suit for that purpose if he has got a grievance. The direction of the learned Subordinate Judge on the defendant to pay court-fees on Rs. 4,000 must also be set aside. The plaintiff is entitled to the principal, interest and costs on his mortgage. The usual preliminary mortgage decree will be prepared. The date of payment will be fixed at three months from this date, after which the total amount will bear interest at the rate of six per cent per annum. The bond rate of interest will run up to the date fixed for payment.

Bose, J.—I agree.

V.S./R.K. *Appeal allowed.*

A. I R. 1930 Calcutta 86

B. B. GHOSE AND BOSE, JJ.

Neckbar— Judgment-debtor — Appellant.

v.

Prakash Nag Choudhari — Decree-holder—Respondent.

Appeal No. 504 of 1927, Decided on 27th July 1928, from appellate order of Sub-Judge, Tippera, D/- 29th August 1927.

(a) Limitation Act, Art. 180—Time for application for delivery of possession in case of auction purchaser begins to run from date of confirmation of sale.

Period of three years under Art. 180 governing the application of the auction purchaser for delivery of possession of property purchased is to be reckoned from the date of the confirmation of sale under O. 21, R. 92 and not from that of the final disposal of the application of judgment-debtor under O. 21, R. 90: 12 *M. I. A.* 244 (*P.C.*), and 23 *Cal.* 775 (*P.C.*) *Dist.* 43 *Mad.* 185 (*F. B.*), *Dist.* [P 89 C 2]

(b) Civil P. C., O. 21, R. 95 — Purchaser can apply for delivery of possession in spite of judgment-debtor's application to set aside sale.

The mere fact that the judgment-debtor has made an application for setting aside the sale does not prevent the purchaser from making his application for delivery of possession. [P 89 C 1]

(c) Limitation Act, Art. 180— Order confirming sale cannot be said to be ineffective so long as it is not set aside.

If for some reason or other, that is by operation of S. 18, Lim. Act, or for some other reason the judgment-debtor prays for time for making an application for setting aside the sale being extended, the order confirming the sale which is already made cannot be said to be ineffective. That order should be considered to be effective so long as it is not set aside; 43 *Mad.* 185 (*Oldfield, J.*), *Foll.* [P 89 C 2]

Akhilchandra Datta and *Shyama Prasanna Deb*—for Appellant.

Jogesh Chandra Roy and *Kiran Mohan Sarkar*—for Respondent.

B. B. Ghose, J.—This is an appeal by the judgment-debtor against the order of the Subordinate Judge affirming that of the Munsiff by which he rejected the objection of the judgment-debtor that the application made by the decree-holder for delivery of possession under O. 21, R. 95 of a certain property which was in the occupancy of the judgment-debtor and which the decree-holder had purchased in execution of his decree was barred by limitation. The sale was held on 19th May 1922. It was confirmed on 23rd June 1922. On 18th June 1925 an application was made by the judgment-debtor to set aside the sale. That application was dismissed on 29th April 1926 by the trial Court. The judgment-debtor appealed against that decision and that appeal was also dismissed on 15th September 1926. The decree-holder made the application for delivery of possession on 28th February 1927. The objection of the judgment-debtor is that this application is barred by limitation. Both Courts have answered the question in the negative and have allowed the application of the decree-holder.

There is no question that Art. 180, Sch. 1, Lim. Act, applies to such an application as this. The question is when the period of limitation begins to run. The words in the third column of the Limitation Act are "when the sale becomes absolute." The contention on behalf of the appellant is that time runs from 23rd June 1922 when the sale became absolute under the provisions of O. 21, R. 92. If that is so, then the application, which had been made nearly five years after that date is clearly barred by limitation. It is also contended as a subsidiary proposition that even if it be held that the right to apply for delivery of possession was suspended from the date when the judgment-debtor made his application for setting aside the sale on 18th June 1925 till the date of the final disposal of his application by the appellate Court, even then the period of three years had expired before 28th February 1927, and in any view of the case the application is barred by limitation. The learned Subordinate Judge has held that the period commenced from the final disposal of the application for setting aside the sale made by the judgment-debtor, that is, on 15th September 1926, and therefore the application is within time. The learned Subordinate Judge relies upon the Full Bench case of the Madras High Court *Muthu Korakkai Chetty* v. *Madar Ammal* (1) and in particular the observations made in the judgment of the Officiating Chief Justice, Sir Abdur Rahim. In that case the facts were similar to the present case. The question which was referred to the Full Bench for answer was:

"whether the existence of the cause of action for an application for delivery of possession to which Art. 180, Sch. 1, Lim. Act, applies is suspended during the pendency of proceedings for setting aside of the sale."

In answering that question the Officiating Chief Justice made the observation which was assented to by the majority of the Judges that the period of limitation should be computed from the date of the order disallowing the petition for setting aside the sale on the ground of fraud and not from the date of the first confirmation. Oldfield, J. was of the contrary opinion and he held that the

(1) [1920] 43 Mad. 185=54 I. C. 66=38 M. L. J. 1 (F.B.).

answer should be that when once a cause of action has arisen it is not suspended by later events. Sadasiva Ayyar, J. held that the cause of action was suspended during the interval of the pendency of the application for setting aside the sale.

On behalf of the respondent it is urged very forcibly that the whole cause of action should be held to be suspended up to 15th September 1926. Reference has been made to the case of *Surno Moyee* v. *Shooshee Mokhee Burmonia* (2). The question in that case, however, was quite different from the present one. There the zamindar sold a patni under Regn. 8 of 1819 for arrears of rent. The patnidar brought a suit for settting aside the sale. That was allowed after a good deal of litigation when the patnidars who had been dispossessed by the purchasers were restored to possession with mesne profits to be paid by the purchasers. After the restoration, the zemindar brought a suit for rent for the period during which these patnidars were out of possession. It was held by the Judicial Committee that the cause of action accrued at the date when the auction sale was set aside and limitation should run from that date. It was held that when the purchasers were in possession and the old patnidars were out of possession by virtue of the sale under Regn. 8 of 1819, the landlord had no cause of action as she was in the position of a person whose claim had been satisfied. It is, however, unnecessary to discuss the question as regards the suspension of the period of limitation which has been decided in some cases by the Privy Council. The cases fall under two classes; where there is suspension of the running of the time under certain circumstances and where the cause of action has arisen afresh at a certain time. The case on which the respondent very strongly relies is that of *Baijnath Sahai* v. *Ramgut Singh* (3).

In that case the question was whether a suit brought by a person for setting aside a revenue sale was barred under Art. 12, Sch. 1, Lim. Act, The facts shortly stated were these: The revenue sale was held on 24th September 1882. It purported to have been confirmed by the Commissioner on 25th January 1884 who refused the petition of the owner for setting aside the sale. The plaintiff then being dissatisfied with the order of the Commissioner made an application to the Board of Revenue. The Board of Revenue set aside the order of the Commissioner confirming the sale on 12th August 1884 and sent back the proceedings before the Collector. The result was that the order of the Collector confirming the sale on 25th January 1884 was discharged and the sale remained unconfirmed. The Collector on receiving the proceedings back refused to confirm the sale. There was an appeal again to the Commissioner who held that he had no jurisdiction to entertain the appeal. Then the defendant in the suit appealed again to the Board of Revenue, and on that occasion the Board of Revenue reversed their previous judgment holding that everything that had been done by them was without jurisdiction. They discharged their previous order and they also discharged the subsequent order of the Collector, the result of which was that they confirmed the order of the Commissioner confirming the sale which was passed on 25th January 1884. This order was made on 21st August 1886 and from that date the order of the Commissioner of 25th January 1884 became an operative order. Upon these facts, their Lordships held that

> "there was no final conclusive and definitive order confirming the sale while the question whether the sale should be confirmed was in litigation, or until the order of the Commissioner of 25th January 1884 became definitive and operative by the final judgment of the Board of Revenue on 21st August 1886 or (in other words) that for the purpose of the law of limitation there was no final or definitive confirmation of the sale until that date."

Strong reliance has been placed upon these words, and it is contended that there was no final or definitive confirmation of the sale in this case until the application of the judgment-debtor to set aside the sale was dismissed finally in September 1926. Now the difference between the case of *Baijnath Sahai* v. *Ramgut Singh* (1) and this case is that in *Baijnath Sahai's* case (1) the order which the plaintiff wanted to set aside by his suit was actually set aside by the Board of Revenue, and it was, after vicissitudes of fortune, that the order was finally restored on 21st

(2) [1868] 12 M. I. A. 244=11 W. R. 5=2 B. L. R. 10 (P.C.).
(3) [1896] 23 Cal. 775=23 I. A. 45=7 Sar. 1 (P. C.).

August 1886. Under those circumstances it seems to me that their Lordships held that the plaintiff could not bring a suit for setting aside the order confirming the sale of January 1884 before August 1886. That order was really not in existence in the interval, it having been set aside by the Board of Revenue in August 1884. To my mind that is the distinction between that case and and the present case, that in the present case the order confirming the sale was never set aside but remained an effective order throughout. The sale became absolute, as I have already stated, on 23rd June 1922. Up to 18th June 1925 nothing happened and in the ordinary course the application for delivery of possession would have been barred after the lapse of about five days if the judgment-debtor had not made any application for setting aside the sale. The mere fact that the judgment-debtor had made such an application did not prevent the decree-holder from making his application for delivery of possession. In *Baijnath Sahai's* case (1) when there was no order confirming the sale in existence the plaintiff could not bring a suit for setting aside the sale. Here the decree-holder could always make his application for delivery of possession, and I do not see any reason why the provisions of Art. 180 should not be given effect to.

It is, however, contended on behalf of the respondent that under R. 92, O. 21, the Court can make an order confirming the sale only when no application is made or where such application is made and disallowed and thereupon the sale becomes absolute. It is urged that in the present case although the Court made an order confirming the sale which had the effect of making the sale absolute still an application was made under R. 90 and therefore the order which was made under R. 92 was not an effective order. The answer to that contention seems to me that the meaning of that rule is that when no such appplication is made under the ordinary rules of limitation, the order confirming the sale should be made. Art. 166 gives the period of 30 days for making such an application, and when no application is made within that period, the Court has to make the order under R. 92. I do not think that, if for some reason or other, that is by the operation of S. 18, Lim. Act. or for some other reason, the judgment-debtor prays for the time for making the application for setting aside the sale being exteded, the order which has already been made confirming the sale should be considered as ineffective. That order should be considered to be effective so long as it is not set aside. With very great respect I am unable to agree with the opinion of the majority of the Judges in the case of *Muthu Kerakkai Chetty* (1) which was not really an answer .to the question referred to the Full Bench. It is not necessary for me to decide in this case whether the period of limitation was suspended during the pendency of the hearing of the application of the judgment-debtor for setting aside the sale, for assuming that to be so the present application would be barred. In my opinion, the period of limitation in this case commenced to run from 23rd June 1922.

On all these grounds in my opinion the application made by the decree-holder is barred by limitation. The appeal is allowed and the application of the decree-holder is dismissed with costs in all Courts. The hearing fee is assessed at three gold mohurs,

Bose, J.—I agree.

V.B./R.K. *Appeal allowed.*

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* A. I. R. 1930 Calcutta 89

B. B. GHOSE AND BOSE, JJ.

Sarat Chandra Rakshit—Appellant.

v.

Subashini Debi—Respondent.

Appeal No. 8 of 1927, Decided on 17th August 1928, against original order of Sub.-Judge, Khulna, D/- 11th September 1926.

*** (a) Civil P. C., S. 2 (2)—Order for mesne profits by way of restitution consequent upon setting aside of sale even though sum has not been worked out, is decree.**

An order directing the decree-holder purchaser to pay mesne profits by way of restitution consequent upon setting aside of the sale is appealable even though the amount has not been worked out. It determines the rights of the parties finally with regard to matter in question and so it falls within the definition of decree under S. 2 of the Code : 15 *Bom.* 125 and 17 *All.* 112, *Rel. on*; 15 *C. L. J.* 187, *Dist.* [P 91 C 1]

(b) Civil P. C., S. 144—Decree must be reversal decree.

Section 144 does not apply by way of entitling the party to claim restitution unless the

decree on which the restitution is claimed is a reversal decree. [P 91 C 1]

(c) Civil P. C., S. 144—Decree-holder purchasing property in suit at sale—Sale confirmed during pendency of appeal by judgment-debtor—Possession granted to decree-holder—Appeal compromised—Decree-holder agreeing to give possession on receipt of first instalment from judgment.debtor—Instalment paid but possession not transferred—Application by judgment-debtor for mesne profits from date of delivery of possession by way of restitution—Held that mesne profits could not be granted from date of delivery of possession.

While an appeal preferred by the judgment-debtor was pending before the High Court the sale of the property in dispute was confirmed and the decree-holder purchaser took over the delivery of possession of the property. The appeal was compromised and a consent order was passed directing the decree-holder to give the delivery of possession back to the judgment-debtor on payment of the first instalment on a fixed date. The judgment-debtor paid the instalment but did not get possession on the specified date and so he filed an application for possession and mesne profits from the date of the delivery of possession.

Held : (1) that up to the date of the payment of the first instalment the possession of the decree-holder was not that of a trespasser, (2) that the order confirming the sale was not reversed and that the judgment-debtor was not entitled to any mesne profits from date of possession by decree-holder : 15 *C. L. J.* 187, *Dist.* [P 92 C 1]

Sarat Chandra Ray Chaudhuri and *Gourmohan Datta*—for Appellant.

Naresh Chandra Sen Gupta and *Jatindra Mohan Choudhuri*—for Respondent.

B. B. Ghose, J.—This is an appeal on behalf of the decree-holder, against the order of the Subordinate Judge declaring that he is liable for mesne profits for a certain period commencing from 22nd January 1923, to the date of the application which was 25th March 1926. The question arises in this way : The decree-holder obtained a decree for arrears of rent with regard to the property in question in the year 1920. The decree was put into execution for the whole amount which was something like nine thousand rupees and the tenure was purchased by the decree-holder at the execution sale on 7th November 1921. The judgment-debtors applied for setting aside the sale and that application was dismissed on 27th May 1922, by the trial Court. The sale was subsequently confirmed and symbolical possession is alleged to have been taken by the decree-holder on 22nd January 1923. From the order of the trial Court dismissing the application for setting aside the sale an appeal was taken to this Court by the judgment-debtors and that appeal was settled by compromise between the parties. The terms of the compromise were that the sale should be set aside on condition that the judgment-debtors deposit in Court the sum of two thousand rupees in April 1925 and the balance of the decretal amount be paid by them in four equal monthly instalments on the first day of every ensuing month, and in default of the first payment being made on 14th April 1925, or of any of the four equal ensuing monthly instalments, the sale was to stand. On payment of the first instalment possession was to be given to the judgment-debtors and the judgment-debtors were prevented from making any permanent settlement without the consent of the decree-holder. In March 1926, the judgment-debtors made an application purporting to have been made under Ss. 144 and 151, Civil P. C., asking for restitution with the mesne profits, which they said they were entitled to get from the decree-holder for his not having delivered possession to the judgment-debtors. The decree-holder took his stand upon the fact that the judgment-debtors were not entitled to any mesne profits, and he further alleged that he had never been in actual possession of the land in question. The Subordinate Judge has held that the decree-holder is liable for mesne profits by way of restitution consequent to the setting aside of the sale under the provisions of S. 144 of the Code. The judgment-debtors claimed about seventy-five thousand rupees per year by way of mesne profits. On the face of it, it seems to be an extraordinarily inflated claim having regard to the fact that the rent reserved for the tenure is only 1,800 rupees which these judgment-debtors had not been able to pay, and for which default the decree was obtained by the decree-holder. From the decision of the Subordinate Judge, the decree-holder has preferred this appeal.

It is contended on behalf of the judgment-debtors respondents that the appeal is incompetent. If it is an order under S. 144 of the Code, it is a decree and from that order there would be an appeal. But it is contended by the res-

pondents that it is not a final order as the amount of the mesne profits due has not been assessed and, therefore, there would be no appeal. The appellant, however, contends that when the order has been made the decree-holder is liable for mesne profits that is a decree, although the sum has not been worked out, and the only thing that remains to be done is to work out the amount. In my judgment, there is an appeal from the order made by the Subordinate Judge, because it determines the rights of the parties finally with regard to the matter in question and it falls within the definition of a decree under S. 2 of the Code. It may further be stated that according to the principles enunciated by the Privy Council in the cases of *Rahimbhoy Habibhoy* v. *Turner* (1) and *Saiyid Muzhar Hussein* v. *Rodha Bibi* (2) this is a final order from which an appeal is maintainable. The preliminary objection, therefore, fails.

The next question is whether the judgment-debtors are entitled to mesne profits by way of restitution. The first question is with regard to the nature of the consent order. If, upon the payment of the first instalment the decree-holder had not delivered possession to the judgment-debtors, there is no question that the judgment-debtors would be entitled to possession by execution. The important question is, and that is the only question which has been argued on behalf of the appellant, as to whether the decree-holder would be liable for mesne profits between the date of 22nd January 1923 to 14th April 1925, when the first payment of the instalments was made by the judgment-debtors. It is contended on behalf of the respondents judgment-debtors that they come within the spirit of the provisions of S. 144 of the Code, where it is stated that when a decree is varied or reversed the party entitled to any benefit by way of restitution or otherwise should get restitution from the first Court. S. 144 does not apply in terms to this case, because it is not a reversal of the decree on which restitution is claimed. But it is said that the judgment-debtors are entitled to recover mesne profits under S. 151 of the Code, and reliance has been placed in support of this contention on the case of *Beni Madho Singh* v. *Pran Singh* (3). There it was laid down following a series of cases, that the Court has inherent power to give relief to a party who has suffered any loss on account of the Court's erroneous order. That proposition certainly is not applicable to the present case. Here the order confirming the sale was set aside by an agreement between the parties and nothing can be said against the Court confirming the sale that the order was made erroneously and therefore the Court should exercise its inherent power to place the parties in the position in which they were before the erroneous order was made. A consent order was made upon certain conditions and it was agreed between the parties that only upon the payment of the first instalment, possession was to be delivered to the judgment-debtors. If it was the intention of the parties that up to that date the decree-holder would be liable for mesne profits for having been in possession of the property, the parties would have distinctly set that forth in that agreement on which the order was made. If it was the intention of the judgment-debtors that they would hold the decree-holder liable for mesne profits up to the payment of the first instalment, the decree-holder might very well have said :

"I am willing to deliver possession this very day if you pay me the money immediately.

It is impossible to conjecture what the attitude of the decree-holder would have been if the judgment-debtors had expressed any such intention. It must therefore, be presumed that the whole contract as regards the liability of the decree-holder to pay anything to the judgment-debtors and the liability of the judgment-debtors for the payment of the decretal amount was contained in the agreement on which the order was passed. On a proper reading of the consent order one cannot possibly suppose that up to the date of the payment of the first instalment the possession of the decree-holder was that of a trespasser, and unless one holds that a person is in possession of another's property without any right to do so, he cannot in any view be made liable to pay mesne profits. The contention therefore on behalf of the judgment-debtor

(1) [1890] 15 Bom. 155=18 I. A. 6 (P.C.).
(2) [1894] 17 All. 112=22 I. A. 1. (P.C.).
(3) [1911] 15 C. L. J. 187=14 I. C. 456.

that they are bound to be restored to the same position in which they were before the sale was confirmed and they are entitled to recover mesne profits from the decree-holder is without any substance whatsoever. The case is quite different when the decree or order of a trial Court is reversed, because in that case the possession taken between the date of the decree of the trial Court and the reversal of that decree becomes wrongful on account of the reversal of the decree of the trial Court.

I am, therefore, unable to agree with the view of the Subordinate Judge that the judgment-debtors are entitled to any mesne profits from the decree-holder up to the date of the payment of the first instalment on 14th April 1925. If the decree-holder has not delivered possession to the judgment-debtors, as provided in the consent order the judgment debtors, as I have already said, are entitled to be put into possession and to other consequential reliefs, but they have no right to claim anything by way of mesne profits prior to 14th April 1925.

The order, therefore, of the Subordinate Judge making the decree-holder liable for mesne profits up to that date, that is 14th April 1925, must be set aside, and the judgment-debtors' application for mesne profits for that period is dismissed.

The appellant is entitled to his costs of this appeal. The hearing fee is assessed at ten gold mohurs.

Bose, J.—I agree.

V.B./R.K. *Appeal allowed.*

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JACK AND MITTER, JJ.

Jogendra Kishore Roy — Plaintiff — Appellant.

v.

Salamat Khan and *another* — Defendants — Respondents.

Appeal No. 241 of 1927, Decided on 1st February 1929, from appellate decree of Fifth Sub-Judge, Dacca, D/- 31st August 1926.

Transfer of Property Act, S. 41—(Per *Mitter, J.*) — **Mortgagee is not ostensible owner within S. 41—Transferee from such mortgagee must prove consideration in suit on the mortgage.**—(*Jack, J.* contra.)

(Per *Mitter, J.*)—A mortgagee or the assignee of a mortgage deed, has in order to get a decree for the enforcement of the mortgage, to establish that the mortgage was for consideration. The assignee cannot get advantage of S. 41, as his transfer is not by an ostensible owner, that is by a person who is apparently a full and unqualified owner but by a mortgagee. [P 93 C 2]

(Per *Jack, J.*)—Interest of the mortgagee is itself immovable property and where the owner of that property transfers it the rights of the bona fide purchaser for value from the ostensible owner of that property, that is to say the purchaser of the mortgagee's right, would be protected under S. 41. [P 94 C 1]

Bimal Chunder Das Gupta—for Appellant.

Profulla Chundra Chukervarty—for Respondents.

Mitter, J.—This is an appeal by the plaintiff and it arises out of a suit for foreclosure. It appears that the principal defendant mortgaged the property now in suit by way of conditional sale to the pro forma defendant on 4th Jaista 1325 B. S. The mortgagee, that is, the pro forma defendant Nabi Bux sold or assigned over the mortgage bond to the plaintiff on 1st January 1924. The present suit to enforce the mortgage by way of conditional sale by foreclosure was instituted on 28th August 1924. The principal defendant mainly contended that the mortgage bond itself and the sale thereof in favour of the plaintiff were both void for want of consideration. The defence further was that the plaintiff was not a bona fide purchaser for value. The Court of first instance held that the mortgage bond was for consideration and that the plaintiff was also a bona fide purchaser for value. It accordingly decreed the plaintiff's suit and passed the usual preliminary decree for foreclosure. Against this decision, an appeal was taken to the Court of the Subordinate Judge by the principal defendant and the learned Subordinate Judge has reversed the decision of the Munsif holding that the kot kobala or the mortgage by way of conditional sale was a benami transaction, that it was without consideration and that Nabi Bux—the pro forma defendant and Rahimuddi—an enemy of the principal defendant combined together to put the principal defendant into trouble. The Subordinate Judge accordingly dismissed the plaintiff's suit. A second appeal has been taken to this Court by the plaintiff and the main contention of the learned advocate for the appellant has been that there has not been a proper disposal of the appeal before the lower appellate Court as it has

not come to any conclusion on the question whether the plaintiff was or was not a bona fide purchaser for value. It is contended that the plaintiff was entitled to a decree on the mortgage if he could establish that he was a bona fide purchaser for value without notice, even if no consideration passed for the mortgage bond of 4th Jaista 1325 B. S. Mr. Bimal Chunder Das Gupta who appears for the plaintiff-appellant has urged with great insistence that his contention proceeds on and finds support from the provisions of S. 41, T. P. Act. He contends that S. 41 not only protects the ostensible owner who is held up to the outside world by the persons interested in immovable property as such owner but also the mortgagee of such person interested in the property. I am, however, unable to agree to this contention. S. 41 runs as follows:

"Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible ewner of such property and transfer the same for consideration, the transfer shall not be voidable on the ground that the transferrer was not authorized to make it; provided that the transferrer, after taking reasonable care to ascertain that the transferrer had power to make the transfer, has acted in good faith."

Applying this section to the facts of the present case, it appears that the principal defendant, that is, the mortgagor was the person who was interested in the immovable property in question and, with his consent express or implied, the pro forma defendant Nabi Bux was not the ostensible owner of such property but was the ostensible mortgagee of such property. In order to give effect to the contention of the learned advocate for the appellant, the word "owner" in S. 41 would have to be replaced by the word "transferee." "The persons interested in immovable property" in my opinion, mean the full owners or the owner which in this case the mortgagor defendant was and the transfer must be by the ostensible owner, that is, by a person who is apparently a full and unqualified owner of the property and not by a mortgagee. It is then contended that, even if S. 41 does not in terms apply, the same principle ought to govern the present case. I am unable to agree to this contention also; for, when the legislature has provided for one state of things expressly limiting it to the case of a full owner, it cannot be said that it was the intention of the legislature also to include a person who has not got the full rights of ownership. No question of equitable principle comes in where the legislature who evidently knew the distinction between an owner and a transferee having lesser rights use the word "owner." Looking to the history of this section, it appears that it really gave effect to the decision of the Judicial Committtee in the case of *Ram Coomar Koondoo* v. *Maria McQeen* (1) where it was said that, if a person being the owner of a property allows another person to hold himself out as the ostensible owner of such property he cannot afterwards be permitted to challenge the transactious entered into by the ostensible owner for valuable consideration and without notice of his secret title. If the contention of the learned advocate for the appellant is to be given effect to, the result will be that even in a case where the mortgage is collusive, the mortgagee is simply to transfer it to a third party in order that such assignee may be relieved from proving that consideration passed for the mortgage. A mortgagee or the assignee of a mortgagee has, in order to get a decree for enforcement of the mortgage, to proceed on certain lines provided for by the Transfer of Property Act. He has to establish in a Court of law that the mortgage was for consideration; and this, in the findings of the lower appellate Court, the plaintiff has failed to do in the present case. In these circumstances, I fail to see how he can get a mortgage decree against the original mortgagor. In this view of the matter, I am of opinion that the decision of the lower appellate Court is right and ought to be confirmed. The appeal is accordingly dismissed; but, in the circumstances of the case, no order should be made as to the costs of the appeal.

Jack, J.—I agree with my learned brother that in this case, the decree of the lower appellate Court ought to be affirmed and this appeal dismissed for the reason that the findings of the learned Subordinate Judge seem to indicate that the transferee did not act in good faith and, therefore, S. 41, T. P. Act does not apply. Those findings are (1) that the plaintiff Jogendra has got

(1) I. A. Sup. Vol. 40=11 B. L. R. 46=13 W. R. 166=3 Sar. 160 (P.C.).

no land near the bond land, (ii) that there is no sufficient reason for the plaintiff to have taken the land and (iii) that he admitted in the first instance in his deposition that he did not purchase any bond. I regret, however, that I cannot agree with my learned brother as to the applicability of S. 41, T. P. Act. It appears to me that inasmuch as the interest of a mortgagee is itself immovable property where the owner of that property transfers it, the rights of a bona fide purchaser for value from the ostensible owner of that property that is to say the purchaser of the mortgagee's right would be protected under S. 41, T. P. Act. The purchaser of a portion of the rights of the owner of immovable property from the ostensible owner to whom such rights have been transferred would be pretected under the Act and similarly the bona fide purchaser of the mortgagee's rights from their ostensible owner to whom they have been transferred by the owner of the property should be protected under S. 41, T. P. Act. However, in this case, for the reasons given, I think the decree of the lower appellate Court should be upheld and this appeal dismissed. There will be no order as to the costs of the appeal.

V.B./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Calcutta 94

S. K. GHOSE AND PANKRIDGE, JJ.

Janakinath Roy and *another*—Plaintiffs—Appellants.

v.

Mohendra Narain Roy Chaudhury—Defendant—Respondent.

Appeal No. 2138 of 1927, Decided on 26th June 1929, from the appellate decree of Addl. Dist. Judge, Faridpur, D/- 14th May 1927.

(a) Lease — Construction — Original lease terminating—Lease continued with agreement to continue "Warishen krame" and "be-meadi"—Tenancy held to be tenancy at will terminable by one year's notice.

A lease obtained by a kabuliyat terminated. On a lease so terminating it was contracted between the landlord and the tenants that though the term of the kabuliat had expired and the rent and the land had diminished still in other respects the terms of the kabuliyat were to remain intact and thenceforward the tenants were to hold lands and the rent "be-meadi," i. e., without term by succession. The actual words used were "warishen krame" and "be-meadi."

Held: that the words indicated that the jama was not permanent and that the tenancy was a tenancy at will to be extinguished by landlord after one year's notice: *A. I. R.* 1928 *Cal.* 392, *Dist.*; (1918) *P. H. C. C.* 11, *Ref.* [P 95 C 2]

(b) Lease—Kabuliyat—Kabuliyat executed by purchasers of jamas — Application for mutation of names—Landlord instead of mutation granting lease for eight years—Jama could not be held to be transferable.

The executants of a kabuliyat had purchased certain jamas in 1822, 1833 and other years. The landlords accepted rent in respect of these jamas from the purchaser all the while. As a consequence of the application for mutation of names in 1842, a kabuliyat was executed which was limited to a term of eight years. It was contended that effort at mutation shows that the jamas were transferable.

Held: that the facts were not sufficient to infer that jamas were transferable: 32 *Cal.* 41 (*P. C.*) and 32 *Cal.* 51 (*P. C.*), *Dist.* [P 96 C 1]

(c) Landlord and Tenant—Adverse possession—Tenancy not transferred—Permanent and transferable tenancy cannot be claimed by adverse possession.

So long as tenant does not transfer his tenancy the question of interference by landlord does not arise and consequently till such transfer there cannot be any acquisition of permanent and transferable right by adverse possession: *A. I. R.* 1923 *P. C.* 118 (*P. C.*) and 22 *C. W. N.* 856, *Ref.* [P 96 C 1]

(d) Practice — Objection to admission of document not taken in trial cannot be allowed to be taken in appeal.

Where a party does not take any objection to a document which is tendered by the opposite party for the purpose of convenience, and there is no doubt that if any objection was taken the strict method of proof would be employed, it is wrong to permit the party in the appellate Court to insist upon strict proof which he did not require in the trial Court. But the position is not the same where the document is inadmissible and unless it is admitted there is no alternative method of proving it. [P 96 C 2]

*** (e) Registration Act, S. 17 (1) (d)—Lease created by decree or order of Court—Lease must be registered.**

The saving clause in S. 17 (2) (6) has no application to the case of a lease created by decrees, compromise decree or order of a Court and it falls under S. 17 (1) (d). [P 97 C 1]

Sarat Chandra Roy Chaudhury, *Sarat Chandra Basak* and *Jatin Mohan Basu*—for Appellants.

Brojolal Chackervarty, *Naresh Chandra Sen Gupta*, *Jahnabi Charan Das Gupta* and *Surendra Lal Mukerjee*—for Respondent.

S. K. Ghose, J.—The plaintiffs who are the purchasers of a patni taluk in execution of a mortgage decree, allege that the defendents vendors held a tenure under patni and created by a dowl kabuliyat bearing the date 19th Aswin

1249. According to the plaintiff's case the tenure is non-permanent and non-transferable. The defendant having purchased in 1330, the plaintiffs sue to eject him. The defence is that the tenure is permanent and transferable. The learned Additional District Judge on appeal has agreed with the trial Court in holding that the dowl kabuliyat created a non-permanent and non-transferable tenure, but he has found that as the result of a compromise arrived at in a rent suit of 1911 the tenure in suit has become permanent and transferable. He has, therefore, reversed the decree of the trial Court and dismissed the suit. The plaintiffs now come in a second appeal.

The first point taken on behalf of the appellants is that the learned Additional District Judge is wrong in holding that the vakalatnama Exh. J, can be treated as secondary evidence of the solenama in the aforesaid rent suit of 1911. It appears that that was a suit for rent at the rate of Rs. 269. The predecessors of the defendant claimed abatement of rent on the ground of diminution of area and suspension of rent on the ground of dispossession. The suit was ultimately decreed on compromise by which the rent was reduced to Rs. 207 odd. The decree and solenama are not now available. But the defendant relies on a vakalatnama which is marked Ex. J. This document contains certain terms which are now put forward as the terms of the compromise. As the original record of the rent suit has been destroyed the learned District Judge considers Ex. J. to be secondary evidence of the solenama. This is obviously against the terms of S. 63, Evidence Act, and the learned advocate for the respondent admits that Ex. J. is not admissible as secondary evidence. Thus the position is that as regards solenama neither primary nor secondary evidence is available. The only other evidence is the register of suits Ex. N. which merely contains an entry to the effect that the suit was decreed on compromise. For the respondent, it is contended, that there is the deposition of one Upendra Mohan Ghosh Chaudhury who is defendant's witness 3 and who was one of the defendants in the rent suit of 1911. He was, however, no party to the vakalatnama. The learned advocate for the respondent argues that the vakalatnama is at least admissible as admission on the part of the plaintiff's predecessors. But admission of what? It cannot be admission of the terms of the compromise which has not yet come into existence and there the matter ends. Thus it seems to me that there is no evidence to prove the terms of the solenama, on which the defence case of permanency and transferability rests. This point therefore must be decided in favour of the plaintiffs appellants.

Another point that may be considered is that, conceding that the vakalatnama is evidence of the terms of the compromise, did those terms really mean that the tenure was being converted into a permanent and transferable one? The learned trial Court has treated the matter as follows:

"Exhibit J shows amongc ther things that the contract was that though the term of the kabuliyat had expired and the rent and the lands had diminished, still in other respects the terms of the kabuliyat were to remain intact and that thenceforward the tenants defendants were to hold the lands, and the rent be meadi i. e., without term by succession. The defendant's learned pleader wants to have the words "warishen krame and bemeadi" construed to mean a permanent tenancy. That is not so. These words are clear indication to show that the jama was not permanent and that the tenancy was a tenancy at will to be extinguished by the landlord after one year's notice, if necessary. If the tenure were indeed permanent one there was nothing to prevent the parties from having it so described by clear and unambiguous terms. That this had not been done shows that it is not such a tenure."

I may say at once that I am in entire agreement with this reasoning. It has been contended that the word "be meadi" really means not terminable, in other words, permanent and I am referred to the case of *Dinanath Kundu* v. *Janakinath Roy* (1). But that case is different on the facts.

It has been contended that the Courts below were wrong in taking the view that the 14 jamas, out of which the jama in question was constituted, were not permanent and transferable. In support of this I am referred to the dowl kabuliyat Ex. 1. It shows that the executants of the kabuliyat had purchased certain jamas in 1822, 1833 and other years and that they were asking for mutation of their names in 1842. It is contended that this shews that these jamas were at least transferable. But this

(1) A.I.R. 1928 Cal. 392=55 Cal. 435.

does not seem to follow. It appears that the landlord accepted rent in respect of these jamas from the purchasers. But it was in 1842 that mutation of names was asked for for the first time and the result was this kabuliyat which was limited to a term of eight years. The cases of *Upendra Krishna Mondal* v. *Ismail Khan Mohamad* (2), *Nil Ratan Mandal* v. *Ismail Khan Mahomed* (3) to which I am referred on behalf of the respondents, were based on much stronger grounds. It is contended that the kabuliyat itself was not limited to the period of eight years, but that only a certain portion of the rent was remitted for that term. I do not think that the document would bear this construction. The concluding words clearly show that the kabuliyat was executed for a term of eight years ; and this is supported by the document Ex. J., if it is at all to be considered.

In behalf of the defendants respondents it is contended that the learned Additional District Judge was in error in holding that the defendant could not acquire a permanent right by adverse possession. It is pointed out that in 1896 certain applications were filed on behalf of the predecessors of the defendant going to show that they were claiming a permanent tenancy right and that in the finally published Record-of-Rights of 1913 the tenure was also described as permanent. But the position here is that the tenant was in possession as tenant as the result, first of the kabuliyat which was executed in 1842, and later on as the result of the arrangement which was arrived at in the rent suit of 1911. So long as the tenant did not transfer his tenancy, the question of interference by the landlord did not arise: see, for instance, *Mahamed Mumtaz Ali Khan* v. *Mohan Singh* (4), *Birendra Kishore* v. *Mahamed Doulat Khan* (5). The defendant's purchase was only in 1330, and so it is not possible that he could have acquired a permanent and transferable right by adverse possession.

My findings on the above points are sufficient to show that the appeal must succeed. It is unnecessary therefore to deal with the other points that have been raised. The decree of the lower appellate Court is set aside and that of the trial Court restored. The plaintiffs appellants will get their costs of this appeal before the lower appellate Court.

Pankridge, J.—I agree. With regard to the alleged permanency of the tenure it may very well be urged that this is a question of fact and we are bound by the findings of fact of the lower appellate Court. But as the case has proceeded it has become necessary to investigate the question on its merits. I am satisfied that the tenure in respect of which the earlier kabuliyat was executed was not a permanent tenure for the reasons given by the Court below, and by my learned brother. The judgments of the Court below have satisfied me that no title to permanent tenure has been acquired by the defendant or his predecessor by adverse possession. Therefore, as the Court below has pointed out, the only ground on which the defendant can claim permanency is the compromise of 1912. Now, I am clear that the trial Court was in error in admitting the document Ex. J a vakalatnama, signed by the administrator acting on behalf of the predecessors of the defendants. I do not think that it is sufficient answer to the argument advanced here that no objection was taken to its admissibility in the trial Court. It appears to me to be one thing when a litigant takes no objection to a document which is tendered for the purpose of convenience and there is no doubt that if any objection were taken the strict method of proof would be employed ; in such cases it is clearly wrong that the litigant should be permitted in the appellate Court to insist upon strict proof which he did not require in the trial Court. But the position is not the same where, as here, the document is inadmissible and unless it is admitted there is not any alternative method of proving it. In my opinion it is certainly not necessary evidence. Secondary evidence was tendered inasmuch as one of the defendants spoke to the fact of the compromise but was apparently not in a position to speak to its terms from independent recollection. No attempt was made to satisfy any of the conditions precedent which would have justified him in refreshing his

(2) [1905] 32 Cal. 41=31 I.A. 144=8 C.W.N. 889 (P.C.).
(3) [1905] 32 Cal. 51=31 I.A. 149=8 C.W.N. 895 (P.C.).
(4) A.I.R. 1923 P.C. 118=45 All. 419=26 O.C. 231=50 I.A. 202 (P.C.).
(5) [1918] 22 C.W.N. 856=43 I.C. 59.

memory from the vakalatnama. Nor indeed was the vakalatnama employed by the defendant for that purpose. It was possibly an error in tactics on the part of the plaintiffs to cross-examine the witness as to the contents of the vakalatnama. But I do not think that this would materially alter the position for it is upon the vakalatnama and not upon the oral deposition with regard to the contents of the solenama that the learned Judge in the Court below has based his judgment. In these circumstances it appears to me that there is no evidence as to the contents of the solenama.

With regard to the other points raised I am by no means satisfied by the appellant's argument on the question of the presumed contents of the decree. It seems to me that it is probably right to say that inasmuch as the code specifically requires that the compromise should be recorded, in the absence of any evidence to the contrary, it may be presumed that record was made of the compromise, and if such record was in fact made it appears to me that the decision of the Privy Council in the case of *Hemanta Kumari Debi* v. *Midnapur Zemindary Co.* (6) is an authority for the proposition that the terms of the compromise, even although not concerned with the operative part of the decree, for the purpose of S. 17, sub-S. 2, Cl. (6), Registration Act need not be registered. At the same time I am inclined to agree with the contention of the appellant based on the fact that this saving clause has no application to the case of a lease which falls under Cl. (d), sub-S. 1, S. 17, Registration Act. Lease :

"is not expressly defined in the Registration Act. It is defined in S. 105, T. P. Act and although I apprehend this definition is strictly applicable only for the purposes of that Act :

"lease" in its ordinary significance bears much the same meaning as it does in the section to which I have referred and it includes leases made in perpetuity. Therefore, I consider that if we regard the contents of the solenama as proved and if we regard that as the respondent would urge as creating a tenancy in perpetuity even so I hold that the solenama is not admissible in evidence for want of registration.

(6) A. I. R. 1919 P. C. 79=47 Cal. 485=46 I. A. 240 (P.C.).

With regard to the construction of the solenama that turns upon the interpretation of the term "be meadi" I agree with my learned brother that "be meadi" does not mean permanent. This view is supported by the decision of the Patna High Court in the case of *Parshan Kuer* v. *Tulsi Kuer* (7).

I need only add that I do not think that the argument based on the fact that the vakalatnama was executed by the administrator is well founded. That would only make the lease voidable and not void and would not, I think make the agreement or compromise an illegal one. I agree in the order proposed by my learned brother.

R.K. *Appeal allowed.*

(7) [1918] P. H. C. C. 11=2 Pat. L. J. 180=99 I. C. 658=1 Pat. L. W. 447.

* A. I. R. 1930 Calcutta 97

PAGE, J.

In re "Rabenfels" (Stoomvaart Maatschappij Nedarlands).

Admiralty Suit No. 1 of 1927, Decided on 28th February 1929.

(a) Tort—Negligence—Collision—Suit for damages—Court has first to determine cause of accident.

In every suit for damages on account of collision on land or at sea the Court in the first place has to determine what was the cause of accident and the cause means the material even from which the accident resulted. [P 100 C 2]

*** (b) Tort—Negligence—Suit for damages—Accident partly caused by negligence of plaintiff and partly by negligence of defendants—Liability how to be determined explained.**

Where the negligence of the plaintiff or that of the defendant is the sole cause of the accident the matter is free from doubt. But difficulty may arise where accident is caused partly by negligence of the plaintiff and partly by that of the defendant. In such circumstances it becomes duty of the Court to endeavour to ascertain whether the negligent act or ommission of the plaintiff, or that of the defendant, was the cause of the accident. If the Court finds itself unable to discover to what extent the negligence of the plaintiff or that of the defendant contributed to bring about the accident, the defendant is entitled to succeed for *in pari delicto potior est conditio defendentis.* On the other hand, though the plaintiff may have been guilty of negligence and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse him. In like manner although there may have been negligence on the part of the plaintiff, yet unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence

he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong: *A. I. R.* 1925 *Cal.* 893, *Foll.*; *Radley* v. *L. & N. W. Ry. Co.*, 1 *A. C.* 754; *Bridge* v. *The Grand Junction Ry. Co.*, 3 *M. & W.* 244, *Ref.* [P 99 C 2]

✲ **(c) Tort—Negligence—Negligence means failure to exercise reasonable skill in particular circumstances.**

Negligence means failure to exercise reasonable care and skill in the circumstances, and a party cannot be held guilty of negligence simply because he failed to take the right course or did what was wrong: *Stoomvaart Maatschappj Nedarlands* v. *Peninsular and Oriental Steam Navigation Co.* (1880) 5 *A. C.* 876; *Jones* v. *Boyce* (1816) 1 *Starkie* 493; *The Bywell* case, (1897) 4 *P. D.* 219; *The Meanatchy*, (1897) *A.C.* 351. and *S. S. Volute's* case, (1922) 1 *A. C.* 129, *Ref.* [P 100 C 1]

(d) Tort—Negligence—Damage due to two or more acts—It must be proved that the damage was effect of concurrent operation of those acts.

If the cause of damage is the combined operation of more acts than one, such acts need not be synchronous, for in order to establish that the damage was caused by more acts than one it is essential to prove not that the damage was the result of two or more simultaneous acts, but that it was the effect of concurrent operation of those acts which in combination were the cause of it: *The Margaret*, (1881) 6 *R. D.* 76 and *S. S. Volute's* case, 1 *A. C.* 129, *Rel. on.* [P 100 C 1]

(e) Tort—Negligence—Collision—Tests for ascertaining cause same at common law and Court of Admiralty.

In every collision case whether it occurs on land or at sea, the same tests are to be applied for the purpose of ascertaining the cause of accident and there is no justification for contention that authorities show that the rules of the Court of Admiralty and the rules of the Court of law as to what amounts being a fault occasioning an accident differ in the slightest degree: *Cayzer* v. *Carron Co.*, (1884) 9 *A. C.* 873, *Ref.* [P 100 C 2]

(f) Tort—Negligence—Contributory negligence—In Admiralty liability is apportioned.

Where the Court is of opinion that the damage was caused by the fault of two or more vessels, the Admiralty Court imposes liability on both parties to make good the loss or damage "in proportion to the degree in which each was in fault." [P 100 C 2]

(g) Admirality—Prosecution under Act 12 of 1859 should be launched after thorough enquiry.

Circumstances attending a collision should be thoroughly examined and great care should be exercised by authorities concerned before a prosecution in respect of it is launched against a pilot under Act 12 of 1859 [P 100 C 1]

A. N. Chaudhuri, *C. E. Bagram* and *T. Ameer Ali*—for the "Calcutta."

N. N. Sircar, *J. Langfod James*, *S. M. Bose*, and *W. W. K. Page*—for the "Rabenfels."

Judgment.—On 29th August 1927 at about 12-42 p.m. the S. S. "Calcutta" collided with the S. S. "Rabenfels" in the Fulta Bight on the river Hooghly. The "Calcutta" was proceeding up river a flood tide nearing high water andon running at about four knots an hour, and the Rabenfels was coming down the river from Calcutta. Both vessels laden with merchandise were being navigated by pilots, Smythe being the pilot on the "Calcutta" and Bacon on the "Rabenfels." At the time of the collision the water in the river had risen about 18 feet, the weather was fine, and the visibility good. Owing to the shifting sand the navigation of the narrow reaches of the Hooghly needs skilled seamanship as the width of the navigable channel constantly changes, the width of the channel in the Fulta Bight between the creek cask buoy and about 1500 below the centre Fulta sand buoy varying from 650 to 900 feet. A further difficulty that pilots have to face is caused by the set of the flood time as it rounds Fulta point to the south of the Bight. As the Fulta sands become submerged the tide is deflected in a northerly direction, and eventually strikes the eastern bank near Fisherman's Point, causing a back water ebb which, passing down the river and meeting the flood time, creates a whirl between the Fulta Point and the lower Fulta Sand buoy known as the Fulta Point eddy. The effect of this eddy is that a ship moving up stream on the flood tide has a tendency to go to starboard, and requires a starboard helm to keep her steady on her course. When the vessels sighted each other as the "Calcutta" was rounding Fulta point it may be taken that they were about a mile and a half apart, and both of them had their ball up denoting that they were proceeding at full speed, the "Calcutta" moving at 10-12 knots, the "Rabenfels" at 8-9 knots over the ground. Taking their combined speed at 20 knots the vessels normally would meet in rather less than 3 minutes. Now under Art. 25, Collision Rules:

> "in narrow channels every steam vessel shall when it is safe and practicable keep to that side of the fairway or mid channel which lies on the starboard side of such vessel."

and it was common ground at the trial that the "Calcutta", proceeding up river on a flood time, had the right of way, and that it was customary and except in an emergency imperative, for

deepships to pass each other port to port in the Fulta Bight. The dimensions of the Calcutta were length 429 feet, beam 56 feet, tonnage 5541 gross, 3537 nett, her draught being 24 feet 10 inches; those of the Rabenfels length 464 feet, beam 57¼ feet, draught 27 feet 7 inches, tonnage 8563 gross and 5310 nett.

Shortly after sighting each other and in answer to a signal from the Rabenfels, Smythe on the Calcutta blew two short blasts which indicated that he was directing his course to port (see Art. 28) and put the helm hard a starboard. On hearing the two blasts from the Calcutta, Bacon on the Rabenfels replied with two short blasts, and starboarded his helm. Immediately after he had blown two short blasts, or at any rate within a few seconds thereafter, Smythe, as he admitted in the witness box, realizing that he had made a mistake blew one short blast, and put his helm hard a port. Bacon, whether or not he heard the one blast from the Calcutta, observed the Calcutta paying off quickly to starboard, and realizing that a collision was inevitable blew three short blasts and reversed his engines, at the same time putting his helm hard a port; both operations tending to throw the head of the Rabenfels to starboard. Smythe also blew three short blasts and when full astern; but within a few seconds a collision took place, the Rabenfels striking the Calcutta with the bluff of her port bow just forward of the bridge at an angle of 45 degrees. At the time of the collision the Calcutta was heading towards the east bank at an angle of between 30 and 45 degrees. The effect of the blow upon the Calcutta was that she "became dead" and drifted on to the eastern bank of the river a little south of the line of the centre Fulta buoy. With the ebb of the time in the afternoon she drifted back across the river, and grounded on the sand below the centre Fulta buoy on the western side of the channel. About 11 p.m. she broke in half, and became a total loss. When the Rabenfels struck the Calcutta her stem was bent to starboard, and as she slid along the port side of the Calcutta her anchor became entangled in one of the davits of the Calcutta; the anchor chain ran out and broke away from the Rabenfels, and, the anchor remaining fast, the Calcutta carried away the anchor with the chain attached to it and lying in the water. Meanwhile the Rabenfells having got clear was taken downstream about 1½ miles and then put about and returned to Calcutta. On her way back as she passed the Calcutta about 2 p. m. lying athwart of the centre Fulta buoy. The Rabenfels when returning went to the westward of the centre Fulta buoy having the Calcutta on the starboard bow, and reached Calcutta without further mishap.

Now the question that arises is what was the cause of the loss and damage that resulted from the collision? Was it due to the fault of the Rabenfels or of the Calcutta or to the fault of both vessels, and if both vessels were at fault to what extent was the loss caused by the fault of each of them?

The law by which the rights of the parties in this case are to be determined has long been well settled, and in *Nani Bala Sen* v. *Aukland Jute Co. Ltd.* (1) (at p. 610 of 52 *Cal.*) I endeavour to restate the general principles as follows:

"Where the negligence of the plaintiff or that of the defendant is the sole cause of the accident the matter is free from doubt. But difficulty may arise where the accident is caused partly by the negligence of the plaintiff, and partly by that of the defendant. In such circumstances it becomes the duty of the Court to endeavour to ascertain whether the negligent act or omission of the plaintiff, or that of the defendant was the cause of the accident. If the Court finds itself unable to discover to what extent the negligence of the plaintiff or that of the defendant contributed to bring about the accident, the defendant is entitled to succeed, for in *pari delicto potior est conditio defendentis*. On the other hand though the plaintiff may have been guilty of negligence and although that negligence may, in fact, have contributed to the accident yet if the defendant could in the result by the exercise of ordinary care and diligence, have avoided the mischief which happened the plaintiff's negligence will not excuse him. (Per Lord Penzance, *Radley* v. *L. & N. W. Ry. Co.* (2)."

In like manner,

"although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover. If by ordinary care he might have avoided them, he is the author of his own wrong. (Per Baron Parke in *Bridge* v. *The Grand Junction Ry. Co.* (3)."

In every case:

(1) A. I. R. 1925 Cal. 893=52 Cal. 602.
(2) [1876] 1 A. C. 754=46 L. J. Ex. 573=25 W. R. 147=35 L. T. 637.
(3) [1838] 3 M. & W. 244=49 R. R. 590.

"the issue which the Court is called upon to determine is whether the negligence of the defendant was the cause of the accident."

In my opinion, the investigating tribunal is :

"well-advised to view the circumstances of the particular case broadly in the flight of the principles which I have restated and not to indulge in verbal refinements which are not only unprofitable, but tend to befog the clear issue to be decided."

I should add:

"that a man may not do the right thing nay, may even do the wrong thing, and yet not be guilty of the neglect of his duty which is not absolutely to do right at all events but only to take reasonable care and use reasonable skill and I agree that when a man is suddenly and without warning thrown into a critical position due allowance should be made for this, but not too much. (Per Lord Blackburn *Stoomvaart Maatschappj Nedarlands* v. *Peninsular & Oriental Steam Navigation Co.* (4), at p. 891, *Jones* v. *Boyce* (5). *The Bywell Castle* (6). *The Meannatchy* (7). *The Admiralty Commr.* v. *S. S. Volute* (8)."

Further, if the cause of the damage is the combined operation of more acts than one, such acts need not be synchronous, for in order to establish that the damage was caused by more acts than one it is essential to prove not that the damage was the result of two or more simultaneous acts, but that it was the effect of the concurrent operation of those acts which in combination were the cause of it. *The Margaret* (9), *Admiralty Commrs.* v. *S. S. Volute* (8). In this connexion I pray in aid and make my own the following observations of Wright, J., in a lecture delivered on 26th May 1927 at the London School of Economics on the doctrine of proximate cause.

"Lord Bacon quoting the maxim in *jure causa proxima non remota spectatur* thus adds: It were infinite for the law to consider the causes of things and their impulsion one on the other; it contenteth itself with the immediate cause, and judgeth of each by that without looking to any further degree certain questions are involved. Does it mean nearest in time? Does it exclude the concurrent operation of more than one cause? I venture to think both questions must be answered in the negative. Other synonyms have been suggested, such as causa causans (really a mere tautology), immediate, direct, dominant or effecient cause. In truth, the awkward epithet could almost be dispensed with, because, in marine insurance as in other spheres of law, it is in general causation pure and simple which has to be ascertained.

Indeed, I question, if, properly understood, the epithet indicates principles different in any way from those applied in other branches of law whenever it becomes necessary to consider the sequence of events, and the relationship of cause and effect. In law we are in the range of common sense conceptions of fact and crude and imperfect logic. I question if any lawyer would now boast that the law is the embodiment of human reason. The growth of scientific methods, of historical research, and of economic studies, has made thinking people realise that legal and judicial methods have ample scope, if the debates of lawyers and conclusions of Judges are more modest in their ambition and are aimed not at the discovery of absolute truth, but at the more practical end of solving practical difficulties in a manner more akin to the methods adopted by men of affairs in settling the grave issues of practical life. The aim of law is to do what is just and right by such methods, and it is a noble aim. But the material with which it works is on the level of every day ideas, and its principles are not principles of exact thought.

Cause, from this standpoint, means a material event from which another material event follows; and we have then cause and effect, not merely because of precedence in time, but because by long experience humanity has seen the former followed by the latter, whence we deduce a causal connexion."

In every collision case, whether it occurs on land or at sea, the same tests are to be applied for the purpose of ascertaining the cause of the accident, and there is no justification for the contention

"that any authorities shew that the rules of the Court of admiralty and the rules of a Court of law as to what amounts to being a fault occasioning an accident differ in the slightest degree per Lord Blackburn in *Cayzer* v. *Carron Co.* (10), [at p. 882]"

although no doubt, where the Court is of opinion that the damage was caused by the fault of two or more vessels the rule in admirality for assessing liability is different, for the Court in that event must allocate the liability to make good the loss or damage

"in proportion to the degree in which each was in fault. Maritime Conventions Act, 1911, S. 1."

In *Cayzer's* case (10) Lord Blackburn added that

"the nature of the thing, of course, requires that in applying those rules you should look to what the nature of the accident is, and to what the neglect is, and investigating the cause of an accident, specially in a case like the present one where the collision already has been the subject of several enquiries, and much argument and examination has been expended upon

(4) [1880] 5 A. C. 876=52 L. J. Adm. 1=29 W. R. 173=4 Asp. M.C. 567=42 L.T. 610.
(5) [1816] 1 Starkie 493=18 R. R. 812.
(6) [1879] 4 P. D. 219=4 Asp. M. C. 207=28 W. R. 293=41 L. T. 747.
(7) [1897] A. C. 351=66 L. J. P. C. 92.
(8) [1922] 1 A. C. 129.
(9) [1881] 6 P. D. 75=50 L. J. Adm. 67=29 W. R. 533=4 Asp. M.C. 575=44 L.T. 291.
(10) [1884] 9 A. C. 873.

alleged discrepancies in the testimony of witnesses—the Court must be careful to keep the material incidents in their true perspective, and not to attach undue importance to the particular times and exact situations to which the witnesses on various occasions have deposed."

That was the reason, I think, why Lord Birkenhead in the *S. S. Volute* case (8) observed that the

"question of contributory negligence must be dealt with somewhat broadly and upon common sense principles as a jury would probably deal with it: *S. S. Volute* case (8) at p. 144,"

for, as Lord Selborne pointed out in *Spaight* v. *Tedcastle* (11) at p. 219:

"great injustice might be done, if in applying the doctrine of contributory negligence to a case of this sort the maxim *causa proxima non remota spectatur* were lost sight of. When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiffs cannot be established merely by showing that if those in charge of the ship had in some earlier state of navigation taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. Such an omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the defendant's fault, and if it had no proper connexion as a cause with the damage which followed as its effect."

Now, applying these principles to the facts disclosed in the evidence the solution of the problem in suit, to my mind is free from difficulty, and I am of opinion that this is a very plain case. I have had the advantage of the advice of two senior branch pilots of the Bengal pilot service as nautical assessors on matters relating to navigation and seamanship, and I have to state that the conclusions that I have formed and expressed on such matters coincide with the advice that the assessors have given me. Indeed, it is a source of satisfaction that I have found myself in entire agreement with the assessors on all the matters in connexion with which they have special knowledge and experience, and on which I have sought their advice.

I should add that after the conclusion of the hearing the parties took steps to enable me to visit the locale, and I thought it well to avail myself of the opportunity thus afforded to enable me more clearly to visualise, so to say, the setting of the incidents leading up to the collision, as to which I had already formed a clear opinion after hearing the evidence and arguments at the trial.

Now, the material incidents in connexion with the collision took place within about three minutes from the time when the vessels first sighted each other as the Calcutta was rounding Fulta Point; but in order to view the situation in its true perspective it must be borne in mind, as I have stated, that at that time, having regard to the combined speed at which the vessels were approaching each other, the Rabenfels and the Calcutta were between 1¼ and 1½ miles apart. I also find upon the evidence that if after the vessels first sighted each other they had been properly navigated they could have passed each other safely either port to port or starboard to starboard.

The normal practice—and except in an emergency the imperative duty — of a pilot placed in a situation such as that in which Smythe found himself after rounding Fulta Point, and who had the right of way, would be to keep the Calcutta on her starboard side of the channel and pass the Rabenfels port to port. Nevertheless, on hearing a signal from the Rabenfels (I will discuss later whether the pilot Bacon on the Rabenfels blew one or two short blasts), Smythe on the Calcutta blew two short blasts, and put the helm hard a starboard. In the circumstances, as he had the right of way and it was for him to dictate the course of navigation, such a signal would indicate that he was directing his course to port with the intention of passing starboard to starboard. Bacon replied with two blasts and put his helm hard a starboard as he was bound to conform to the course dictated by the Calcutta, and after considering the evidence on the one side and on the other I am satisfied and find that if Smythe had continued on a starboard helm the vessels could, and in all probability would, have passed each other safely starboard to starboard.

But in the circumstances that was not a correct manoeuvre for Smythe to initiate and he admitted in the witness box that in giving the order for two short blasts he had made a mistake; and promptly realizing that he had given a wrong order immediately or after a few seconds endeavoured to correct his mistake by ordering one short blast to be

(11) [1881] 6 A. C. 217=4 Asp. M. C. 406=29 W. R. 761=44 L. T. 589.

blown. It was impossible, however, for him then to give any order that could have prevented a collision which had become inevitable. Now, if the order for two blasts was a mistake, a .fortiori the succeeding order for one blast was a fatal blunder, and I have no doubt or hesitation in finding that the cause of the collision was the action of Smythe in giving these two orders.

The next question that arises is whether in so acting Smythe was guilty of negligence.

Now, what was the narrative of the events leading upto the conclusion as presented on behalf of the Calcutta.

According to Smythe the Calcutta rounded the Fulta Point in a normal sweep, and when she was clear of the eddy at the point marked green X on the composite plan he took stock of the situation, and as he observed the Rabenfels at the point green X (not green Y) on the composite plan below the Creek Cash buoy between the figures 25 and 26 heading towards the easter bank at a bad angle and showing her starboard side, he determined to go nearer to the eastern bank that usually he did in order to give the Rabenfels more room to pass port to port. He added that the Rabenfels was under the influence of an eddy or current coming from the creek opposite the red cask buoy which would have a tendency to set her head still more towards the easter bank. Upon the evidence, however, I am not satisfied that there was any eddy or current in the vicinity of the creek which would affect appreciably the navigation of the Rabenfels. Smythe further stated that when the Calcutta was at green D, and the Rabenfels at green D the Rabenfels sounded two short blasts, and that he replied with two short blasts and put his helm hard a starboard as the only possible chance of escaping a collision which then appeared to be inevitable. The course that Smythe indicated at the trial did not substantially differ from that of Baker, the master of the Calcutta, although it would appear from Smythe's course that the Calcutta was hugging more closely the eastern bank. But at the trial Smythe placed the vessels much nearer each other when the first blast was blown by the Rabenfels than he had done at the Marine Enquiry, and also closer together than Baker put the vessels at the trial, (blue C and R). Both Smythe and Baker insisted that after the time when the Calcutta came out of the eddy neither the Calcutta nor the Rabenfels changed her course until immediately before the collision, and that there was no room for a mistake on their part with respect to the first signal blown by the Rabenfels, for they both distinctly heard two short blasts from the Rabenfels. Rappange, the Chief Officer and Greenandaal the Third Officer of the Calcutta gave evidence to the same effect. The narrative of the accident as told by Smythe and Baker to my mind is incredible, and I do not believe it. In order to test the truth of their story I will assume that the Calcutta at all material times was on her starboard side of the channel, and that the Rabenfels from and after the time when she was at the point green X (Y) or blue R was at a bad angle heading towards the eastern bank and showing her starboard bow, and I will also assume, as Smythe and Baker stated, that she continued on her course without any change of helm. If that were so, it necessarily would follow that the Rabenfels would have struck the eastern bank before she reached the date column, and the collision would not have taken place. Again, in such circumstances why should Bacon have sounded two short blasts indicating that he was directing his course to port, thereby accentuating the danger of the course that he was taking ?

I asked witness after witness if he could suggest any reason why Bacon should have given such an order, except that he suddenly had become bereft of his senses. No other reason was assigned, or, in my opinion, could be suggested for giving an order so dangerous and senseless. If, however, Smythe had seen the Rabenfels continuing to head across the channel to the east without changing her course in the way that he stated, I am of opinion and the nautical assessors agree with me that he ought to have endeavoured to breach his ship on the eastern bank. That was the course adopted I venture to think rightly by the pilot on the Clan Mackellar which was following the Calcutta when, on rounding Fulta Point he observed the Calcutta and the Rabenfels three-quarters of mile ahead close

together abreast of the centre Fulta sand buoy.

Apart from the inherent improbability of the allegation that the Rabenfels did not alter her course but continued steadily heading towards the east bank, the falsity of the story became further apparent during the cross-examination of Symythe. He was asked to mark on Ex. 2 the position of the Rabenfels in the channel after passing the Red Cask Buoy. He was then asked to mark the position of the Rabenfels in the channel at D1 here Smythe had stated that the Rabenfels blew the first blast. It at once became obvious that the Rabenfels could not have reached the position in the channel at D1 where Smythe had placed her unless she had ported her helm and gone to starboard after she had left the earlier position that Symthe had marked on Ex. 2. Smythe was asked the following questions :

Q. 426.—To me it appears as though it would be perfectly impossible for this blue vessel up above here to get to the spot. D1 without alteration of her helm ? Yes, she must alter it.

Q. 427.—I should have thought that she would have to port fairly considerably ? Not fairly considerably, but she would have to go on porting all the time taking the bend.

Q. 428.—Do you think that is what the Rabenfels did ? I don't know.

Q. 429.—Unless she was a crab how else can you explain her getting there ? She must have used her helm to get there.

Q. 430.—Could you possibly place the Rabenfels' position at D1 showing how she was angled across the stream ? Witness does so.

Q.431.—I suggest to you that from the position of the blue vessel at the north in order to get the position of the other vessel it must have ported round the edge of the sand, and then for some reason or other she must have starboarded violently ? May have done so.

Q. 432.—That is the only result of this map ? I would not say that for certain.

Q. 433.—I suggest to you that that is the only conclusion that you could draw from this map ? That is the conclusion I can draw from seeing her starboard side when she was at that angle.

Q. 434.—Looking at this map the only conclusion I can draw is that this vessel must have gone porting round the edge of that sand and then starboarded her helm violently ? Don't know what he did.

Q. 435.—Do you agree with that ? No, I don't agree. I don't know what he did with his helm.

Q. 436.—Have you got any other theory which will put this blue vessel into the position of the vessel at D1? I have no other theory I have no theories.

Baker exercising, I think, a wise discretion, refused to mark on the chart the position of the Rabenfels in the channel as Smythe had done :

Q. 317.—You say that the Rabenfels was in the stream at a wrong angle ? Yes, heading to the east side of the channel.

Q. 318.—You have already refused to put the vessel on the chart to show how she was heading ? Yes.

Q. 319.—And you will continue to refuse ? Yes.

Q. 320.—Will you tell me what portion of the stream she was in whether the east bank or the west bank ? About the middle of the river.

Q. 321.—Facing some angle or other to the east bank ? Yes.

Q. 322.—Did you ever see her alter her head? At the last moment.

Q. 323.—Can you explain why she did not go ashore ? I do not know. I cannot.

A number of other witnesses gave evidence as to the course taken by the Rabenfels, but the only witnesses to whose evidence I propose to refer in this connexion are Scoby the pilot Goodson Smyth the Master, and Wood the second officer of the *S. S. Ninkfield* which had been overtaken by the Rabenfels in the vicinity of the Fulta Flat Buoy, and was following down the channel in the wake of the Rabenfels. The evidence of these witnesses was not in any way shaken in cross-examination and the effect of it was that the Rabenfels was on the western side of the channel hugging the line of buoys, and using such port helm as was necessary to enable her to do. Scoby gave his evidence in a blunt and frank manner ; I was particularly impressed by his demeanour in the witness-box, and I am prepared to accept his evidence as that of a witness of truth. A number of witnesses on the one side and on the other were called also in connexion with the question as to whether the Rabenfels in the first instance blew one or two short blasts. I do not propose to burden my judgment with a detailed discussion of this evidencebut I have taken it into consideration and the conclusion at which I have arrived on these points is that the Rabenfels in the first instance blew only one short blast, and proceeded downstream after passing the Fulta Flat Buoy in the middle or on the western side of the navigable channel, and never came right over to the eastern side as stated by the witnesses on behalf of the Calcutta. For these reasons the narrative of the events leading up to the accident as related by Smythe and Baker, in my opinion, is incrdible and I do not be-

lieve it. The truth of the matter appears to me to be that the Calcutta was rounding Fulta Point in a wider sweep than pilots normally take "making an Admiral's sweep of it" as Goodson Smyth the master of the Winkfield put it ; that when Smythe steadied his vessel coming out of the eddy and was still in a position in which it was practicable for him to pass the Rabenfels either port to port or starboard to starboard he foolishly and improperly decided to keep to the western bank and pass starboard to starboard ; and in answer to the Rabenfels' one short blast blew two short blasts to indicate to Bacon what his intention was. Realizing almost immediately that he had made a mistake he endeavoured when it was too late to rectify his blunder by blowing one short blast and porting his helm ; but by that time an accident had become inevitable, and very shortly afterwards the collision took place. Even assuming (although, in my opinion, it is not proved), that the Rabenfels came down the Fulta Bight "a little out of position" as Smythe had stated at the Marine Enquiry, I am clearly of opinion that at the time when Smythe made up his mind to blow two short blasts and to pass starboard to starboard no emergency had arisen through any fault on the part of the Rabenfels or otherwise which would justify the application of what is known as the Bywell Castle rule to free him from responsibility on the ground that in the circumstances negligence was not to be imputed to him for the wrong and improper order that he gave, and I hold that the cause of the collision and of the loss and damage that resulted therefrom was the negligence of Smythe for whose acts the owners of the Calcutta were responsible.

The next question that arises is whether the fault of the Calcutta was the sole cause of damage, or whether it was caused by the combined action of the Calcutta and the Rabenfels. Now, in considering the action of those on board the Rabenfels I feel bound to say that that whereas Bacon gays his evidence frankly and with calmness Smythe appeared to me to be determined to uphold his theory of the cause of the accident in every detail even on points where it was apparent that it could not be accepted, and in giving his evidence at times he seemed to me to be following his bias rather than his memory. Having seen them both in the witness-box I feel it incumbent upon me to say that if I had to rely upon the uncorroborated evidence of one or the other of them I should prefer to accept the testimoney of Bacon. In this case, however, a number of witnesses were called on both sides and the substance of Bacon's narrative of the facts leading up to the collision was corroborated not only by Winters, the Master of the Rabenfels, but also by those on the board the Winkfield. I was impressed by the way in which both Winters and Scoby gave their evidence ; they appeared to me to be free from bias and anxious to tell the truth, and I am prepared to place reliance upon their testimony. Bacon's version of the material events is summed up in his answers to the following questions :

Q. 72.—As you went down lower you met a vessel, I believe ? Yes, the Sirdhana.

Q. 73.—That is the vessel you told me you have seen at Fisherman's Point ? Yes, I presumed so.

Q. 74.—Which side of the channel was she and which side were you when you passed her? She was on the eastern side and I was on the western side.

Q. 75.—That is normal ? Yes.

Q. 76.—Had you any trouble in passing her at all ? None.

Q. 77.—Had it any effect upon your subsequent manoeuvres ? None that I know of.

Q. 78.—Whereabouts was she when you passed the Sirdhana ? Above the Fulta Creek buoy.

Q. 79.—Having passed her did you take a normal course through the Bight ; I more or less remained over to the western side of the centre of the channel.

Q. 80.—As you were passing down the Bight did you see the Calcutta ? Yes.

Q. 81.—When did you first sight her ? When I was below the Creek Cash buoy.

Q. 82.—Where was the Calcutta then ? Below the Fulta Point buoy.

Q. 83.—What course did you take down the Bight ? I proceeded down the western side of mid-channel.

Q. 84.—What course did the Calcutta take round Fulta Point ? She appeared to be fairly wide.

Q 85.—At some point coming down that Bight you blew one blast to the Calcutta ? Yes.

Q. 86.—What did you do when you did that ? I ported my helm and went to starboard.

Q. 87.—Had your head on to anything ? I got her head on to the Centre Fulta Sand buoy.

Q. 88.—At the time when you blew that one blast where was the Calcutta ?

She was on my starboard bow showing me her starboard side.

Q. 89.—That is pretty wide coming round that corner? Fairly wide as she was showing me her starboard side at that time.

Q. 90.—The object of blowing one blast is to give information to the vessel coming as to what you are doing? Yes.

Q. 91.—Had you any other object in blowing this blast except telling him that? To get a reply blast from him which would indicate to me what he wanted to do.

Q. 92.—Had you at that time in mind what course he would take? I cannot say that I definitely had.

Q. 93.—Thinking of it now had he an alternative? He could have gone to the other side so far as I know.

Q. 94.—Which ship had the right of way? The Calcutta had.

Q. 95.—Why? Because she was coming up with the flood.

Q. 96.—You are bound to manoeuvre as she answers you, she having the right of way? I had to manoeuvre my ship to try and coincide with his movements to carry out his action.

Q. 97.—I think you said that you blew one blast and ported over so as to get that buoy ahead? Right ahead.

Q. 98.—Would it have been a possible manoeuvre for you to have gone to the west of that buoy, outside of it? Yes.

Q. 99.—It would have been a very close fit? It required skill navigation.

Q. 104—Did you in fact that morning ever go outside that buoy? That afternoon I did.

Q. 105.—When? On my return to Calcutta I went westward of the buoy.

Q. 127.—You remember you said that you passed the Sirdhana in the Bight port to port? Is that the normal way you pass there? Yes.

Q. 128.—When you first sighted the Calcutta how did you think that she was going to pass? Port to port.

Q. 129.—When you gave this one short blast did you get any answering signal to it? Yes.

Q. 130.—What was it? Two blasts from Calcutta.

Q. 131.—What did that indicate to you? That he was going to port. That he was going to starboard his helm and going to port.

Q. 132.—On that what would be the proper manoeuvre for you to carry out? The same starboard helm and go to port.

Q. 133.—Did you do so? I gave him two blasts seeking to tell him that I was going to do so, and I endeavoured to do so.

Q. 134.—Did you continue that course? No, because I saw him shortly after that swinging very quickly to starboard across my bow.

Q. 135.—Then what manoeuvre was left for you to carry out? To go full astern.

Q. 136.—Did you do so? Yes.

Q. 137.—What happened? We came into collision.

Q. 138.—Where did you hit him? On the port side forward of the bridge.

Q. 139.—In what position in the channel so far you could guage? On the western side of mid-channel.

Q. 140.—Do you remember the time when you blew one short blast and slightly ported? Yes.

Q. 141.—Supposing at that time the Calcutta had ported her helm would there have been any collision in your opinion? No.

Q. 142.—Take another possiblity; at the time when the Calcutta blew two short blasts; if she continued to carry out that manoeuvre and you had blown your two short blasts and carried out that manoeuvre there would have been no collision? No.

Q. 143.—At the time when you blew this one short blast there was time for you to carry out the manoeuvre of either going to the eastern bank or keeping along the western bank and avoid a collision according as he manoeuvred? If he let me knew what he was going to do, Yes.

Q. 144.—You said that after he blew two short blasts and you answered with your two short blasts that you saw his head paying off or swinging to starboard? Yes.

Q. 145.—That would indicate I take it that he was on port helm? That is what you would suppose.

Q. 146—Did you hear any signal from him indicating that he was proceeding on port helm? No.

Q. 147.—Do you think that it is at all possible that this would happen, that he gave two blasts and you answered with two blasts and while you were giving your blasts, he gave one blast which you did not hear? Yes, quite.

Q. 148.—You said that you answered his two short blasts with two short blasts, and you said that that was the proper thing to do in your opinion, and that if he had carried it out there would have been no collision? Yes.

Q. 149—Once he altered his mind and did not carry it out was a collision avoidable? No, I don't think so then.

Q. 150—Could you have done anything else except to go astern in those circumstances? No.

Q. 151.—What is the effect of going astern? It pulls her head to starboard. It really pushed my stem to port; that action is bigger than pushing my head to starboard.

Now, although I am not satisfied that the Calcutta when rounding the Fulta Bight took quite as wide a sweep as that indicated by Bacon on the composite plan (marked in black), I find that in substance the narrative of the accident as told by Bacon is correct. To my mind it is inconceivable that Smythe having the right of way should have sounded two short blasts (whether or not he was under the impression that Bacon had sounded two short blasts) unless he was well over on the western side of the channel and had decided to pass the Rabenfels starboard to starboard. I have held that the order for two short blasts was erroneous and improper, and upon no other hypothesis, as it seems to me, could such an order have been given by a pilot so experienced as Smythe undoubtedly was.

In my opinion, and on this matter I find myself in agreement with the advice that the asseesors have given to me, Smythe had ample time in which to make up his mind what he would do, and how he would pass the Rabenfels before he gave the order for two short blasts, and there is no ground for the contention that he gave the order in the agony of an emergency created by the action of the Rabenfels.

What then, is the negligence on the part of Bacon which it is contended was the cause of the collision? It was at one time suggested in the course of the trial that because Bacon had not noticed the Calcutta near Hooghly Point when the Rabenfels was at Fisherman's Point there was not a proper look out kept on the Rabenfels. But what had that to do with the accident, unless it were to be held that on sighting the Calcutta from Fisherman's point the Rabenfels ought not to have entered the Fulta Reach till the Calcutta had passed her, and, therefore, in some way or other the failure to sight the Calcutta was the cause of the accident.

Inasmuch, however, as it is not open to doubt or controversy, in my opinion, that when the Calcutta and the Rebenfels first sighted each other in the Bight as the Calcutta was rounding Fulta point there was no difficulty or danger in the situation, and the vessels under proper navigation could have passed each other either port to port or starboard to starboard, I am not disposed to labour this part of the case that was presented on behalf of the Calcutta, for applying the principles of law that I have restated the failure of the Rabenfels to sight the Calcutta from Fisherman's Point was no more the cause of the collision than the failure of the Rabenfels to remain in her moorings at Calcutta. I arrive at the same conclusion for the same, among other reasons with regard to the contention that if the Rabenfels had not overtaken the Winkfield at or about Fulta Flat buoy or passed the Sirdhana above the Creek Cask buoy she would not have been "at a bad angle" and the collision would not have taken place. Further, I am not satisfied upon the evidence that the Rabenfels committed a breach of Chap. 11,R. 5 of the Hooghly Rules by overtaking the Winkfield in the Fulta Bight, although no doubt she overtook her somewhere in the vicinity of the Fulta flat buoy.

Again, I am not satisfied that the Rabenfels in passing the Sirdhana in the Fulta Bight was acting in contravention of any warning against passing vessels in the Fulta Bight that was then in operation. It appears that towards the end of 1926 the sand had shifted in the Bight, and had lessened the width of the navigable channel, and that a warning against passing vessels in the Bight had been posted on the notice board in the Port Office in December 1926. The warning notice was not produced, and its exact terms were not proved, but in any case I am satisfied that in August 1927 it had become a dead letter, for the navigavable channel by that time again had been restored to the width prevailing before December 1926, and all the pilots who were called as witnesses agreed that before August 1927 it was the universal practice of pilots to pass though not to overtake vessels in the Fulta Bight. In my opinion the action of Bacon in overtaking the Winkfield and in passing the Sirdhana, which operations he carried out in a proper and seamanlike manner, in no way caused the collision that took place between the Calcutta and the Rabenfels. What then is the alleged negligence on the part of Bacon after the two vessels had first sighted each other in Bight that it is contended was the cause of the collision?

It was urged by learned counsel on behalf of the Calcutta that if the collision took place at the point marked green *C* as stated by Smythe, the Rabenfels must have been on the wrong side of the channel, and must have run down the Calcutta who had chance of escape thus causing the collision. "She pushed me ashore, broad side" Smythe said. Now, in considering what was the position of the vessels in the stream when the impact took place somewhere in the navigable channel in the vicinity of a line between the Centre Fulta buoy and the figure 61 it must be borne in mind that at this point the channel was not more than 650 feet wide. and with the Calcutta heading an angle of 30-45 degrees towards the east bank, and the Rabenfels striking her at an angle of 45 degrees it is apparent that the ves-

sels were straggled across the stream at the time when the collision occurred, and in such circumstances it would not be easy to estimate exactly where the vessels were in relation to the east bank and the Centre Fulta buoy. Paterson Smith the master of the Clan Mackeller hearing the anchor cable running out looked ahead, and in his opinion the vessels at that time were about 100 feet from the eastern bank, but he could not say whereabouts in the channel the actual collision had taken place. The witnesses from the Winkfield, Scoby, Goodson, Smith, and Wood all stated that the impact took place in midstream and after considering all the evidence adduced on this point I find that the collision took place in the middle of the navigable channel somewhere in the vicinity of the Centre Fulta buoy, and I am satisfied that the Rabenfels was never right over on the eastern side as stated by Smythe. In my opinion the Calcutta, which had way on when the Rabenfels struck her, continued to move with her own momentum towards the eastern bank after the collision, and struck that bank at about the figure 61.

It was next contended that the Rabenfels, being at a bad angle after passing the Winkfield and the Sirdhana, blew two short blasts in order to pass the Calcutta starboard to starboard, but I find that the Rabenfels kept a normal course coming round into the Bight, and was not at a bad angle as stated by Smythe, and as I also hold that Bacon in the first instance blew only one short blast I am of opinion that this contention on behalf of the Calcutta is ill-founded. I go further, for in my opinion even if the Rabenfels was "a little out of position" that cnnnot be regarded as in any way the cause of the collision. Such a contention cannot be upheld, in my opinion, taking into account Smythe's evidence alone.

Q. 315.—What happened after this? I was out of the eddy and saw the Rabenfels' starboard side a little out of position, but I still thought, to my mind, that she could pass me port to port. You remember saying that? Yes, that is my story, that is the truth.

Q. 316.—Then you remember saying: "What happened then? When I got a little closer I heard two blasts from the Rabenfels"? Yes.

Q. 317,—May I take it, therefore, when you steadied out of this eddy you were under the impression that the Rabenfels and you could pass port to port? Yes.

Q. 318.—And you say she was a little out of position? Yes.

Q. 319.—Can you remember which side of the river she was? No, I could not. She was out of position as regards her angle. That is what I want you to get at.

Q. 320.—Was there anything to prevent her going over on to her starboard side of the channel? Not if she had her helm hard-a-port, as I stated before.

Q. 321.—In the position in which you were if she had given one short blast and ported her helm and proceeded, there would have been no collision? I could not tell you.

Q. 322.—Provided that you went up on the eastern bank? Yes and she answered her helm. Don't forget that.

Q. 323.—Do you suggest that she did not answer her helm? I could not; she did not appear to me to change her line of direction. I always saw her starboard side. That was just my own impression at the time.

Q. 324,—Court:—You did not notice her change her line at all? No.

Q. 325.—If she had ported her helm you thought you could pass port to port? When we were in this position.

Q. 326.—At that time provided both ships were properly navigated there was no danger of collision? No, that is my impression.

Q. 327.—The correct thing for the Calcutta to do was to proceed along the eastern bank of the river? Yes.

Q. 328.—And the correct thing for the Rabenfels to do was to proceed along the western bank? Yes.

Q. 329.—You are not able to assist us at all in saying how far off the western bank the Rabenfels was at that time? No.

The last contention on behalf of the Calcutta was that the Rabenfels ought to have slowed down her speed or stopped in order to have allowed the Calcutta to pass her either (1) when she first sighted the Calcutta, or (2) after Bacon had sounded his first signal of one short blast; or (3) after he had sounded his second signal of two short blasts.

In my opinion none of these contentions can be upheld. As to (1) it is enough to say that it was not really a matter of dispute at the trial that at that stage the vessels were in a position in which they would pass each other safely if they were navigated in a normal and skilful manner, and there was no reasonable ground to induce Bacon to ease his engines or to proceed otherwise than in the usual way with his ball up; or, indeed, to justify him in so doing. As to (2) it was urged that as the Calcutta had the right of way it was improper for Bacon to have given any signal, and that he blew his whistle because he must have known that there was danger, and ought to have eased on

stopped. I am clearly of opinion that in giving a signal to indicate that he was pursuing a normal course to his starboard side of the channel Bacon in the circumstances was acting in a proper and seamanlike manner. When he saw the Calcutta rounding the Fulta point in a rather wider sweep than vessels usually take in my opinion it was reasonable and prudent for him to indicate that he would be following a normal course unless the Calcutta directed some other course. Bacon in cross-examination was asked:

Q. 601.—Before you blew your first blast your idea was that the "Calcutta" was in difficulty with the tide? I do not know that I thought of it in that light. I did not know what she was going to do or whatt she was capable of doing.

Q. 602.—Then when she started drifting northwards you thought that something unsual was happening? At what time?

Q. 603.—Shortly before you blew your first blast? I thought that she was taking a peculiar course round there. And I would exactly indicate to her what I was going to do.

Q. 604.—Did you at that time think that she was possibly going to take western course? I did not know what she was going to do.

Q. 605.—Did you think that? I was prepared for him to do anything so long as he gave me an indication as what he was going to do.

Q. 606.—Did you think that something had gone wrong with the Calcutta? After giving my one blast I thought that something might possibly have gone wrong.

Q. 607.—Which may have been due to the current in the eddy? No, because if he had been in that eddy he would have swung to his starboard side.

Q. 608.—Didn't you think that his steering gear might have broken then, or his vessel might have got into the eddy? I am afraid I cannot say exactly what might have happened, or might have been wrong.

Q. 609.—Before your first blast did you not expect him possibly to keep to the western side? He might have done that seeing his peculiar position.

Q. 610.—That was the reason why you gave your first blast according to you? I gave that blast to indicate to him that I was directing my course to starboard.

Q. 611.—Is it true that you gave the first blast because you thought that she was going to the western side, and you wanted information? I gave the first blast to indicate that I was directing my course to starboard, and with the hope that he would give me some reply or indication as to what direction he was going to take.

See *the Uskmoor* (12); *the Corinthian* (13) and *the Megantic* (14). But there is a further answer to this contention. Assuming, as I have found to be the fact, that when the vessels first sighted each other in the Bight there was no reason for Bacon to suppose that the Calcutta could not and would not pass the Rabenfels in the normal way, it was clearly established by the evidence and I find that vessels answer the helm better and are more easily controlled when proceeding at some speed than when going slow, and that it would have been a bad manouvre on the part of Bacon to have eased or stopped his engines until Smythe had indicated what course he was proposing to take. Indeed, Smythe agreed with Bacon and Winters that to have slowed down would have been bad seamanship on the part of Bacon.

Smythe was asked:

Q. 506. I just want to remind you of the statement you made in Alipore Court. You said there that it would have been a bad manoevure for Mr. Bacon to slow down? No, I do not remember what I said there. If you show it to me under my signature I might be able to say. (Then says). Yes, I remember it now. That was on the question of his unskilfulness.

Q. 507.—Do you agree that it would be a bad manoeuvre? Yes.

Upon this matter I sought the advice of the nautical assessors, and they entirely agreed with me that it would have been bad seamanship on the part of Bacon if he had slowed up or stopped before he heard the two short blasts from the Calcutta. As to (3) in my opinion, and the advice of the assessors is in accordance with my view, after Smythe had sounded two short blasts followed by one short blast the collision was inevitable, and that, although Bacon did all that he could to avoid and minimise the severity of the impact, at that stage nothing could be done to avoid the collision taking place.

After considering the evidence as a whole I am of opinion that the Rabenfels at all material times was navigated in a skilful and proper manner; that Bacon was not in any way guilty of negligence and that the collision was not caused by any act or omission on the part of those on board the Rabenfels. In my opinion, the sole cause of the collision and of the loss that resulted therefrom was the improper and negligent navigation of the Calcutta by Smythe, and I hold that the loss and

(12) [1902] P. 250=71 L. J. P. 103=18 T.L.R. 727=9 Asp. M. C. 316=51 W. R. 93=87 L. T. 55.

(13) [1903] P. 260=78 L. J. P. 121=25 T.L.R. 693=53 S. J. 650=11 Asp. M. C. 264=101 L. T. 265.

(14) [1915] 31 T. L. R. 190.

damage was caused solely by the fault of the Calcutta.

This case has been fully and skilfully presented and argued on both sides, and learned counsel on behalf of the Calcutta in his final address, if I may be allowed to say so, properly and handsomely expressed regret for what he regarded as the ill-advised step of putting Bacon on his trial for his action in connexion with this accident. I desire to endorse and associate myself with these observations of Mr. Chaudhri. The duty of navigating deepships in the Hooghly is never an easy one, and the pilots are always subjected to strain and anxiety. Pilots, of course, are required to exercise skill and foresight, but they are not expected to be infalliable, whether or not it is necessary or expedient to intiate proceedings under Act 12 of 1859 must depend upon the particular facts of each case. In the present instance no misconduct or moral delinquency was to be imputed to Bacon in connexion with this collision, and, having regard to the evidence before the Marine Court of enquiry, and to the findings of the Marine Court, among others, that the proximate cause of the accident was the blameworthy action of Smythe and that on certain important and material issues the evidence of Smythe would not be accepted, I am bound to say that I do not find it easy to understand why it was deemed necessary or reasonable to put Bacon alone on his trial, and thus compel him to suffer the anxiety, humiliation, and expense that such a prosecusion must entail.

If I have spoken strongly on this matter (although I hope not in unmeasured terms), it is because I feel strongly that the circumstances attending a collision should thoroughly be examined; and that great care should be exercised by the authorities concerned before a prosecution in respect of it is launched against a pilot under this Act. It will be a source of satisfaction to all those concerned in and with the navigation of the Hooghly that, notwithstanding what has taken place in connexion with this collision, Bacon's character remains unblemished, and that the reputation which after 24 year's service he has gained as an experienced and efficient pilot has now been vindicated. The result is that the suit is dismissed with costs, including the costs of the two commissions and reserved costs (if any), on scale No. 2.

V.B./R.K. *Suit dismissed.*

A. I. R. 1930 Calcutta 109

SUHRAWARDY AND JACK, JJ.

Abhoy Charan Modak—Plaintiff—Appellant.

v.

Ram Sunder Shaha and *others* — Defendants—Respondents.

Appeal No. 2125 of 1925, Decided on 2nd May 1929, from appellate decree of First Addl. Dist. Judge, Dacca, D/- 29th July 1925.

(a) Bengal Tenancy Act (8 of 1885), S. 22 (2)—What ceases to exist is not holding but occupancy right in it.

Where a patnidar purchases a holding under the patni what is extinguished under S. 22 (2) is occupancy right in the holding and not the holding itself: 24 *Cal.* 143, *Foll.* [P 110 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 22 (2), as amended by East Bengal and Assam Tenancy Amendment Act (1 of 1908)—Amendment is not retrospective.

Where a cosharer landlord purchases a raiyati holding before amendment of S. 22 (2) by the East Bengal and Assam Act, his position under the Act as amended is not affected since the amending Act is not retrospective in its operation. [P 110 C 1]

Sarat Chandra Basak, Rajendra Chandra Guha and *Charu Chandra Choudhuri*—for Appellant.

Gunada Charan Sen and *Prosanta Bhusan Gupta*—for Respondents.

Judgment.—In this case the plaintiff who is the appellant brought a suit to recover khas possession of the lands of schedules kha and ga to the plaint on the allegation that the said lands were khas khamar lands appertaining to seven pice share of the patni which originally belonged to defendant 1's father Ram Nath Shah and which was purchased subsequently by the plaintiff in an auction sale in execution of a mortgage decree. The plaintiff's case is that defendant 1's father who was a patnidar to the extent of seven pice share in the patni had purchased certain holdings under the patni and was in possession of them. The patni right of defendant 1's father having been sold defendant had no right to retain possession of the khas land which passed with the patni to the plaintiff. The trial Court dismissed the plaintiff's suit in respect of the schedule kha land but decreed it in respect of ga..

The lower appellate Court on appeal by the plaintiff confirmed the decree of the trial Court dismissing the suit in respect of the schedule kha lands.

The point that arises in this case is the effect of the purchase by defendant 1's father of the raiyati holdings under the patni. These purchases were made in 1883 and 1896 prior to the amendment of S. 22, Ben. Ten. Act, by the East Bengal and Assam Act of 1908. If by his purchase defendant 1's father under the old S. 22, Cl. (2), lost only the occupancy right but the holdings were not extinguished, the plaintiff is not entitled to recover possession of them unless the amending Act of 1908 had retrospective effect which it has been held it has not. If on the other hand under the law defendant 1's father's purchase destroyed not only the occupancy right in the holdings but also the holdings themselves the plaintiff is entitled to succeed.

If the question raised in the case were res integra we would have given careful consideration to the submissions made on behalf of the appellant. But it seems to be covered by a Full Bench decision of this Court and a number of cases following it. In the case of *Jawadul Huq* v. *Ram Das Saha* (1), a case tried by a Bench of five Judges it was held that under sub-S. 2 S. 22, Ben. Ten. Act before the amendment, on a proprietor purchasing an occupancy holding the holding did not cease to exist but the right of occupancy ceased. This decision was followed by the Full Bench in *Ram Mohan Pal* v. *Sheikh Kachu* (2) and it has since been followed in every reported case in which the point arose for consideration: *Akhil Chandra Biswas* v. *Husan Ali Sowdagar* (3), *Purna Chandra Roy* v. *Mathura Mohan Shah* (4) and *Profulla Nath Tagore* v. *Secy. of State* (5). There is one reported case which seems to have taken a different view. In *Roshan Ali* v. *Chandra Mohan Das* (6) it was practically held that the law after the amendment of S. 22 was the same as before it and the proprietor purchasing an occupancy holding did not hold the raiyati but possessed the holdings as proprietor. It will not be profitable to consider the ratio decidendi of this case as we are bound by the Full Bench decision above referred to and the cases in which it was followed. But it is argued that the Full Bench decision in *Ram Mohon Pal* v. *Sheikh Kachu* (2) has been impliedly overruled by their Lordships of the Judicial Committee in the *Midnapur Zemindari Co.* v. *Naresh Narayan Roy* (7.) That was a suit for a partition by Naresh Narayan Roy against the Midnapur Zemindari Company in which one of the defences put forward by the company was that the company held jote rights in the lands in suit. In the authorized report it does not appear when the holdings were acquired by the company before or after the amendment of 1908. But assuming that it was before the amendment it appears that their Lordships were considering the question which was raised, namely' whether the company obtained jote rights in the holdings acquired by them. On this point their Lordships observed thus:

"No cosharer can as against his cosharers obtain any jote right, a right of permanent occupancy, in the lands held in common nor can he create by letting the lands to cultivators as his tenants any right of occupancy of the lands in them."

In another passage their Lordships remarked:

"Even if the Midnapur Zemindary Company purchased any jote rights in lands held in common by the cosharers such a purchase would in law be held to have been a purchase for the benefit of all the cosharers, and the jote rights so purchased would by the purchase be extinguished."

These are the two observations in that case which have any bearing upon the question before us. It seems that their Lordships in that case were not considering the effect of a purchase by a co-proprietor under the old S. 22 (2) on the holding but were examining whether the Midnapore Zemindari Company had a permanent occupancy right in the holdings purchased by them. When their Lordships said that the purchase made by a cosharer is for the benefit of his cosharers they meant to make it clear that the jote right ceased to exist for the benefit of all the cosharers as it would by the purchase be extinguished. It will be charging the Judicial Committee

(1) [1897] 24 Cal. 143=1 C. W. N. 166.
(2) [1905] 32 Cal. 386=1 C. L. J. 1=9 C.W.N. 249 (F. B.).
(3) [1913] 18 C. L. J. 262=20 I. C. 698=19 C. W. N. 246.
(4) A. I. R. 1923 Cal. 210.
(5) A. I. R. 1921 Cal. 429.
(6) A. I. R. 1923 Cal. 701=50 Cal. 749.
(7) A. I. R. 1924 P. C. 144=51 Cal. 631=51 I. A. 293 (P. C.).

with deciding a point not raised before it or argued, the effect of which decision might be to overrule the Full Bench decision of this Court and a number of other cases in which the same view was taken without examining those cases. In my opinion the decision of the Judicial Committee lays down only that if a cosharer purchases an occupancy holding the permanent character of the holding is destroyed, but it does not decide that the raiyati also ceases to exist. A reference in this connexion may be made to the case of *Golbar Bibi* v. *Aswini Kumar* (8) where the Privy Council case of *Midnapur Zemindary Company* v. *Naresh Narayan Roy* (1) was considered. It may be noted in passing that the Amending Act of 1908 was passed to undo the effect of the decision in *Jawadul Huq's* case (1) and the Full Bench decision in *Ram Mohon Pal's* case (2).

There is a finding of fact by the lower appellate Court which disposes of the plaintiff's claim in respect of this holding with the exception of the seven pice share owned by defendant 1's father. That Court finds that all the cosharer landlords with the exception of defendant 7 admit that they granted a jote settlement of this land to defendant 1's father after his purchase and the evidence shows that the father of defendant 7 recognized these jotes. This fact is proved by numerous rent receipts and by the settlement khatians which are in favour of defendant. On this finding of fact the plaintiff is not entitled to succeed in respect of fourteen annas one pice share in the holding. As to the seven pice share owned by defendant 1's father in the view of the law we take he is not entitled to it.

The result is that this appeal is dismissed with costs. The respondents who have appeared have filed a cross-objection in respect of Sch. ga to to the plaint. The learned Subordinate Judge in his judgment has observed that defendant 1 has filed no cross-objection against the trial Court's finding about the Sch. ga land. It has been brought to our notice that as a matter of fact a memo of cross-objection was filed on behalf of defendant 1 in the Court below. From this statement in the judgment of the learned Subordinate Judge it seems to us that the cross-objections might have been filed but were not brought to the notice of the Judge much less were they urged at the hearing of the appeal. We cannot therefore, entertain them in this Court. The cross-objections are also dismissed but without costs.

V.B. R.K. *Appeals and cross-objections dismissed.*

(8) A. I. R. 1929 Cal. 253.

A. I. R. 1930 Calcutta 111

RANKIN, C. J. AND SUHRAWARDY, J.

Gorai Mollah and *others*—Plaintiffs—Appellants.

v.

Panchu Haldar and *others*—Defendants—Respondents.

Appeal No. 2268 of 1927, Decided on 18th July 1929, against appellate decree of Second Class Sub-Judge, Faridpur, D/- 27th May 1927.

(a) Bengal Tenancy Act (8 of 1885), S. 22 (2)—Suit for ejectment — Defence that parties are not under-raiyats but raiyats—They must prove it.

In a suit for ejectment if the defence to the suit is that the defendants are not under raiyats but raiyats it is for the defendants to make that defence good, particularly if they have to begin by admitting that their tenancy in origin was an under-raiyati. [P 111 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 22 (2)—Occupancy right only and not tenancy right ceases to exist.

When the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure holder, it is merely the occupancy right that ceases to exist and not the tenancy holding:-32 *Cal.* 336 (*F.B.*); 24 *Cal.* 143; *A. I. R.* 1921 *Cal.* 420: 27 *C. W. N.* 760*n* and 37 *Cal.* 709, *Foll.*; *A. I. R.* 1923 *Cal.* 701 and *A. I. R.* 1924 *P.C.* 144, *Dist.* [P 112 C 2]

Asita Ranjan Ghose—for Appellants.

Jahanbi Charan Das Gupta and *Jogesh Chandra Sinha*—for Respondents.

Rankin, C. J.—In this case, it appears that, in 1897, plaintiff 1 purchased an occupancy raiyati interest under a certain howla. In 1898, he took a kabuliyat from the defendant's predecessors. That kabuliyat was to be in operation for nine years; but the tenants have held over upon the terms thereof. The plaintiffs sue in ejectment and the defence with which they are met is that these defendants are not under-raiyats but are raiyats. It is for the defendants to make that case good, particularly if they have to begin by admitting that their tenancy in origin was an under-raiyati. They claim to make that defence

good in this way: They say that a six anna share in the howla superior to the occupancy raiyati interest which plaintiff 1 purchased in 1897 was bought by a brother of plaintiff 1, and they further say that this transaction and also the acquisition of the occupancy right were transactions by plaintiff 1 and his brother jointly. From this, they go on to maintain, first, that the purchase of the six annas share in the howla was before the purchase in 1897 of the occupancy right and, on that basis, they say that the case comes within Cl. (2), S. 22, Ben. Ten. Act, before it was amended in 1907.

Now, before the trial Court, the kabala representing the purchase of the six anna share of the howla was not produced. The entry in the khatian relating to the purchase was the evidence upon which the matter was discussed and it would seem then to have been agreed by both the parties and assumed by the trial Court as well as by the lower appellate Court that the purchase of the interest in the howla was prior to 1897. If the defendants were to succeed in making out their defence and were to do so by bringing the case within Cl. 2, S. 22, Ben. Ten. Act, the burden of proof was entirely upon them to show that, at the time this occupancy raiyati was acquired, the purchasers were cosharers, in the howla. Strictly speaking, therefore, it was for the defendants to show the date of the purchase of the howla interest ; but it seems to have been a matter of no controversy in the Courts below and the assumption was made in favour of the defendants on the point.

In this Court, Mr. Ghose on behalf of the plaintiffs-appellants has produced a registered kabala of the year 1902 which purports to satisfy the description of the deed by which Lal Mahomed — brother of plaintiff 1 purchased the six anna interest in the howla. It looks very much, therefore, as if the real facts of the case were that the purchase of the superior interest was made after the acquisition of the interest in the raiyati. If that be true, then it is clear that there is no defence to the plaintiffs' claim because the matter would come within the explanation of the original S. 22. Assuming, however, the facts to be as the Courts below thought, the position is that the case would come within Cl. 2, S. 22. That clause was as follows :

'If the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure holder, it shall cease to 'exist'".

Many years ago, a question arose, first, whether this meant that the tenancy of holding should cease to exist or merely the occupancy right should cease to exist and that matter was decided in favour of the latter alternative in many cases.

I will refer to the case of *Jawadul Huq* v. *Ramdas Saha* (1), a decision of the Special Bench and to the Full Bench decision in *Ram Mohun Pal* v. *Kachu*(2). There is another decision *Prafulla Nath Tagore* v. *Secretary of State* (3), and also a decision reported in *Abinash Chunder Bhattacharjee* v. *Amar Chunder De* (4). Again, there is a decision in *Ramlal Sukul* v. *Bhela Gazi* (5). These decisions, it appears to me, are binding on this Court because there is a decision, amongst others of a Full Bench supported by a strong current of authority. The Full Bench decision in *Ram Mohan Pal* v. *Kachu* (2) is further supported by this circumstance that the legislature being minded to change the rule of law as laid down by the Full Bench altered the Statute in 1907 and did not alter it with retrospective effect. In these circumstances, it appears to me that, while I do not doubt that in the observations of my learned brother B. B. Ghose, J., in the case of *Roshanali* v. *Chandra Mohun Das* (6), there is very forceful reason, it is nevertheless quite impossible for a Division Bench of this Court to ignore, in the circumstances which I have mentioned, the decision of the Full Bench reported in *Ram Mohanlal* v. *Kachu* (2). If the matter were worth while, it might be a matter for consideration of the Chief Justice whether to constitute a Special Bench of seven Judges to reconsider at this time of the day the decision of the Full Bench to which I have referred. There is no reason to think, however, that, after all these years, such a course has become necessary. But if that decision of the Full Bench is to be changed, it must be changed in that way. In the present case, we are bound

(1) [1897] 24 Cal. 143=1 C. W. N. 166.
(2) [1905] 32 Cal. 386=1 C. L. J. 1=9 C. W. N. 249 (F.B.).
(3) A. I. R. 1921 Cal. 429.
(4) [1923] 27 C. W. N. 760*n*.
(5) [1910] 37 Cal. 709=6 I. C. 370=14 C. W. N. 814.
(6) A. I. R. 1923 Cal. 701=50 Cal. 749.

by the Full Bench decision; and, in that view, this appeal will have, in any event, to be allowed. In my judgment, the present appeal must be allowed with costs and a decree for ejectment must be passed for the plaintiffs.

I should like to add that the judgment of Sir John Edge in *Midnapore Zemindary Co. Ltd* v. *Naresh Narain Roy* (7) does not seem to me to be directed to the construction of S. 22 of the old Ben. Ten. Act. The law as laid down by him was to the effect that a landlord cosharer purchaser of a tenancy was a trustee for all the other cosharers and that in that way there was an extinction of the jote right. That does not seem to me to be in point on the present question.

Suhrawardy, J.—I agree. I have given my reasons fully in support of the view taken by the learned Chief Justice in my judgment in the case of *Abhoy Churn Modak* v. *Ram Sunder Sauha* (8).

V.B./R.K. *Appeal allowed.*

(7) A. I. R. 1924 P. C. 144=51 Cal. 631=51 I. A. 293.

(8) A. I. R. 1929 Cal. 109.

A. I. R. 1930 Calcutta 113

C. C. GHOSE AND PAGE, JJ.

Currimbhoy and *Co. Ltd.*—Defendants—Appellants.

v.

L. A. Creet and *others*—Plaintiffs—Respondents.

Appeal No. 471 of 1928, Decided on 23rd August 1929, from original decree of Sub-Judge, Asansol, D/- 12th October 1928.

(a) Contract Act, S. 4—Contract by correspondence—To find at what stage contract is concluded whole correspondence must be looked at—Rule for construction enunciated—Contract—Construction.

Where it is sought to establish a contract by correspondence, the rule is that the whole of the correspondence relating to the matter in question must be looked at for the purpose of finding out at what stage there was, if at all, a complete contract between the parties; so that if the cardinal points of a proposed contract are definitely agreed upon by letters, the mere fact that in the course of the correspondence, reference has been made to a more formal agreement or subsidiary non-essential stipulations, will not prevent the Court from considering the agreement arrived at by the letters as concluded. If once a definite offer has been made and it has been accepted without qualification and it appears that the letters of offer and acceptance contain all the terms agreed on between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiation, and no testimony aliunde is admissible. Subsequent letters cannot be referred to, to aid in construing the contract contained in the material letters: *Cayley* v. *Walpole*, 33 *L. J. Ch.* 601; *Bellamy* v. *Debenham*, 1 *Ch.* 412; *Perry* v. *Suffield*, 2 *Ch.* 187 and *Lewis* v. *Nicholson*, 18 *Q. B.* 503, *Ref.* [P 124, C 2, P 121 C 1]

(b) Civil P. C., S. 100—Question whether correspondence amounts to binding contract is question of law.

Question whether the terms contained in a correspondence amount to binding contract between the writers is one of law: *Cheveley* v. *Fuller*, 13 *C. P.* 122, *Ref.* [P 121 C 1]

(c) Specific performance—Effect of company going in liquidation while contract entered into is subsisting is same as when party to contract becomes bankrupt or insolvent.

The effect of a company going into liquidation while a contract entered into by the company before liquidation is subsisting is the same as when a party to a contract becomes bankrupt or insolvent. The bankruptcy or insolvency of a party may not alone necessarily result in such an incapacity to perform the contract as to entitle the other party at once to treat it as broken and to claim damages, because it may be for the benefit of the bankrupt or insolvent or of his estate to complete the contract and the representatives of his estate may be authorized to do so. (*English case law discussed.*) [P 121 C 1]

(d) Specific performance — Bankruptcy—Notice of adoption of contract by trustee in bankruptcy is not necessary.

The law does not require that the trustee in bankruptcy should give express notice within a reasonable time after the date of the bankruptcy of his adoption of the contract. The law only requires the trustee in bankruptcy to perform the bankrupt's part of it as and when he should have done it himself: *Gibson* v. *Carruthers*, (1841) 8 *M. & W.* 321, *Ref.* [P 122 C 2]

(e) Specific performance — Specific performance of contract by bankrupt to buy property is not granted against trustees.

Specific performance of a contract by a bankrupt to buy property is not ordinarily granted against the trustee in bankruptcy of a vendee without his consent: *Holloway* v. *York*, 25 *W. R.* (*Eng.*) 627; *Ex parte Rabbidge*, 8 *Ch. D.* 367 and *Pearce* v. *Bastable*, 2 *Ch.* 122, *Ref.* [P 122 C 2]

(f) Tort—Trespass — Possession alone is sufficient to sustain claim against mere wrongdoer.

Trespass is a wrong to another's possession; it is an injury to a possessory right and therefore the proper plaintiff in an action for trespass to land is the person who is in actual or constructive possession of the land, i. e., entitled to immediate possession. The gist of the action of trespass must be and is the wrong to the right of the plaintiff's possession. The right to possession is all important in an action for trespass and a mere right of property without a right to possession is not sufficient

to support the action. Right to possession is one of the constituent elements of the complete right of property; and it has been laid down from very old times that a person with a right to possession can always maintain an action of trespass against a wrong doer. So also in the case of a person in actual possession. Such a person has against a mere stranger or wrong-door the same remedies as if he had the right to possession and he can as against the stranger maintain trespass and in general the stranger who violates his possession cannot justify the violation by showing that the possession was without title or even by showing that it was wrongful, unless he further proves not only that a third person was entitled to the possession but that he, the stranger, had acted with the authority of the said third person. The fact of possession in the sense referred to above therefore is prima facie evidence of title, and is alone sufficient to sustain the plaintiff's case against a mere wrongdoer. [P 124 C 1, 2]

(g) Co-owners — One cosharer can sue trespasser.

One of several co-owners can maintain an action against a trespasser without joining the other co-owners as parties to the action (*Case law considered.*) [P 125 C 1]

(h) Cosharers—Mines — One can convey without consent of other co-owners.

Co-owners of mining properties have a right to convey their interest without reference to other co-owners: *Bentley* v. *Bates*, 4 *Y. & C.* 182, *Ref.* [P 125 C 2]

(i) Co-owners—Mines—Rights of.

It is settled law that each co-owner is entitled to work the mines provided he does not take more than his share of the minerals nor work the same wastefully. A person who is a co-owner of a mine with another or others, whether as joint tenant, tenant-in-common or coparcener, can enter upon and work the mine, or license another person to do so, subject only to restriction that he shall not take more than his share: *Job* v. *Potton*, 20 *Eq.* 84; *Wilkinson* v. *Haggarth*, 12 *Q. B.* 837; *Glyn* v. *Howell*, 1 *Ch.* 665; *Denys* v. *Shuchburgh* 4 *Y. & C.* 42; 32 *Cal.* 837 and *A. I. R.* 1928 *Cal.* 216, *Ref.* [P 125 C 2, P 126 C 1]

(j) Civil P. C., O. 22, R. 10—Addition of liquidators or trustee in bankruptcy of company in suit against company is under O. 22 if there is devolution of interest in their favour, otherwise addition is under Civil P. C., O. 1, R. 10.

In a suit against a company unless there has been an assignment, creation or devolution of interest in favour of liquidators or trustees in bankruptcy on the date of their addition as parties, the liquidator or trustees in bankruptcy cannot be added as parties to the suit under O. 22, R. 10. If they are so added, they must be considered to have been so added under O. 1, R. 10, Civil P. C.: *A. I. R.* 1922 *P. C.* 304 *Rel. on*: *Chorlton* v. *Dickie*, 13 *Ch. Dn.* 160 and *Borneman* v. *Wilson*, (1884) 28 *Ch. D.* 53, *Dist.* [P 126 C 2, P 127 C 1]

(k) Tort—Trespass—Trespass to coal mine—Damages, measure—Rule.

The measure of damages in a case where trespasser works the coal mine is the fair market value of the coal at the pit mouth at the time when it was severed subject to just allowances. As to what allowances there shall be depends on the conduct of the parties and the other circumstances of the case. There are two rules—(1) the harsher, under which only the cost of bringing the coal to bank is allowed and (2) the milder under which the expense of hewage and haulage, i. e., the cost of working and severing as well as of bringing to bank is allowed. The harsher rule, only allowing the expense of bringing to bank, has been applied where the misconduct has been of a substantial character, e. g., where the wrongful working has been wilful and fraudulent. So also where the working has been unauthorized and without mitigating circumstances, wholly unauthorised and unlawful, fraudulently concealed, or continued after negotiations for purchase had fallen through, negligent, and notwithstanding that the employers relied on their certificated manager, and had no personal knowledge or notice of the wrongful working, malicious and with full knowledge that wrong is being done, furtive and in bad faith. The reason why allowances are made in favour of an innocent mistaken trespasser and disallowed as against a wilful and intentional trespasser, is because the latter must not qualify his own wrong, But the milder rule, allowing the deduction of the expense of working and severing the coal as well as of bringing it to bank, will be applied where the wrongful working has not been done with a guilty or negligent mind, or sinister intention, e. g., where the wrongful working has been done without fraud or negligence, but fairly and honestly, inadvertently and under a bona fide belief of title without the express authority, though with the knowledge of the rightful owner, neither tortious, nor larcenous, nor negligent, but in the assertion of a right; so, if the workings were continued on the fair expectation that a lease would be granted, or have been innocent, and in ignorance, and with as little negligence or carelessness as possible and in the belief that it belonged to the trespasser. (*English case law discussed.*) [P 128 C 2, P 129 C 2]

N. N. Sircar, *S. M. Bose*, *Rupendra Kumar Mitter*, *S. C. Mitter*, *R. N. Sircar* and *K. N. Bose*—for Appellants.

L. P. E. Pugh, *Sarat Chandra Bose*, *Bijan Kumar Mukherjee*, *N. K. Bose* and *S. S. Sarkar*—for Respondents.

C. C. Ghose, J.—The suit, out of which this appeal has arisen, was instituted by the plaintiff on 14th May 1924 in the Court of the Subordinate Judge at Asansol against Messrs. Oosman Jamal & Sons Limited, for damages for breach of contract for the sale and purchase of certain lands with mining rights thereunder in mouza Khandra in the district of Burdwan, for recovery of khas possession of certain properties of which possession had been given to the said defendants pending completion of the contract and particulars whereof are given in the plaint, and for an account of certain quantities of coal which had

been raised by the said defendants or, in the alternative, for specific performance of the said contract and for other reliefs as stated in the plaint.

More than 2 years after the institution of the suit, namely, on 30th June 1926, an order for compulsory liquidation of Messrs. Oosman Jamal & Sons Limited was passed by this Court on its original side and a Mr. R. Ray, chartered accountant, was appointed liquidator. The liquidator was thereupon added as a defendant to this suit on 13th July 1926. On 21st August 1926 the present appellants Messrs. Currimbhoy & Co. Ltd. (hereinafter called Currimbhoys) applied to the learned Subordinate Judge to be added as defendants to this suit. In their application for addition as defendants, Currimbhoys stated that Messrs. Oosman Jamal & Sons Ltd. (hereinafter ealled Jamals) undertook sometime in September 1922 to provide for them a "coal mining property" known as Khandra colliery comprising about 400 bighas of coal bearing lands in one block with all rights, buildings, shafts, machinery, plant and that implements for the proper working of a colliery, and that pursuant to that agreement they had advanced to Jamals a large sum of money amounting to about five lacs of rupees, with part of which the said colliery had as a matter of fact been developed ; that the said colliery had "long" been managed by Jamals on their behalf as managing agents, and that they were the real owners of the said colliery. They further stated that in these circumstances, although no conveyance of the said colliery and lands had been executed in their favour, they were the only persons interested in the property which was the subject matter of the litigation, and that as the pecuniary condition of Jamals had then become precarious, they had been obliged to take over direct possession and management of the said colliery from 7th May 1926.

The plaintiff at first strenuously objected to Currimbhoys being added as defendants to this suit and the grounds upon which such objection was based were set out in the plaintiff's petition dated 18th September 1926. On these grounds the plaintiff denied all the allegations of fact relied upon by Currimbhoys. Currimbhoys' application, however, was not disposed of by the Court till 28th July 1927, when, as appears from the order sheet, the plaintiff having agreed to their being added as defendants to this suit without prejudice to his objections, an order was made by the learned Subordinate Judge adding Currimbhoys as defendants. Thereafter Currimbhoys filed their written statement on 12th August 1927, but the issues arising on the pleadings as they then stood were not finally settled till 21st August 1928. The suit eventually was disposed of by the learned Subordinate Judge by his judgment and decree dated 12th October 1928.

In Sch. 1 to the plaint the plaintiff described the lands and the minerals thereunder in respect of which he prayed for khas possession. The plaintiff adduced considerable evidence showing the raising of coal since 19th February 1923. On consideration of this evidence and of the other evidence bearing on various other points in the case, the learned Subordinate Judge passed the following decree in favour of the plaintiff :

" The plaintiff do get khas possession of all the lands (surface or underground) now owned by the defendant in mouza Khandra described in Sch. 1 of the plaint ; defendants do pay to the plaintiff Rs. 5,49,445 plus costs of the suit. The defendants are directed to remove their structures, boilers, machinery, etc., within 2 months from this day. On failure, the plaintiff will be entitled to apply in the execution proceedings for their removal and disposal and will get the costs which he will have to incur. The decree will bear interest at 6 per cent per annum till realization. The plaintiff do pay deficit court-fees on Rs. 3,49,445, on or before 30th November 1928. On failure, the decree will be prepared on the basis of damages at 2 lacs for which court-fees have been paid."

Against this decree, the present appeal has been brought by Currimbhoys ; there is no appeal by Jamals as represented by the liquidator. Now, in order to understand the various contentions which have been advanced before us on behalf of Currimbhoys and which are hereinafter referred to, it is necessary to set out at some length the facts involved in the present litigation and a short history of the plaintiff's title to the lands in suit, and I will, therefore, now proceed to do so.

Mouza Khandra within touzi 12 of the Burdwan Collectorate consisting of 5,545 bighas appertains to the zamindari of the Maharajadhiraj of Burdwan. The entire area is subdivided as follows : (A)

Khandra proper ; (B) Kismat No. 1 ; (C) Kismat No. 2 ; (D) Chuck Talabanka ; (E) Bajeapti lands and (F) Khas Khalasi lands. It appears that many years ago, the Maharaja of Burdwan granted a patni lease of (A) and (B) to certain gentlemen who are known as the Ukhra Babus. The last named persons in their turn granted a dar-patni of (A) to certain persons who are known as the Sahays of Arrah. Thereafter the Maharaja of Burdwan granted a mining lease of (A) to the said Sahays of Arrah ; and apparently sometime previously, certain people known as the Buxis had taken a patni lease of (C) and (D) from the Maharaja. On 8th January 1915 the Maharaja of Burdwan and the said Sahays granted a prospecting lease or amalnama to one Kangal Chandra Mandal for the purpose of examining the 'coal lands' in and of mouzah Khandra for a period of three years on certain terms and conditions specified in the lease which is marked Ex. 3217. From the boundaries set out in the schedules thereto it would appear that the lease in question covered the entirety of mouza Khandra and it was expressly agreed between the parties that at the end of the said period of three years, the lessee would be entitled to obtain a mining lease of mouzah Khandra for a period of 999 years. On 9th March 1915, Kangal Chandra Mandal sold a moiety of his right, title and interest under the said prospecting lease for a sum of rupees twenty-five thousand to one Taranath Dutt (Ex. 18). On 28th October 1915, the Maharaja of Burdwan granted a mining lease of (B) to Rai Pulin Behari Lal Sinha, Handay Bahadur and two others. On 17th December 1918, the lessee Kangal Chandra Mandal, ignoring the grant he had already made in favour of Taranath Dutt, purported to grant a prospecting lease for a period of eight months commencing from 1st January 1919 of the whole of mouzah Khandra in favour of one F. D. Boga (Ex. T).

It appears that sometime thereafter the plaintiff L. A. Creet, who had acquired some sort of interest in and was in possession of certain Bajeapti and Khas Khalasi lands i. e., lands in (E) and (F), got into touch with the said F. D. Boga and entered into an agreement with him on or about 7th May 1919 to purchase his right, title and interest under the grant in his favour by Kangal Chandra Mandal. It appears that the latter had not been able to obtain from the Maharaja and the Sahays a mining lease of mouzah Khandra within the time limited as above, but what he had done was this ; he had succeeded in obtaining an extension of time from his lessors up to the end of Pous 1326, to apply for a mining lease on payment to his lessors of certain sums of money which he had obtained as advances from Taranath Dutt. The plaintiff Creet, who had heard of Taranath having been left out, wanted to make his position secure, and accordingly he entered into an agreement with Taranath Dutt on or about 28th July 1919 under which he became entitled to prospect for coal in mouzah Khandra up to the end of Pous 1326 corresponding with 14th January 1920. The terms and conditions under which the said prospecting lease was obtained from Taranath Dutt are set out in Ex. (329). On 29th July 1919 Kangal Chandra Mandal obtained a mining lease of mouzah Khandra from the Sahays : see Ex. (3218).

The Maharaja of Burdwan, who was to have joined the Sahays, however, refused to sign the lease ; and the result was that Kangal Chandra Mandal had to institute a suit against the Maharaja for specific performance of the contract with him. That suit was disposed of on 14th April 1927. The decree in that suit directed that the Maharaja of Burdwan should execute a lease as prayed in favour of Kangal Chandra Mandal on payment by him of a sum of Rs. 14,000 within four months from the date of the decree and that in default, the plaintiff Kangal Chandra Mandal would be entitled to have the lease executed by the Court for and on behalf of the Maharaja of Burdwan. As a matter of fact, the lease was not executed by the Maharaja but was ultimately executed by the Court in terms of the decree of 1st November 1927 on deposit of a sum of Rs. 14,000. As regards Taranath Dutt, he had instituted a suit against the Maharaja of Burdwan and others to enforce his rights. This suit was, however, dismissed for default on 12th April 1927. Now, as regards the Ukhra Babus ; the properties be-

longing to them had been partitioned and, as a result thereof, Pulin Behari Singh became entitled to (B). Pulin granted a mining lease of (B) to one Haridas Mukherji and the latter, in his turn, granted a similar lease of (B) to the plaintiff L. A. Creet on 21st November, 1920 (Ex. 3-f). It was stated before us that the lease covered an area of 200 bighas approximately. Now, as regards the Bajeapti and khas Khalasi lands : It appears that the plaintiff Creet was able to get mining leases in respect of certain of the areas comprized therein, but he had not succeeded in acquiring the interest of one Jyotish Chandra Sircar and some of his cosharers. There was some contention raised as to whether the holders of the Bajeapti and khas Khalasi lands were entitled to the minerals thereunder or whether the Maharaja of Burdwan, as the zamindar, was entitled to the same. Be that as it may, it appears that the plaintiff Creet succeeded on 18th October 1921 in obtaining from the Maharaja of Burdwan a mining lease of 825 Bighas of Bajeapti and khas Khalasi lands in the said mouzah Khandra see : Ex. 3210. So much for the title as regards the property which is the subject matter of the present suit.

Two other matters must be mentioned. The plaintiff alleged that Jyotish Chandra Sircar and his cosharers who were interested in certain Bajeapti lands had entered into a contract with him to grant a mining lease. This was not admitted by the Sircars, and the plaintiff had to institute a suit against the Sircars for specific performance of the said alleged contract. The suit was dismissed by the Subordinate Judge of Asansol on 25th June 1927 and it has been stated before us that the decree dismissing the suit has since been affirmed by this Court on appeal. Creet also instituted a suit against Boga and others for specific performance of the agreement of 7th May 1919. This suit also was dismissed by the Additional Subordinate Judge of Asansol on 30th April 1928 and it is said that an appeal against the decree is now pending.

Now, in the early part of May 1920, Jamals were carrying on business in Calcutta, and were on the lookout for coal lands in and near about Rancegunge. They had in their employment a mining Engineer named H.C. Reid who was on friendly terms with the plaintiff Creet. Reid, acting on behalf of Jamals, got into touch with Creet and his object was to acquire mining rights for Jamals from, or with the instrumentality of, the plaintiff. On 18th April 1920 Creet, who had paid selamis to owners of various bajeapti lands for the purpose of acquiring mining rights thereunder and had got possession of certain bajeapti lands, writing to Reid proposed certain terms which were to the effect that Jamals should advance to him a sum of Rs. 50,000 immediately, and that when he got mining leases from the bajeapti holders and succeeded in winning the suit which was then pending against Boga and in acquiring Boga's title and further succeeded in obtaining a mining lease from Taranath Dutt after the latter had managed to obtain title from the Maharaja of Burdwan, he Creet would assign the rights hereinbefore mentioned to Jamals in consideration of Jamals paying Rs. 90 per bigha as selami in addition to the royalties etc. payable to the superior owners and that when Jamals' title was finally completed, the said Rs. 50,000 would be taken into account. There were various other matters mentioned in the letter of 18th April 1920, but the above is, I think, a fair and an intelligible account of the material terms proposed by the plaintiff, Creet, who is an Armenian, does not write correct English.

On 20th April 1920 Jamals made a counter offer which, however, was not accepted by the plaintiff. On 26th April 1920 Jamals intimated to the plaintiff that they had agreed to consider his terms. On 13th May 1920 Jamals proposed that they should take over "this place" (meaning the area where mining operations had already been begun by the plaintiff) immediately for the purpose of "sinking and opening out" under the supervision of their Manager, Mr. Seth Ram and that this should be done subject to "ratification" by their solicitors "as arranged for the acquisition of the property" from Creet : see Ex. 1 (d). On 13th May 1920, Messrs. Morgan & Co., who were Jamals' solicitors, put in writing what they understood to be the terms on which the advance of Rs. 50,000 was to be made by Jamals, and a copy of Messrs. Morgan & Co.'s letter dated 13th May 1920 was for-

warded by Jamals to the plaintiff, and the plaintiff was asked whether he agreed to act on the opinion of Messrs. Morgan & Co. The letter of 13th May 1920 from Jamals was acknowledged by Creet on 15th May 1920, and the plaintiff authorized Jamals to start work at once. On 15th May 1920 the plaintiff wrote again and informed Jamals that he was agreeable to act on the opinion of the solicitors (Messrs. Morgan & Co.) if they were also agreeable. On 17th May 1920, Jamals wrote to the plaintiff as follows :

"Yes, we are agreeable to act on the opinion of the solicitors and since you are agreeable also, we shall get in touch with Messrs. Morgan & Co. today and ask them to draw an agreement on the terms agreed upon."

On 18th May 1920, Jamals informed Creet that payment would be made on the agreement being signed and registered and that they would try and persuade Messrs. Morgan & Co. to do this as soon as possible. As a matter of fact, the agreement was not drawn up then or for some time thereafter ; but on 1st June 1920 Jamals were allowed to take possession of the property which was briefly described in the correspondence as "Khandra." Nothing was done in the matter of the execution of the agreement in 1920 or for the matter of that in 1921; but it appears that Jamals paid to Creet on various dates between 25th June 1920 and 28th November 1920 several sums aggregating Rs. 30,000. In November 1921 Jamals received a bill from Creet for Rs 4,000 on account of minimum royalty, surface rent and selami and they wrote to Creet to say that they would pay the amount if Morgan & Co. were prepared to pass the title and get the documents ready. A demand was also made by Creet for payment of a sum of Rs. 3,641-15-9 on account of certain expenses which Creet had been put to and which, it was understood, Jamals would pay. Jamals paid the said two amounts in question to Creet on or about the 27th November 1921 although no progress had been made in drawing up the agreement hereinbefore referred to. It appears that the examination of Creet's title was for various reasons not proceeded with rapidly and completed, although Messrs. Morgan & Co. reported on 27th February 1922 that Creet had got title to 106 bighas of bajeapti lands, 200 bighas of mal lands and 825 bighas of bajeapti and khas khalasi lands under the lease from the Maharaja of Burdwan. Creet was requested to complete his acquisitions of bajeapti and khas khalasi lands so as to make up a block of 600 bighas; but Creet stated that there was no such understanding, and that Jamals had agreed to take such lands, whether in one block or otherwise, as he could get.

There were interviews and correspondence in 1922, and it appears that on 13th October 1922 Creet wrote to Jamals saying that if Morgan & Co. did not approve of the title, then they, Jamals, should stop raising coal at once. On 9th October 1922, Narendra Mohan Chatterji, pleader, Asansol, who was acting on behalf of Creet, wrote to Jamals reminding them of the balance due by them of Rs. 20,000 and calling upon them to pay the said sum as also another sum of Rs. 40,000 and suggesting that they should place a further sum of Rs. 1,50,000 in deposit with their Solicitors Messrs. Morgan & Co. "for settlement of the disputes regarding the property" which were going on. A lengthy reply to this letter of Mr. Chatterjee was sent on 17th November 1922 by Jamals in which they gave their version of what they understood to be the contract between the parties and of what had happaned since then. Jamals asked that there should be a conveyance of the mining rights already acquired by Creet and covered by the documents which had been deposited by Creet and that Creet could go on acquiring further mining rights in areas "under titles which were to be approved by their solicitors." On 8th January 1923 there was a meeting between Reid, Creet, Ashraf Jamal of Jamals and Jamals' manager, Seth Ram at the Century Colliery and certain terms, according to Jamals, were agreed upon at the said meeting. These terms are to be found in a letter dated 10th January 1923 from Jamals to Creet: see p. 117, Vol. II, Part. II. On 15th January 1923 Jamals sent to Creet a draft conveyance of 1025 bighas which had been drawn up by Messrs. Morgan & Co. see : Ex. L Creet, however, was not prepared to accept the draft conveyance and he forwarded the same to his lawyer for his corrections. The lawyer referred to is Narendra Mohan Chatterji, and instead of sending the

draft conveyance after correction by him Chatterji sent on 23rd January 1923 a draft agreement which according to Creet had to be first executed by Jamals before the question of the execution of the draft conveyance could be taken up. Meanwhile, Chatterji prepared a draft conveyance which is Ex. M and which was sent to Jamals, and on 2nd February 1923 he, Chatterji, fixed fifteen days' time for the completion of the transaction, that is, for the execution of the agreement and the conveyance. Various difficulties thereafter arose with the result that Creet through his pleader gave notice on 19th February 1923 asking Jamals to stop all work and stating that inasmuch as Jamals "had failed to obtain title from him" they would be regarded as trespassers.

A suggestion was made by Messrs. Morgan & Co. in June 1923 that there should be a settlement of outstanding disputes, and on 30th July 1923 Creet opened correspondence with Jamals "without prejudice." On 23rd November 1923 Messrs. Orr Dignam & Co. who were then advising Creet, made certain suggestions to Jamals for settlement of the disputes. The main points were that Jamals should execute the agreement prepared by Chatterji (which is Ex. 2 in this case) subject to such modifications as might be approved by Messrs. Orr Dignam & Co.; that Jamals should undertake to pay all minimum royalties and rents to the superior landlords as from the date on which they commenced to be payable with interest thereon at 15 per cent per annum, and that they should also pay all costs of the acquisition of surface lands with like interest and further should undertake to pay a royalty on all bricks manufactured, and to take over and acquire the twenty odd bighas of surface land taken up by Mr. Boga at a selami of Rs. 100 per bigha and an annual rent of Rs. 10 per bigha. These points were re-stated by Messrs. Orr Dignam & Co, in their letter of 18th December 1923 and were accepted by Jamals on 28th December 1923. The only question which then remained outstanding was the preparation of the necessary documents. It appears, however, that instead of the documents being got ready, correspondence was embarked upon between Messrs. Orr Dignam & Co. and Jamals which led to no useful result, and the latter were finally served with notice that until the transaction was completed by 31st March 1924, Creet would cancel the "arrangement" i. e., the contract. Nothing was done and finally, as stated above, the present suit was instituted on 14th May 1924.

As stated above Currimbhoys came into this suit more than two years after the institution thereof; but although they were added as defendants in July 1927 and were allowed to file a separate written statement, the plaint, as it was originally filed, remained unamended. On this appeal it was vigorously argued by the learned Advocate-General on behalf of Currimbhoys, when this appeal was opened before us, that the plaintiff had no title and had acquired no title to the lands, khas possession whereof was prayed for by him, and that in any event, having regard to the fact that Jamals were invited by the plaintiff to go into possession of the property and had spent money thereon for the purpose of raising coal and further that Currimbhoys had advanced a large sum of money to Jamals on the security of the property and the colliery thereunder and were in possession of the same through Jamals as their Managing Agents, they were entitled to obtain specific performance of the contract, at any rate to the extent of 400 bighas, they waiving all questions as regards Creet's title thereto and their right to claim compensation or abatement. The learned Advocate-General argued that if on the correspondence between the parties between 18th April and 18th May 1920 the Court came to the conclusion that there had been a concluded agreement between the parties and that such agreement was still subsisting, there was no reason why specific performance of the agreement to the extent claimed by Currimbhoys should not be granted. The learned Advocate-General further argued that if, contrary to his submission, the Court came to the conclusion that there had been no such concluded agreement, the Court ought to consider the agreement arrived at between the parties and embodied in the letter of 10th January 1923 referred to above, and decree specific performance thereof in favour of Currimbhoys. He further argued that if the Court was of

of opinion that the terms set out in the letter of 10th January 1923 had not been accepted unconditionally by Creet, there could, however, be little doubt that the letters of 23rd November 1923, 18th December 1923, and 28th December 1923, taken together, did amount to a concluded agreement and that Currimbhoys were, at any rate, entitled to obtain specific performance of that last mentioned agreement. It was also contended on behalf of the appellants that in the events which had happened and having regard to the state of Mr. Creet's alleged title to the property in suit, the decree for damages made by the Court below should be discharged.

Before I deal with the above contentions and with the elaborate argument which has been addressed to us by Mr. Pugh, who appeared for the plaintiff-respondent Creet, I must state shortly what the position of Currimbhoys was in this matter. It appears that two shafts had been sunk in a place called Karabagan. Certain persons known as the Sircars (i. e., Jyotish Sircar and his cosharers) had a half anna share in Karabagan. Creet had been trying to negotiate with the Sircars for a mining lease but Jyotish Sircar and some of the other Sircars were standing out. Jamals, who were carrying on the mining operations in Karabagan had not, however, the necessary finance wherewith to carry on such operations. They were, however, friendly with Messrs. Currimbhoys & Co. Ltd. of Bombay of which company Sir Fazulbhoy Currimbhoy (who was connected with Ashraf Jamal of Jamals) was a director. Jamals succeeded in inducing Currimbhoys to lend to them on or about 3rd November 1921 as a short period loan a sum of Rs. 4,00,000 bearing interest at the rate of six per cent per annum. The loan was not repaid in proper time as promised by Jamals, and on 11th September 1922 Jamals proposed to Currimbhoys that they would be prepared to transfer to them 400 bighas of the Khandra property together with all mining rights etc., as also all machinery then lying on the property, provided it (i. e. such transfer) was applied to the liquidation of the account between Jamals and Currimbhoys. Jamals stated that the proposal was an advantageous one, and that while the cost of raisings could be taken that Rs. 5-8 ans per ton, the sale price would be about Rs. 12 and that this would leave a margain of Rs. 6-8 annas per ton as clear profit. Apparently Currimbhoys fell in with Jamals' suggestion and it was agreed on or about 13th September 1928 between Jamals and Currimbhoys that the debt due by Jamals would be wiped off by the transfer of 400 bighas of Khandra with the colliery and machinery etc. and that the colliery would be managed on behalf of Currimbhoys by Jamals on a 5 per cent profit commission basis. Currimbhoys thereupon instructed Messrs. Morgan & Co. to draw up necessary documents giving effect to the agreement to transfer the said 400 bighas of Khandra with a colliery and machinery etc. It is to be noticed that at this date Jamals had not obtained any title from Creet except the right to be in possession; but it has been argued that there can be little doubt from a consideration of the documents set out on pp. 175, 176, 177, 178, 179, 181, 182, 183, 184, 188, 189, 192, 193, 194, 195, 200, 203, 204, 205, 206, 216 and 227 of Vol. 2, Part 2 of the paper-book, that Currimbhoys were in possession of the property including the colliery from September 1922 through Jamals as their managing agents, and that they (Currimbhoys) have spent a large sum of money for the purpose of developing the property. It was also contended that such money was spent by Currimbhoys on the footing that there was a subsisting agreement between Creet and Jamals which they could adopt and of which they obtained an assignment and in respect of which they were entitled to claim specific performance.

Before I proceed further, I think it will be convenient if at this stage I dispose of the contention of the learned Advocate-General that Currimbhoys are entitled to claim specific performance of, at any rate, one of the three contracts referred to above. For the reasons which I am about to state, in my opinion, this contention must be negatived.

I start with the contract of April-May 1920. The contract, if any, was contained in certain letters which passed between Creet and Jamals. Now, where it is sought to establish a contract by correspondence, the rule is that the

whole of the correspondence relating to the matter in question must be looked at for the purpose of finding out at what stage there was, if at all, a complete contract between the parties. There are numerous authorities in support of this proposition. It has been held that where the cardinal points of a proposed contract are definitely agreed upon by letters, the mere fact that in the course of the correspondence, reference has been made to a more formal agreement or subsidiary non-essential stipulations, will not prevent the Court from considering the agreement arrived at by the letters as concluded : see *Cayley* v. *Walpole* (1).

It is also clear that if once a definite offer has been made and it has been accepted without qualification and it appears that the letters of offer and acceptance contain all the terms agreed on between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiation. : see *Bellamy* v. *Debenham* (2) ; *Perry* v. *Suffield* (3). Again it is equally clear that where certain letters are stated as constituting the agreement, no testimony aliunde is admissible and subsequent letters cannot be referred to to aid in construing the contract contained in the material letters : see *Lewis* v. *Nicholson* (4). Bearing in mind the rule laid down in the above cases and also that the question whether the terms contained in a correspondence amount to a binding contract between the writers is one of law : *Chevéley* v. *Fuller* (5), I am of opinion that even if there was a complete contract between the parties i. e. Creet, and Jamals in April-May 1920, such contract was put an end to by the consent of the parties : see per Lord St. Leonards in *Carolan* v. *Brabazen* (6), and the only contract which ultimately emerged from the correspondence as having been made by and between the parties and was in force was the contract which was contained in the letters of 23rd November 1923, 18th December 1923 and 28th December 1923.

I am of opinion that there was no contract concluded between the parties in January 1923 as it is quite clear that the terms embodied in the letter of 10th January 1923 were not accepted by Creet at any time. The position, therefore, being that the only contract between Creet and Jamals which mattered was the contract in December 1923, let us next see what happened after that date. As I read the correspondence from December 1923 onwards no time was ever agreed or insisted upon by the parties for the performance of the contract contained in the letters of 23rd November 1923, 18th December 1923, and 28th December 1923. In these circumstance the contract in question had to be performed within a reasonable time from the date of the contract by Jamals. Whether in the present case a reasonable time had elapsed between the date of the contract is question and the date of the institution of this suit is a matter now of academic interest in view of subsequent events. I will assume for the purposes of argument that the contract in question was subsisting even at the date of the institution of the suit. Jamals, however, went into liquidation in June 1926 and a liquidator was appointed to wind up Jamals compulsorily. What was the effect of Jamals having gone into liquidation on this contract ? It is not disputed that the effect of a company going into liquidation while a contract entered into by the company before liquidation is subsisting is the same as when a party to a contract becomes bankrupt or insolvent. Now, the bankruptcy or insolvency of a party may not alone necessarily result in such an incapacity to perform the contract as to entitle the other party at once to treat it as broken and to claim damages : see *Brooke* v. *Hewitt* (6-a) ; as it may be for the benefit of the bankrupt or insolvent or of his estate to complete the contract and the representatives of his estate may be authorized to do so : *Exparte Stapleton* (7).

Thus where a banking company after giving a letter of credit undertaking to

(1) [1870] 39 L. J. Ch. 609=18 W. R. 782=22 L. T. 900.
(2) [1891] 1 Ch. 412=60 L. J. Ch. 166=39 W. R. 257=64 L. T. 478.
(3) [1916] 2 Ch. 187=85 L.J. Ch. 460=60 S.J. 494=115 L. T. 4.
(4) [1852] 18 Q. B. 503=21 L. J. Q. B. 311=16 Jur. 1041.
(5) [1853] 13 C. P. 122.
(6) [1846] 3 Jones & Lat. 203=9 Ir. Eq. 124.
(6a) [1796] 3 Ves. Jr. 259.
(7) [1879] 10 Ch. D., 586=27 W. R. 327=40 L. T. 14.

accept bills to be drawn against bills of lading stopped payment before it was used, it was held that there was no breach for which the holder of the letter could prove damages in the winding up, because there had been no refusal to accept this and the liquidator might be authorized to carry out the contract and accept them : *Ex parte Tendeur* (8), nor does bankruptcy or insolvency alone entitle the other party to rescind the contract ; but a notification by a party of his insolvency may be taken as presumptively importing an offer to rescind which the other party may accept : and it would at least justify a refusal on his part to complete the contract unless the insolvent or his representatives should prove his ability and readiness to complete his part : *Ex parte Chalmers* (9). If the bankrupt before bankruptcy has contracted to sell or mortgage, the trustee in bankruptcy takes it subject to an obligation to fulfil the contract : see 2 *Halsbury* 156.

If, for instance, it is a contract to grant a lease, the trustee in bankruptcy may obtain specific performance of the contract if he agrees to be personally bound by the covenant : see *Powell* v *Llyod* (10). As to the position of a trustee who completes the contract see *Drew* v. *Josolyne* (3). The contract, however, has got to be performed by the trustee in bankruptcy, if he chooses to perform it at all within a reasonable time ; and if it is not performed within a reasonable time the other contracting party may treat the contract as having been abandoned : see *Laurence* v. *Knowles* (12) ; *Morgan* v. *Bain* (13) ; *Ex parte Stapleton* (7). The position therefore being that the trustees of a bankrupt may disclaim an onerous contract or may perform all that the bankrupt was neglecting to perform at the time when he was bound to perform them, and the bankruptcy having no other effect on the contract than to put the trustee in the place of the bankrupt neither rescinding the obligation on either side nor imposing new ones, nor anticipating the period of performance on either side, if the trustee does all that the bankrupt ought to have done, he may recover against the contracting party the damages which the bankrupt himself could have recovered if he had performed the contract ; or if he omits to do so and neglects to perform the contract, he loses the benefit of the contract and the other party has his remedy against the bankrupt's estate : see per Parke B in *Gibson* v. *Carruthers* (14).

The law does not require that the trustee in bankruptcy should give express notice within a reasonable time after the date of the bankruptcy of his adoption of the contract. The law only requires the trustee in bankruptcy to perform the bankrupt's part of it as and when he should have done it himself : see per Parke B. in *Gibson* v. *Carruthers* (14) at p. 334. It may be stated in passing that Mr. Pugh on behalf of Creet did not ask before us for specific performance of the contract in question as he recognized that specific performance of a contract by a bankrupt to buy a property is not ordinarily granted against the trustee in bankruptcy of a vendee without his consent : see *Holloway* v. *York*, (15) Fry on Specific Performance, 6th Edn. pp. 446-447 ; see however *Ex parte Rabbidge*, (16), *Pearce* v. *Bastable* (17) ; as to the position of a trustee in a bankruptcy of a vendor. Further Creet who had treated the contract as at an end could not in any event claim specific performance. Bearing the above observations in mind, it is impossible to escape from the conclusion that reasonable time for performance of the contract in question in this case had long elapsed long before the date of the compulsory liquidation of Jamals. The contract, therefore, was at an end and the liquidator could not take advantage of it. But assuming that the contract was subsisting on 30th June 1926, it is common ground and manifest that

(8) [1868] 37 L. J. Ch. 121=16 W. R. 270=5 Eq. 160.
(9) [1873] 8 Ch. 289=42 L. J. Ch. 8=21 W. R. 149=28 L. T. 385.
(10) [1824] 1 L. J. & J. 427=2 Y. & J. 1872.
(11) [1887] 18 Q. B. D. 800=56 L. J. Q. B. 490 =35 W. R. 570=57 L. T. 5.
(12) [1899] 5 Bing. N. C. 1.
(13) [1874] 10 C. P. 15.
(14) [1841] 8 M. & W. 321.
(15) [1877] 25 W. R. (Eng.) 627.
(16) [1878] 8 Ch. D. 367=26 W. R. 646=38 L. T. 663.
(17) [1901] 2 Ch. 122=70 L. J. Ch. 446=17 T. L. R. 366=8 Manson. 287=84 L. T. 525.

the liquidator did not take any steps whatsoever to perform the contract or even to offer to perform the contract within a reasonable time thereafter or at all. Therefore, so far as Jamals and their liquidator were concerned, the contract had been abandoned and was at an end and no question of the specific performance of the contract could possibly arise. What that was the position of Currimbhoys in the events which had happened?

On the date when Currimbhoys were added as parties defendants to this suit, they had not obtained any title from the liquidator of Jamals. The only document of title which Currimbhoys obtained from the liquidator was on 25th January 1928 which is marked Ex. K: see Vol. 1, Part 2, p. 399. There is in this document no reference whatsoever to the contract between Creet and Jamals in December 1923; and as I read the document it is insufficient, in my opinion, to confer any title upon Currimbhoys upon which they could rest for the purpose of enforcing any rights whatsoever under the contract of 1923 against Creet. The ultimate position, therefore, is that at no time there was any privity of contract between Creet and Currimbhoys and Currimbhoy's position could not in any way be bettered, and was not bettered in fact or in law, by the conveyance from the liquidator dated 25th January 1928. The claim, therefore, on the part of Currimbhoys for specific performance of the contract must fail.

Specific performance of the contract in question at the instance either of the plaintiff or of Currimbhoys being therefore out of the way, the next important matter for consideration is with regard to the plaintiff's claim for damages, and whether Currimbhoys had taken possession of the property and, if so, on and from what date. Incidentally, the question has to be faced as to what was the effect of Currimbhoys being added as defendants to this suit on 28th July 1927 vis a vis the plaintiff. Mr. Pugh has contended before us that on the documentary evidence in this case the conclusion is irresistible that Currimbhoys had taken possession of the property in suit from September 1922, and had since then been in possession, and he laid special stress in this connexion on the contents of the application made by Currimbhoys before the learned Subordinate Judge on 21st August 1926 to be added as defendants. Mr. Pugh further contended tnat the addition of Currimbhoys as defendants to this suit was made under O. 22, R. 10, Civil P. C. and that the moment Currimbhoys were added as defendants to this suit, they adopted everything what had previously been done in this suit and undertook to make themselves responsible for what ultimately happened in this suit; in other words, Mr. Pugh's contention was that Currimbhoys agreed to abide by the result of this suit and made themselves liable for all the damages which the plaintiff Creet had sustained in the events which had happened.

On the other hand, the learned Advocate-General, apprehending that our conclusion might be to the effect that there was no privity of contract between Creet and Currimbhoys and that the claim made by Currimbhoys for specific performance of the contract in question might have to be negatived, argued that the documents showed that although on paper Jamals were representing that from September 1922 they were holding possession of the property in suit as managing agents on behalf of Currimbhoys there was as matter of fact no legal transfer of title of any sort in favour of Currimbhoys till 25th January 1928 when the liquidator transferred to Currimbhoys such right, title and interest of Jamals (if any) as was then subsisting and that the possession (such as it was) of Currimbhoys prior to 7th May 1926, assuming that it amounted to what is called equitable possession, should not be seized upon for the purpose of fastening on them a liability for damages. The learned Advocate General further reiterated his contention that in order to succeed in a claim for khas possession and damages the plaintiff Creet had to show that he had acquired title, and that it was quite clear on the documentary evidence that he had failed to show such title. He further contended that the claim in ejectment i. e. for khas possession must fail because it was clear that at any rate from 25th November 1924 Currimbhoys had been cosharers of the plaintiff in this property, and, if that was so, the claim for damages for the period subsequent to 25th November

1924 must also equally fail. The learned Advocate General clinched his argument by saying that the only possible claim that could come up for real consideration and necessary adjudication in this case was for damages for a period of three years prior to the date when Currimbhoys were added as defendants to this suit, namely, 28th July 1927; and that even so, from such period would have to be deducted the period between 25th November 1924 and 28th July 1927. In other words, the learned Advocate-General pointed out that the only period for practical consideration in this case in respect of the claim for damages in the events which had happened was the period between 28th July 1923 and 25th November 1924.

The questions thus raised require treatment from a broad point of view and cannot, in my opinion, satisfactorily be disposed of on a mere consideration from a technical point of view of the effect of the addition of Currimbhoys as defendants to this suit on 28th July 1927. I will therefore attempt to state and define the position of Currimbhoys from at any rate, 25th November 1924, and in doing so I will first of all look at the question from the point of view that Currimbhoys might be regarded as trespassers when they first obtained possession, and consider the question as to whether Creet was entitled to maintain an action in ejectment in the events which had happened against Currimbhoys.

Now, what is trespass to land? Trespass is a wrong to another's possession; it is an injury to a possessory right and therefore the proper plaintiff in an action for trespass to land is the person who is in actual or constructive possession of the land i.e., entitled to immediate possession. The gist of the action of trespass must be and is the wrong to the right of the plaintiff's possession. The right to possession is all important in an action for trespass; and a mere right of property without a right to possession is not sufficient to support the action. Right to possession is one of the constituent elements of the complete right of property; and it has been laid down from very old times that a person with a right to possession can always maintain an action of trespass against a wrongdoer. So also in the case of a person in actual possession. Such a person has against a mere stranger or wrong-doer the same remedies as if he had the right to possession and he can as against the stranger maintain trespass and in general the stranger who violates his possession cannot justify the violation by showing that the possession was without title or even by showing that it was wrongful, unless he further proves not only that a third person was entitled to the possession but that he, the stranger, had acted with the authority of the said third person: see Pollock & Write on Possession in the Common Law pp. 145-147. The fact of possession in the sense referred to above therefore is prima facie evidence of title, and is alone sufficient to sustain the plaintiff's case against a mere wrong doer: see Bullen & Leake, 3rd Edn. pp. 801-802; see also Dicey on Parties p. 333 et seq. If therefore Creet had actual possession, or had a right to immediate possession, in other words, if Creet can prove a possessory title, he must be held to be entitled to maintain an action of trespass against all persons who trespassed on the property in question. Now so far as I can make out from the voluminous record before us, there can be no doubt that Creet had a sufficient possessory title to Karabagan, where the colliery in question is situate. He had an undisputed title to possession of the major portion of Karabagan, which is included in the bajeapti lands. I do not think it is necessary or incumbent on me, having regard to the course which the argument before us has taken to go in detail through the various leases, surface and underground, of the bajeapti lands for the purpose of demonstrating that Creet had acquired what is called a possessory title to the major portion of the bajeapti lands. And indeed I am relieved of the necessity, because the learned Advocate General, in answer to a specific question on this point, did not dispute this fact but his point was that at the time when Jamals went into possession, he had only acquired the surface rights in respect of a very small area.

The question then resolves into this: whether Creet, as a cosharer in respect of the bajeapti lands, with which we are concerned, was entitled to maintain an action of trespass against the trespassers, i. e. Currimbhoys. On principle

I do not see why a cosharer cannot by himself maintain an action of trespass against a wrongdoer. The early English cases are not against this view; indeed they support this proposition but it is sufficient for me to observe that this question has recently been the subject of debate and decision in Madras and in Bombay. In the case of *Ahmed Sahib* v. *Magnesite Syndicate, Limited* (18), it was held by Seshahiri Ayyar, J. and Kumaraswami Sastri, J., that one of several co-owners can maintain an action in ejectment against a trespasser without joining the other co-owners as parties to the action. Again in *Maganlal* v. *Bhudar* (19), it was held by Shah and Fawcett, JJ., that the rule laid down in the last mentioned case should be followed. They observed as follows :

"The reason of the rule which requires one fresh and common volition of co-owners to put an end to that which commenced under their common volition, does not apply to a case where what commenced under a common volition has come to an end and where the person concerned requires a fresh common volition to continue in possession. The case of a person, who is a tenant on sufferance, is akin to the case of a trespasser. It has been held in the case of *Shutari* v. *Magnesite Syndicate Ltd.* (18). that one co-owner can maintain an action to eject a trespasser who has been holding over wrongfully."

I do not to wish to burden this judgment with a discussion of the earlier authorities to be found in the reports in India, but reference may be made by the curious investigater into this branch of the law to the cases *Mooktakeshee Debee* v. *Oomabutty* (20) ; *Alum Monjee* v. *Ashad Ali* (21) ; *Hulodhur* v. *Goocoo Doss* (22) ; *K. P. Kanna Pisharody* v. *V. M. Narayanan* (23) ; *Balkrishna* v. *Municipality of Mahad* (24) ; *Radha Proshad* v. *Esuf* (25); *Dakhyani* v. *Mono Raut* (26) ; *Balkrishna* v. *Moro* (27) ; *Harendra* v. *Moran* (28) ; *Kabil* v. *Chunder* (29) ; *Sri Thakurji* v. *Hiralal* (30) ; *Secretary of State* v. *Girjalai* (31) and *Kanai Kunari* v. *Kiran* (32). If what I have stated is the law, it is difficult to see why Creet was not entitled to maintain an action in ejectment against Currimbhoys whom I have taken to be trespassers for the purposes of this argument. In my view, Creet was entitled to maintain such an action.

The next important question is this: If Currimbhoys were trespassers, did they cease to be trespassers on 25th November 1924 when they obtained a conveyance of Jyotish Sircar's interest in the bajeapti lands which as stated above included Karabagan? The document referred to is a conveyance by Satish Chandra Sircar, Jyotish Chandra Sircar, Srish Chandra Sircar (sons of Protap Chandra Sircar deceased), Samarendra Nath Sircar, Arabindra Nath Sircar and Tripurendra Nath Sircar (sons of Rash Behari Sircar deceased) to Currimbhoys of their interest in 100 bighas of bajeapti and khas Khalasi lands in mouzah Khandra, surface and underground the lands being particularly described in the schedules thereto. This conveyance is Ex. 16 and is on p. 305. Vol. 1, Part 2 of the paper book. As regards the right of the co-owners of mining properties to convey without reference to the other co-owners there seems to be no doubt that they have such sight: see *Bentley* v. *Bates* (33). The position, therefore, was that on and after 25th November 1924 Currimbhoys had become cosharers of Creet. No question, therefore, could arise from and after 25th Novembor 1924 as regards the right of Currimbhoys to remain on the land and work the mines in Karabagan. Thus there is an end to Creet's claim for ejectment and with it there must necessary fail his claim for damages for the period subsequent to 25th November 1924. It is settled law that each co-owner is entitled to work the mines, provided he does not take more than his share of the minerals nor work the same wastefully. A person who is a co-owner of a mine with another or others, whether as joint tenant, tenant-in-common or coparcener, can enter upon and work the mine, or license another person to

(18) [1915] 39 Mad. 501=28 M. L. J. 598=29 I. C. 69=2 M. L. W. 460
(19) A. I. R. 1927 Bom. 192=51 Bom. 149.
(20) [1870] 14 W. R. 31=8 B. L. R. 396n.
(21) [1871] 16 W. R. 13.
(22) [1873] 20 W. R. 126.
(23) [1881] 3 Mad. 234.
(24) [1885] 10 Bom. 32.
(25) [1881] 7 Cal. 414=9 C. L. R. 76.
(26) [1913] 19 C. W. N. 407=22 I. C. 666=19 C. L. J. 113.
(27) [1896] 21 Bom. 154.
(28) [1887] 15 Cal. 40.
(29) [1892] 20 Cal. 590.
(30) A. I. R. 1922 All. 408=44 All. 684.
(31) A. I. R. 1925 Bom. 197=49 Bom. 126.
(32) [1898] 2 C. W. N. 229.
(33) [1840] 4 Y. & C. 182=4 Jur. 552=9 L. J. Ex. Eq. 30.

do so, subject only to the restriction that he shall not take more than his share: see Cockburn on the Law of Coal and other Minerals p. 82; *Job* v. *Potton* (34); *Wilkinson* v. *Haggarth* (35); *Glyn* v. *Howell* (36); *Denys* v. *Shuckburgh* (37); *Mahesh* v. *Nowbat* (38) and *Chandra Kishore* v. *Biseswar Pal* (39).

This being the true position in law, and Creet having never expressed the desire or taken any steps to work the mines himself unless Creet is in a position to show that Currimbhoys have taken more than their share of the minerals he can claim nothing from them or against them after 25th November 1924. But we are not concerned with such a claim. The present suit is not a suit for partition or for an account against Currimbhoys nor has the present suit been conducted on such a footing. If Creet had or has any rights against Currimbhoys in respect of the period commencing on 25th November 1924, his rights will in no way be prejudiced by reason of this judgment.

I have just said that Creet's claim for recovery of khas possession must fail and with it also his claim for damages for the period subsequent to the 25th November 1924. In order that there may not be any misunderstanding I desire to make it plain that my observations relating to the failure of Creet to recover khas possession apply only, and are limited to the property, surface and undergronnd, which is covered by the conveyance of 25th November 1924 (Ex. 16). In respect of all areas, surface and underground, other than the subject matter of the said conveyance the plaintiff Creet will be entitled to recover khas possession. I understand that there have been no raising of coal from underground except in Karabagan and that no profit can be obtained otherwise from the lands in suit. If that is so as indicated above, the claim for damages for the period subsequent to 25th November 1924 fails.

Mr. Pugh, however, has argued that Currimbhoys went into possession on 13th September 1922 and that it is not a fact that they went into possession at a later stage namely on 7th May 1926 as alleged by them in their application to be added as defendants to this suit. According to Mr. Pugh, in the events which had happened, S. 116, Evidence Act came into play and the appellants cannot be allowed to raise any objection to the title of Creet. Further, in the circumstances, Mr. Pugh contended that Currimbhoys having come into this suit must be taken to have agreed to abide by the result of the suit, and must be held responsible in damages during the period of their possession, at any rate, up to 25th November 1924.

It may be convenient to dispose of the last point at once. Mr. Pugh's contention is that the addition of Currimbhoys as defendants to this suit on 28th July 1927 was made under the powers conferred on the Court by O. 22, R. 10, Civil P. C., and that so far as Currimbhoys are concerned the suit in which they were added as .defendants was and is no new suit at all. In support of this contention Mr. Pugh relied on the case of *Chunni Lal* v. *Abdul Ali* (40). He also relied on the cases of *Chorlton* v. *Dickie* (41), and *Borneman* v. *Wilson* (42). First of all we must ascertain whether the addition of Currimbhoys as defendants to this suit was made under O. 22, R. 10, Civil P. C. As will have been gathered from what has been stated above on the date on which Currimbhoys were added as defendants to this suit they had not obtained any assignment whatsoever of any sort from the liquidator of Jamals; in other words, there had not been any assignment, creation or devolution of any interest in favour of Currimbhoys upto the date of their addition as defendants and it is to be borne is mind that before Jamals went into liquidation there had been no assignment, creation or devolution of any interest in favour of Currimbhoys. Further, in the events which had happened i. e., the contract of December 1923 having been abandoned and being at an end there was nothing in

(34) [1875] 20 Eq. 84=44 L. J. Ch. 262=32 L.T. 110.
(35) [1847] 12 Q.B. 837=11 Jur. 104=16 L.J. Q.B. 103
(36) [1903] 1 Ch. 666=78 L.J.Ch. 391=53 S.J. 269=100 L.T. 324.
(37) [1840] 4 Y. & C. 42=5 Jur. 21.
(38) [1905] 32 Cal. 837=1 C.L.J. 437.
(39) A. I. R. 1928 Cal. 216=55 Cal. 396.
(40) [1901] 23 All. 331.
(41) [1879] 13 Ch. D. 160=49 L.J.Ch. 40=28 W.R 228=41 L.T. 467.
(42) [1884] 28 Ch. D. 53=54 L. J. Ch. 631=33 W.R. 141=51 L. T. 728.

respect of which there could be an assignment, creation or devolution of any interest in favour of Currimbhoys. I am, therefore, of opinion that the addition of Currimbhoys as defendants to this suit was not made and could not have been duly made under O. 22, R. 10, Civil P. C.: see in this connexion *Manindra Chandra* v. *Ram Kumar* (43). As regards the two cases in England cited by Mr. Pugh, *Chorlton* v. *Dickie* (41), affords no assistance.

In the case of *Borneman* v. *Wilson* (42), an interlocutory order for injunction and receiver having been made against the defendants in an action they gave notice of appeal and shortly afterwards became bankrupt. An order was made for carrying on the proceedings against their trustee. The trustee gave notice to the plaintiff that he should not proceed with the appeal. Shortly after this the trustee entered an appearance and called for the statement of the case. He declined to pay the costs of the appeal incurred by the plaintiff before the notice that the appeal would not be proceeded with and the question for decision was as to the costs which had been incurred. It was held that the appeal must be dismissed with costs to be paid by the trustee, for, having adopted the defence of the bankrupts he had placed himself in their place as to the whole of the action and could not reject part of the proceedings in it. As I read the case of *Borneman* v. *Wilson* (42) it does not carry Mr. Pugh home having regard to the special facts of the present case. I am inclined to the view that the addition of Currimbhoys as defendants to this suit was made under the provisions of O. 1, R. 10, Civil P. C., and, if that is so, the proceedings in this suit must be taken to have commenced as against Currimbhoys on the date when they were so added as defendants namely, 28th July 1927.

As indicated above Currimbhoys have admitted that they went into possession of the colliery on 7th May 1926; but since that date for the reasons given above (i. e., Currimbhoys having become cosharers of Creet in Karabagan), no relief against Currimbhoys can be given in favour of Creet. I have also considered whether Creet is entitled to any relief against Currimbhoys for the period between 25th November 1924 and 7th May 1926. I have proceeded on the assumption that Currimbhoys were in possession of Karabagan between those two dates and for the same reasons I have been obliged to negative Creet's claims to any relief in this suit against Currimbhoys in respect of the period between those two dates.

I have now got to consider whether Currimbhoys were in possession of Karabagan between 13th September 1922 and 15th November 1924. I have set out in an earlier portion of this judgment the references to the material documents bearing on the question of Currimbhoys' possession of Karabagan within which is the disputed colliery, and I will not again refer to these documents. Towards the close of the argument before us, there arose an acute controversy between the parties as to whether Currimbhoys had gone into possession before 7th May 1926. Mr. Pugh on behalf of the plaintiff Creet drew pointed attention to the statements contained in Currimbhoy's application to the Court to be added as defendants, to the statements made by them in their written statement, to the correspondence between Jamals and Currimbhoys and also between Morgan & Co. and Currimbhoys, to the entries in Jamals' books, and to the payments made from time to time in respect of the said colliery by Currimbhoys, and he argued that on this body of evidence the conclusion was irresistible that Currimbhoys were in possession before 7th May 1926. On the other hand the learned Advocate General, without in any way abandoning the contentions advanced by him when he opened this appeal before us, contended that the true conclusion on the facts was that there was merely an agreement between Jamals and Currimbhoys as regards the acquisition by Currimbhoys of this colliery, that Currimbhoys were not in possession as is proved by the renewal of the promissory notes for Rs. 4,00,000 from time to time and by the claim put forward by Currimbhoys before the liquidator of Jamals.

The problem is not an easy one to solve and our difficulties have mainly arisen because of the conflicting statements made from time to time by Currimbhoys but on the best consideration

(43) A. I. R. 1922 P. C. 304=1 Pat. 531=49 I. A. 220 (P.C.).

that I have been able to bestow on this matter both while the argument was in progress and afterwards, I am clearly of opinion on the documentary evidence adduced in this case and not disregarding entirely the oral evidence that Currimbhoys were in possession of the disputed colliery from September 1922. In the view which I have taken it is not necessary for me to consider the application of S. 116, Evidence Act on the facts of this case.

For what period then prior to 25th November 1924, must Currimbhoys now pay damages? As has been stated above, Currimbhoys were added as defendants on 28th July 1927 and therefore the suit must be taken to have been commenced against them on that date. The plaintiff Creet therefore is entitled to recover damages against Currimbhoys for a period of three years, prior to the date of commencement of the suit against Currimbhoys i. e., for the period between 28th July 1924 and 28th July 1927. But for the reasons given above the period between 25th November 1924 and 28th July 1927 cannot be taken into account. There therefore remains the period between 28th July 1924 and 25th November 1924 during which the damages sustained by Creet have to be ascertained for the purposes of this suit.

Mr. Pugh referred to the case of *Laird* v. *Pim* (44), and contended that the measure of damages should be that which was adopted in that case. Now, if the coutract had been a subsisting one and if Jamals or their liquidator had appealed, we should have had to consider the question raised in *Laird* v. *Pim* (44). In that case a party had been let into possession of lands under a contract of purchase but did not complete the purchase and refused to pay the purchase money and no conveyance was executed. It appeared that after the vendees had been let into possession they had taken from the land and sold a quantity of brick clay. Baron Parke held that the measure of damages in such a case was the injury sustained by the plaintiff by reason of the defendants not having performed their contract and the question was how much worse off was the plaintiff by the diminution in the value of the land, or the loss of the purchase money in consequence of ths non-performance of the contract. It was held that the defendants were liable to pay the interest on the purchase money up to the commencement of the action and the value of the clay taken away. It is apparent therefore that the position in the present suit so far as Currimbhoys are concerned is far away from *Laird* v. *Pim* (44), for there was no privity of contract between them and Creet.

The measure of damages in a case like this is the fair market value of the coal-be it remembered that Creet was a part owner of the coal-at the pit mouth at the time when it was severed subject to just allowances. As to what allowances there shall be, depends on the conduct of the parties and the other circumstances of the case. There are two rules (1) the harsher, under which only the cost of bringing the coal to bank is allowed and (2) the milder under which the expense of hewage and haulage i. e. the cost of working and severing as well as of bringing to bank is allowed. The harsher rule, only allowing the expense of bringing to bank, has been applied where the misconduct has been of a substantial character; e. g., where the wrongful working has been wilful and fraudulent: see *Martin* v. *Porter* (45), *Morgan* v. *Powell* (46) also see Lord Macnaughten's remarks in *Peruvian Guano Co.* v. *Dieyfus* (47) or the workings have been continued by a person in possession after it was known that a lease would not be granted and that he had no title and had no right to expect a title: see *Trotter* v. *Maclean* (48). So, also where the working has been unauthorised and without mitigating circumstances: see *Wild* v. *Holt* (49), wholly unauthorised and unlawful: see *Llynvi Coal Co.* v. *Brogden* (50) the decree herein it may be noted is the

(44) [1841] 7 M. & W. 474=10 L. J. Ex. 25 =8 D. P. C. 860.

(45) [1839] 5 M. & W. 352=2 H. & N. 70.

(46) [1842] 11 L. J. Q. B. 263=3 Q. B. 278= 6 Jur. 1109=11 L. J. Q. B. 263=2 G. & D. 721.

(47) [1892] A. C. 166=61 L. J. Ch. 749=7 Asp. M. C. 225=66 L. T. 536.

(48) [1879] 13 Ch. D. 574=28 W. R. 244=42 L. T. 118.

(49) [1842] 9 M. & W. 672=11 L. J. Ex. 285 =10 (n. s.) 876.

(50) [1870] 11 Eq. 188=40 L. J. Ch. 46=19 W. R. 196=23 L. T. 518.

model form fraudulently concealed, or continued after negotiations for purchase had fallen through : see *Phillips* v. *Homfray* (51); negligent, and notwithstanding that the employers relied on their certificated manager and had no personal knowledge or notice of the wrongful working: see *Joicey* v. *Dickinson* (52),· malicious, and with full knowledge that wrong is being done: see *Per Curiam Livingstone* v. *Rawyards Coal Co.* (53), furtive and in bad faith. The reason why allowances are made in favour of an innocent mistaken trespasser and disallowed as against a wilful and intentional trespasser, is because the latter must not "qualify" his own wrong: see Per Lord Blackburn, *id.* But the milder rule, allowing the deduction of the expense of working and severing the coal as well as of bringing it to bank, will be applied where the wrongful working has not been done with a guilty or negligent mind, or sinister intention e. g., where the wrongful working has been done without fraud or negligence, but fairly and honestly: see *Wood* v. *Morewood* (54), inadvertently and under a bona fide belief of title: see *Hilton* v. *Woods* (55), as that a lease which had in fact expired was still continuing, see *Jegon* v. *Vivian* (56), without the express authority, though with the knowledge of the rightful owner: see *Ashton* v. *Stock* (57), under a mere mistake and without any suggestion of fraud: see *Re United Merthyr Colliery Co.* (58), neither tortious, nor negligent, but in the assertion of a right: see *Job* v. *Potton* (34). So, if the workings were continued on the fair expectation that a lease would be granted: see *Trotter* v. *Maclean* (48), or have been innocent, and in ignorance, and with as little negligence or carelessness as possible, and in the belief that it belonged to the trespasser: see *Livingstone* v. *Rawyards Coal Co.* (53).

I will not now discuss the evidence showing how and under what circumstances Currimbhoys got into possession of the colliery in suit, but if ever there was a case where the milder rule ought as a matter of justice to be applied it is this case and I am of opinion that Currimbhoys should be allowed as against the price of coal raised from 28th July 1924 to 24th November 1924 the cost of working and severing as well as of bringing the coal to bank.

The result, therefore, is that in my opinion the decree against Jamals must stand; as against Currimbhoys there can be no decree for khas possession of the lands covered by the conveyance from the Sarkars in their favour dated 25th November 1914; in respect of all other lands surface and underground, Creet is entitled to khas possession; as against Currimbhoys the decree for damages made by the learned Subordinate Judge must be discharged; there will be a declaration that Creet is entitled to recover damages to the extent of his share in the lands at Karabagan during the period from 28th July 1924 to 25th November 1924, that such damages must be calculated on the following basis, namely, from the price of the coal raised during the period from 28th July 1924, to 25th November 1924, Currimbhoys would be entitled to deduct the cost of working and severing as well as of bringing to bank.

On the evidence adduced in this case documentary and oral, I find that during the period last mentioned 5,500 tons of coal were raised and the price thereof taking Rs. 11 per ton as an average amounted to Rs. 60,500 and that the cost of working and severing as well as of bringing to bank the said quantity of coal amounted to Rs. 8,937. The net balance due in respect of the said quantity of coal is Rs. 51,563 but Creet would not be entitled to the entirety of the last mentioned sum; he would be entitled to the extent of his share in Karabagan. Creet, however, would be entitled to interest on the amount payable to him at 6 per cent from 28th July 1924 down to the date of realization. Unless the parties agree among themselves as to this there will be a remand to the Court below to find out the extent of Creet's share and to calculate the amount payable to Creet by Currimbhoys accordingly. So far as I can make out the ultimate

(51) [1871] 6 Ch. 770.
(52) [1881] 45 L. T. N. S. 643.
(53) [1880] 5 A. C. 25=28 W. R. 357=42 L. T. 334.
(54) [1841] 3 Q. B. 44.
(55) [1867] 4 Eq. 432=36 L. J. Ch. 491=15 W.R. 1105=16 L.T. 736.
(56) [1871] 6 Ch. A. 742=40 L. J. Ch. 389.
(57) [1877] 6 Ch. D. 719.
(58) [1872] 15 Eq. 46=21 W. R. 117.

sum payable to Creet will be a substantial amount; as this has been a divided success, there will be no costs in this Court. The order made by the Court below as regards costs will stand.

Page, J.—I agree.

V.B./R.K. *Order accordingly.*

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* A. I. R. 1930 Calcutta 130

RANKIN, C. J., AND C. C. GHOSE, J.

Osman Gani Mistry and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 191 of 1929, Decided on 23rd August 1929.

*** (a) Criminal P. C., S. 154—Person of accused's party going first to Police Station and giving information of offence—Real complaint though lodged later on cannot be kept aside and only made use of under Criminal P.C., S. 162.**

The proposition that, because a person of the party of the accused goes first to the Police Station and says that some of the complainant's party has committed an offence, the real complaint lodged later on under S. 154 against the accused must be kept off the record save on terms under S. 162, is one which cannot be judicially approved. [P 131 C 1]

(b) Criminal P. C., S. 410—Question whether statement made to police officer is under S. 162 or is made by way of complaint under S. 154, is one of fact.

It is a question of fact whether a statement made to a police officer in the course of an investigation comes under S. 162 or is made by way of complaint to commence an investigation under S. 154. [P 131 C 1]

Suresh Chandra Talukdar—for Appellants.

Anil Chandra Roy Choudhury—for the Crown.

Rankin, C. J.—In this case 11 accused were put upon their trial before the learned Sessions Judge and a jury. Eight have been found guilty by a majority of three to two and they have been convicted by the learned Judge. The case arose out of an affray which appears to have occurred in connexion with a dispute as to who had the right of possession of certain agricultural land. The occurrence took place at three or four o'clock in the afternoon of 22nd July 1928. The learned Judge in his charge to the jury has described the occurrence which would appear to show that both the complainant party and the accused party were present. Many of them were armed and so far as the complainant's party was concerned, they were in possession of one gun and a member of the party of the accused was shot with it. The questions for the jury have been very lucidly and elaborately set forth in the charge. The learned Sessions Judge has explained most satisfactorily the importance of the question of possession. He has shown to the jury that unless they find that the complainant's party were in possession they cannot find the common object of the charge under S. 147, Criminal P. C. and also they would have to consider the serious question of private defence. Upon reading the charge as a whole it does not appear to me that any objection of a serious kind can be taken to it. In the end Mr. Taluqdar for the accused persons lays stress upon the objection which he makes to the way in which the learned Judge has dealt with the question as what is the first information report.

In this case it would seem that the affray having taken place in the afternoon of 22nd July the first person to lodge a complaint within the meaning of S. 154, Criminal P. C. was one of the accused party. He made no complaint of anything having been done by his own party, but he complained that the complainants had assaulted them. The next day that is, on 23rd July, it appears that the complainant's party two of whom were badly wounded went to the hospital and before they went there they informed the constable at the police station that three people had been injured. It would appear that they went nearer to the Falta Police Station than the Diamond Harbour Police Station. At about 2 o'clock one of the party went to the former Police Station and could not find the officer-in-charge and accordingly he went back to the hospital and next morning that is, on 24th, he came to Falta Police Station to see the officer-in-charge and made a complaint under S. 154, Criminal P. C. At the trial the learned Judge has treated this as the first information report for the purposes of the present case; the others have not been treated as the first information report. The question

which has been raised by Mr. Taluqdar is whether the counter-information of 22nd July is not the first information report which would prevent that of 24th July being received in evidence, save at the instance of the defence, by reason of S. 162, Criminal P. C. In my judgment the contention of Mr. Taluqdar is not sound on the facts of this case. The first information report which is to be dealt with properly under S. 154, Criminal P. C. is a different thing from the statements made to a police officer in the course of an investigation such as are brought within S. 162, Criminal P. C. I do not assent to the proposition that because a person of the party of the accused goes first to the police station and says that some of the complainant's party has committed an offence, the real complaint against the accused must be kept off the record save on terms under S. 162, Criminal P. C. It is a question of fact whether a statement made to a police officer in the course of an investigation in such cases comes under S. 162 or is made by way of complaint to commence an investigation under S. 154. The two matters are dealt with differently in the Code. One says that even if the statement is reduced to writing, is not to be signed whereas the other statement is to be reduced to writing and is to be signed.

In my opinion the first information within the meaning of the Code which applies to this particular trial was the document of 24th July which has been properly treated as the first information. In these circumstances I am of opinion that the appeal fails and must be dismissed.

The accused must surrender to their bail and serve out the unexpired portion of their sentences.

C. C. Ghose J.—I agree.

V.S./R.K. *Appeal dismissed*

A. I. R. 1930 Calcutta 131

RANKIN, C. J. AND PATTERSON, J.

Dabiruddin Mohammad and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1010 of 1929, Decided on 15th August 1929.

(a) Criminal P. C., S. 144—Temporary orders may be made without there being real danger—It must be proved that disobedience of accused would have caused breach of peace—Penal Code, S. 188.

Section 144 makes provision for a contingency that local and temporary orders may, at times, be made without there being a real danger of breach of the peace or other reason justifying it. Accordingly under that section it has to be proved that the accused not merely disobeyed the lawful order but that the act of disobedience was such as caused or involved the risk of a breach of the peace or other danger or trouble. [P 132 C 1]

(b) Criminal P. C., S. 144—Trying Magistrate passing order under S. 144 within jurisdiction—Expiration of period of order—High Court will not send back matter for rehearing—Criminal P. C., S. 439.

Where the High Court finds that the trying Magistrate has jurisdiction to pass an order under S. 144, it will not send back the matter to the Magistrate, notwithstanding that the order has expired, so that he may begin the proceedings again, as regards the accused's showing cause against the order: 13 *C. W. N.* 195; 20 *C. W. N.* 758; 20 *C. W. N.* 981; 23 *C. W. N.* 145 and *A. I. R.* 1928 *Cal.* 446, *Ref.* [P 132 C 2]

Mirtyunjoy Chatterji and *Debabrata Mukherji*—for Petitioners.

Rankin, C. J.—In this case an order was made under S. 144, Criminal P. C., prohibiting the petitioners from exercising any act of possession in respect of a certain fishery. The Magistrate made this order on the basis of a police report and that police report did state that a serious breach of the peace was likely to take place unless such an order was made. Thereupon the petitioners applied to the Magistrate to show cause against the order. In the meantime a complaint had been preferred against the petitioners for a breach of the order and the Magistrate for that reason refused to proceed as he is directed by the section to do and to give the petitioners proper opportunity of showing cause against the order. The petitioners' case appears to be that they could have shown to the Magistrate's satisfaction that there was no likelihood of a breach of the peace. The petitioners went on appeal to the District Magistrate who

rejected their petition. They accordingly have come to this Court in revision and ask us to set aside the order. By the time we are dealing with it the order has expired and is now of no effect.

Mr. Chatterjee on behalf of the petitioners has referred us to certain cases in which this Court has set aside an order of this character notwithstanding that it had expired by lapse of time : see the cases of *J. A. Thomson* v. *Emperor* (1); *Bishessur* v. *Emperor* (2); *Chandra Kanta* v. *Emperor* (3); *Chandra Nath* v. *E. I. Ry. Co.* (4); *Ram Gopal* v. *Narayan Das* (5). So far as the actual order itself is concerned I am not of opinion that that order was without jurisdiction. It is true that one may doubt whether it would not have been better to proceed under S. 145, Criminal P. C., or to proceed under some other section. But on the plain terms of S. 144 it is impossible to hold, in my view, that the order is without jurisdiction. These petitioners have been prosecuted under S. 188, I. P. C. and the policy of the legislature with reference to section is to make provision for a contingency that local and temporary orders may, at times, be made without there being a real danger of breach of the peace or other reason justifying it. Accordingly under that section it has to be proved that the accused not merely disobeyed the lawful order but that the act of disobedience was such as caused or involved the risk of a breach of the peace or other danger or trouble. It appears to me, therefore, that if the petitioners in this case are in a position to show that by fishing or by doing what they were forbidden to do no risk of a breach of the peace was occasioned they would have a complete defence to the proceeding.

We are asked to send the matter back to the Magistrate notwithstanding that the order has expired so that he may begin the proceedings again, as regards the petitioners' showing cause against the order. I cannot find that this Court has ever made such an order as that after the time when the order under S. 144, Criminal P.C. has expired, nor do I think that it would be a reasonable order to make. It appears to me that if it were shown that the order under S. 144, Criminal P. C. was without jurisdiction we might be justified in view of the prosecution in setting it aside. It does not appear to me that that can be made in this case. This rule must be discharged.

Patterson, J.—I agree.

V.S./R.K. *Rule discharged.*

(1) [1909] 13 C. W. N. 195=4 I. C. 590=5 M. L. T. 96.
(2) [1916] 20 C. W. N. 759=34 I. C. 312=24 C. L. J. 272.
(3) [1916] 20 C. W. N. 981=36 I. C. 144=17 Cr. L. J. 464.
(4) [1919] 23 C. W. N. 145=47 I. C. 803=28 C. L. J. 483.
(5) A. I. R. 1928 Cal. 446=55 Cal. 1077.

A. I. R. 1930 Calcutta 132

CUMING AND LORT-WILLIAMS, JJ.

Sreehari Swarnakar — Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 96 of 1929, Decided on 2nd August 1929, from decision of Sess. Judge, Dinajpur, D/- 8th January 1929.

Evidence Act, S. 6—Statement made by girl to her mother after transaction is over—Statement is not relevant under S. 6—Evidence Act, S. 8, Illus. (j).

Where the statement of the girl to her mother does not form part of the transaction viz., the raping of the girl, or occur during it, but is made after this transaction is over, when the perpetrator had gone away and the girl came away from the scene of occurrence to her mother's house, the statement is not relevant under S. 6. [P 133 C 1]

Sachindra Kumar Ray—for Appellant.

Bireswar Chatterjee—for the Crown.

Cuming, J.—This is an appeal by one Sreehari Sawarnakar who was tried by the learned Sessions Judge of Dinajpur sitting with a jury on a charge of rape on a child of some eight or nine years old. The jury unanimously found the accused guilty and the learned Judge agreeing with verdict sentenced him to five years' rigorous imprisonment and 16 strokes. The facts are briefly these: The girl who was raped named Durgamani was living with her mother one Sailabala who is a widow. On the day of occurrence the mother of the accused came to call Durgamani to collect firewood with the accused who was also collecting firewood. Durgamani went with the accused to a place called Puranbhita where they began to collect firewood. While the girl was engaged in

collecting wood the accused Sreehari caught hold of her, placed her on the ground and proceeded to have sexual intercourse with her. Finally he let her go and the girl went back weeping to her mother to whom she told the matter. After some delay information was given to the authority and the appellant was put on his trial with the result already mentioned.

The appellant pleaded not guilty and it was suggested that the charge was the result of enmity. It was further suggested that the injury on the girl was due to the bite of a leech. The first point urged by the learned vakil for the appellant is that the learned Judge misdirected the jury by telling them that there was no evidence that the girl had been bitten by a leech beyond the doctor's statement, that it was possible that the wound on the girl was caused by the biting of a leech. The learned vakil contends that there is a statement by the girl's mother that the girl said that she had been bitten by a leech. The learned Judge was quite correct in saying that there was no evidence that the girl had been bitten by a leech beyond the doctor's statement. The statement of the girl's mother as to what the girl said is not evidence of the fact that she had been bitten by a leech. It could possibly be used to corroborate or to contradict the statement made by the girl. By itself it would not be substantive evidence of the fact that she had been so bitten. The learned vakil contends that under S. 6, Evidence Act, her statement to the mother would be a relevant fact. S. 6 provides as follows :

"Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places."

It is clear that the statement of the girl to her mother, if she had made any, did not form part of the transaction by which I understand the raping of the girl or occur during it. This transaction, namely raping of girl, was over when the perpetrator had gone away and the girl came away from the scene of occurrence to her mother's house. Therefore, this statement is not relevant under S. 6. Even then it would not be evidence of the fact that she had been bitten by a leech. It could only be evidence of the fact that she made that statement to her mother. There is therefore no misdirection by the learned Judge on this point.

The learned vakil then contends that the learned Judge did not tell the jury that the statement to the mother could be used to contradict the girl, and that the learned Judge should have specifically drawn the jury's attention to the statement. As a matter of fact the jury's attention was drawn to the fact that the mother had said that the daughter told her that she had been bitten by a leech. The jury themselves specifically questioned the girl on the point, for at the end of her cross-examination there is a note :

"To the jury. It is not true that when I came home after the occurrence I told my mother that I had been bitten by a leech. I told my mother that I had been raped by accused."

Therefore although the learned Judge did not in his charge specifically draw the attention of the jury to this point the jury's attention had been drawn to it as is clear from the girl's answer quoted above. Therefore the omission on the part of the learned Judge to draw specifically the jury's attention to the point is of no importance.

It has next been argued that the mother Sailabala admitted in her cross-examination that since a certain salis she did not allow the accused to come to her house and the learned vakil suggests that the Judge should have put to the jury whether it is likely that in such circumstances the girl would be allowed to go with the accused. The learned Judge did draw the attention of the jury to the fact that there was enmity between the parties. He did not no doubt specifically suggest to the jury that they might consider the question as to whether, if there was any enmity between the parties, the girl would have gone with the accused to gather wood. No doubt the Judge might have put this point to the jury. But I do not think that the putting of this point specifically to the jury is of much importance when the jury's attention was drawn to the fact that there was enmity between the parties.

Then it is urged that the learned Judge should have drawn the attention of the jury to the contradiction between the statement of the girl that the place of occurrence was visible from other houses and the evidence of the Sub-Inspector

who investigated the case that the actual spot of occurrence was not visible from other houses.

The Sub-Inspector was shown the spot by the child. The child, no doubt, said that Puranbhita is visible from certain other places. That is not the same as saying the place of occurrence is visible. The actual place of occurrence may be somewhere inside the Puranbhita. There is no contradiction between the girl's statement and that of the Sub-Inspector. The girl was not asked whether the place on which she was, was visible from other houses.

Lastly it has heen urged by the learned vakil for the appellant that the sentence is too severe. Looking at the facts of the case we are not prepared to say for one moment that the sentence is severe. The rape has been perpetrated on a child of nine. In such cases infliction of whipping is a very suitable form of punishment in addition to the sentence of imprisonment. The result is, the appeal is dismissed. The accused, if on bail, must surrender to serve out his sentences.

Lort-Williams, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 134

GRAHAM AND LORT-WILLIAMS, JJ.

Nayan Mandal and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 109 of 1929, Decided on 6th August 1929, from judgment of Sess. Judge, Faridpur.

(a) Criminal Trial—Evidence — Examination of witnesses—Prosecution is not obliged to examine witnesses who will not speak truth—Defence has privilege to cross-examine such witnesses which they must exercise at right time.

The prosecution is under no obligation to examine witnesses who it has reason to believe will not speak the truth. It is usual in such circumstances for the prosecution to tender such witnesses for cross-examination. The defence, however, is certainly entitled to claim that privilege but having omitted to do so they cannot be permitted to make capital of the fact that these witnesses were not cross-examined: 8 *Cal.* 121, *held too widely stated.* [P 135 C 1]

(b) Criminal Trial—Evidence — Presumption—Presumption of correctness attaching to finally published Record-of-Rights relates only to possession at time of its preparation—Such presumption by lapse of time (10 or 12 years) is rendered of weakest description—Record-of-Rights.

The presumption of correctness, which attaches to the finally published Record-of-Rights, relates only to possession at the time when the record is prepared; and, even if such presumption can be made in a criminal trial, it is clear that where there has been an interval of ten or 12 years between the preparation of the record and the occurrence of an offence in respect of dispute arising over possession of land, any presumption arising from the record is obviously of the weakest possible description. Indeed the probative value is practically nil since all sorts of changes may obviously take place in the course of 10 or 12 years. [P 135 C 2]

(c) Criminal P. C., S. 540—Court has power to admit rebutting evidence to contradict evidence of defence.

Under S. 540 Court has power to admit rebutting evidence for the purpose of contradicting evidence adduced on behalf of the defence, if the Court thinks it to be essential to the just decision of the case. [P 135 C 2]

B. C. Chatterji and *Suresh Chandra Talukdar*—for Applicants.

Debendra Narain Bhattacharyya—for the Crown.

Graham, J.—This is an appeal by three persons named Nayan Mandal, Panchanan Mandal and Moti Lal Mandal who have been convicted by the Sessions Judge of Faridpur on a trial with the aid of a jury and convicted under Ss. 148 and 304 (part 1) read with S. 149, I. P. C., and sentenced as follows: Nayan Mandal to rigorous imprisonment for ten years under S. 304 (part 1) read with S. 149, I. P. C., and Panchanan Mandal and Moti Lal Mandal to five years' rigorous imprisonment under S. 304 (part 1), read with S. 149, I. P. C. No sentences were inflicted under S. 148, I. P. C.

The case for the prosecution was that on the day of occurrence the complainant with a number of other persons had gone to cultivate a certain plot of land and that the accused came in numbers variously armed and ordered them to stop cultivating the land. The complainant's party refused and thereupon the accused attacked them and one Tarini was killed and one Lakhi Kanta was also injured and died afterwards. The defence was that the accused were in possession of the land and were cultivating it, and that the complainant's party came up and attacked them while they were peacefully cultivating the land and that any injuries, which were caused, were caused by the accused in the exercise of their right of private defence.

On behalf of the appellants three points were argued before us. It was first contended that the learned Sessions Judge erred in allowing the prosecution to withhold four witnesses named Abhoy Charan Shikari, Ramananda Biswas, Bonomali Biswas and Jagabandhu Biswas, who were examined in the committing Court, but were not examined in the Sessions Court, or tendered for cross-examination. It is urged that they ought at least to have been tendered for cross-examination. Two of these witnesses Abhoy and Ramananda were named in the first information. In the committing Court they were declared hostile because they did not support the prosecution. The prosecution is under no obligation to examine witnesses who it has reason to believe will not speak the truth: see *Empress* v. *Dhunno Kazi* (1). It is usual in such circumstances for the prosecution to tender such witnesses for cross-examination, and it is not clear whether this procedure was adopted or not. The defence, however, was certainly entitled to claim that privilege. Having omitted to do so they cannot be permitted to make capital of the fact that these witnesses were not cross-examined.

As regards the other two witnesses Banamali and Jagabandhu there does not appear to be anything to show that they were material witnesses. The prosecution was not bound to examine them. The remarks which have been made above apply to these witnesses also.

It is also urged on behalf of the appellants that the learned Judge should have told the jury that if material witnesses are not called, it may be presumed that, if they had been called, they would not have supported the prosecution. The charge docs, however, contain a direction of this nature.

Secondly, it was contended for the appellants that the learned Judge misdirected the jury inasmuch as he did not clearly and explicitly tell them that the settlement record was in favour of the accused and that the presumption was that the record is correct. The learned Judge has referred to the point in his charge. It was perhaps not so clearly put as it might have been. But however that may be, it is well settled that the presumption of correctness, which attaches to the finally published Record-of-Rights, relates only to possession at the time when the record is prepared, and, even if such presumption can be made in a criminal trial, as to which, speaking for myself, I entertain some doubt, it is clear that where there has been an interval of 10 or 12 years. as in this instance, between the preparation of the record and the occurrence, any presumption arising from the record is obviously of the weakest possible description. Indeed the probative value is practically nil since all sorts of changes may obviously take place in the course of 10 or 12 years. The material question in a case of this description is possession at the date of the occurrence. If the learned Judge had told the jury that the settlement record gave rise to a presumption in favour of the possession of the accused at the date of the occurrence he would certainly have misdirected them.

Thirdly and lastly, it was urged for the appellants that the defence was seriously handicapped by the fact that rebutting evidence was allowed to be brought on the record at the 11th hour for the purpose of contradicting the evidence adduced on behalf of the defence, and it was further contended that certain documents, which were called for from the Sadar Registration Office, were not admissible in evidence, and that the trial has been vitiated by the reception of inadmissible evidence. As regards the first part of this contention reference may be made to S. 540, Criminal P. C., and S. 135, Evidence Act. S. 540 empowers the Court at any stage to summon any person as a witness, if his evidence appears to it to be essential to the just decision of the case. S. 135, Evidence Act, lays down that the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and in the absence of any such law by the discretion of the Court. I think, therefore, that the Court had power to admit this evidence and that the objection on this point must fail. Finally as regards the objection that the documents in question Exs. X and Y, are not admissible in evidence we think there can he

(1) [1882] 8 Cal. 121.

no doubt that these documents are public documents, and they were, therefore, rightly admitted. In the result all the points which have been urged on behalf of appellants fail, the appeal must be dismissed and the convictions and sentences are confirmed.

Lort-Williams, J.—I agree. I desire to add that, in my opinion, the statement of Wilson, J., in *Empress* v. *Dhuano Kazi* (1), p. 124 is too wide. The learned Judge says:

"The only legitimate object of a prosecution is to secure not a conviction, but that justice be done. The prosecutor is not, therefore, free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his favour directly bearing upon the charge. It is prima facie his duty, accordingly, to call those witnesses who prove their connexion with the transactions in question, and also must be able to give important information. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. If such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution."

It is difficult to understand what in practice would be the effect of the first part of the learned Judge's dictum, namely that the only legitimate object of a prosecution is to secure not a conviction, but that justice be done. If the evidence in the hands of the prosecution points to the conclusion that a crime has been committed, it is the legitimate object of the prosecution to see that the prisoner is convicted. If the evidence in hand does not point to the probability that he is guilty of a crime, he ought not be prosecuted at all. Consequently if the prosecution are of opinion that the evidence in their possession points to the probability that the prisoner has committed a crime, obviously in their view justice would be done by his conviction, which it should be their object to secure. The dictum, therefore, though rhetorically and theoretically excellent, is meaningless in practice. The law in my opinion is correctly stated in Archbold's Criminal Pleadings, 27th Edn., 496:

"Although in strictness it is not necessary for the prosecutor to call every witness whose name is on the back of the indictment, (or, in India, "whose deposition has been taken"), it has been usual to do so, that the defendant may cross-examine them."

That is supported by a number of cases, the first being *R.* v. *Simmonds* (2) and the last being *R.* v. *Barley* (3):

"If counsel will not call the witness, the Judge in his discretion may: *R.* v. *Simmonds* (2). . . . . However the prosecutor is not bound to call them all; though he ought, it has been said, to have them in Court, that they may be called for the defence, if the prisoners choose: *R.* v. *Cassidy* (4)."

The latter part of the learned Judge's statement about the presumption which may be drawn, is of course correct. If the prosecution, in their discretion, do not choose to call such a witness, then the presumption may be drawn that his evidence, if given, would be unfavourable to their case.

V.S./R.K. *Sentences confirmed.*

(2) 1 C. & P. 84.
(3) 2 Cox. C. C. 191.
(4) 1 F. & P. 79.

A. I. R. 1930 Calcutta 136

CUMING AND LORT-WILLIAMS, JJ.

Natabar Haldar — Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 107 of 1929, Decided on 30th July 1929, from decision of Sess. Judge, Bakarganj, D/- 14th December 1928.

(a) Criminal P. C., S. 297—Summing up of evidence—Judge should sift and analyse evidence for prosecution and draw attention of jury to defence raised.

In summing up of evidence the Judge should not confine himself to detailing chronologically the evidence given by the witnesses for the prosecution without sifting or analyzing it and without directing the jury in any way upon the value or weight which ought to be or might be attached to it. He ought also to draw the attention of the jury to the defence raised. Omission to do either makes the Judge of little assistance to jury. [P 138 C 1]

(b) Criminal P. C., S. 297—Misdirection to jury—Direction upon Ss. 302 and 304—In direction under S. 302, Judge not adhering to words of section used word "possible" for "likely" held amounted to misdirection.

A Judge after explaining Ss. 302 and 304, Penal Code, said in his charge to jury. "If, however, you find that the accused had neither the intention nor the knowledge requisite under S. 302 consider his liability under S. 304." He then read and explained that section and continued "if you hold that he intended to cause the deceased such bodily injury that death would be possible but not the most probable result you will find him guilty under S. 304, Part I, or if you hold that he had no such intention but knew as a reasonable man that the deceased's death would be a likely consequence of his act you will find him guilty under S. 304, Part 2."

Held : that there was misdirection.

[P 138 C 1, 2]

Suresh Chandra Talukdar and *Bhupendra Nath Dutt Roy*—for Appellant.

Anil Chandra Roy Chowdhury—for the Crown.

Lort-Williams, J. — The accused Natabar Haldar alias Natak was tried before the learned Sessions Judge at Barisal with a jury under S. 302, I. P. C. for causing the death of one Karim Shah. Along with the accused his brother Nandabashi was also tried under S. 302 read with S. 114, I. P. C. for abetting him. He was acquitted. The case of the prosecution was that the two accused brothers, Nandabashi and Natabar, lived together and were tenants of Abdul Kader Talukdar of Chatra. Narendra Nath Bose was the landlord's Tahsildar and Karim Shah was his Mridha. In the afternoon of Tuesday 27th March 1928 Narendra (with Karim) had gone to the Bari of the two brothers where he found them and also Mahommad Shah and Abdul Karim Rari.

There was some conversation and Narendra demanded the rent due from the brothers. Nandabasi said that they were unable to pay them and the Tahsildar and Karim were about to depart when Nandabasi invited them to the inner hut at the north Viti of the Bari to say something to them. Thereupon they went to the north Viti hut, Natabar also accompanying them and there they sat down. An altercation then arose between the two brothers and Karim Shah with regard to a Jaisudi Bari which apparently the latter had taken possession of, but the possession of which was claimed by the brothers. They complained that he did not pay any rent for this Bari. His answer was that various people held mortgages on the property and he did not know to whom to pay the rent. When the altercation had been going on for about 20 minutes, Natabar who had gone inside the hut suddenly appeared with a leja and speared Karim as he sat on the verandah. He attempted to get up and Nandabasi then got up and helped Natabar to press the leja home. Karim rolled over and died within a few minutes. Narendra got up and ran out of the Bari for help. Mohammad Shah who had been left at the Baithak-khana heard his brother Karim cry out and ran to the north Vita hut and saw his brother lying in front of the door of the hut and Natabar standing on the verandah witn a leja in his hand. He tried to drag the body away but Nandabasi cried to his brother to kill him if he persisted in the attempt. Mohammad then ran away from the Bari. On his way he passed a number of people who had been called as witnesses and he told them all that his brother had been killed by Natabar. Various witnesses came to the Bari and were threatened by Natabar who said that he would kill anybody who came near or tried to take the body away. Some of the witnesses alleged that he had said that he would kill them as he had killed Karim. The wound upon Karim when examined afterwards by the doctor were found to be consistent with having been done with a leja. The chest was slashed open and the wound perforated the upper lobe of the left lung, the left varticle of the heart in two places and the stomach in two places. It is obvious therefore that considerable force must have been used.

Natabar's defence was that he had had a quarrel with a neighbour on account of the neighbour's son interfering with his Panbaroj, that somebody suggested that he should go to his landlord to have the matter decided, and that the landlord instead of helping him had fined him Rs. 25 apparently on three separate occasions making the fine Rs. 75 in all. He also sentenced him to be slapped with a shoe but this part of the sentence was remitted. He says further that in consequence of his inability to pay the fine imposed the landlord had sent his servants for the purpose of collecting the fine and that they with a number of other persons had attacked him when he was attending to his Panbaroj and that he had ran away towards his Bari when a leja had been thrown at him but missed him. He managed to get into his Bari and when he tried to shut the door another leja was thrown at him which grazed him on the thigh and in turn he picked up the leja which had been thrown on him and either threw it back or used it in his defence with the result that, during the fight which ensued, Karim was struck. These shortly are the facts.

The sole witness of actual striking of Karim was Narendra but Mahomed saw the body almost immediately afterwards, and as I have said certain witnesses deposed that Natabar threatened them that he would kill them as he had killed Karim. It will be observed that a considerable part of the evidence of the persons who say that they saw Mahomed running and heard his news is as consistent with the case for the defence as it is with that of the prosecution. It would fit in with either story. Udoy Chandra Roy, prosecution witness 11, said in his cross-examination that the men he had seen were running with something like lathis in their hands and that from within the Basabari he heard Natabar cry out that he was being murdered.

Mr. Taluqdar on behalf of the appellant has complained first of all that the learned Judge has not properly put the case of the defence to the jury. He has also raised a point of law with regard to the learned Judge's direction upon S. 304, I. P. C. In view of the opinion which we have formed as to the learned Judge's direction in law it is not necessary to deal at length with the first point taken on behalf of the accused. But reading the charge as a whole I am of opinion that it does not sufficiently draw the attention of the jury to the defence raised, nor does it show the importance of the evidence of Udoy Roy in his cross-examination. The learned Judge, as so many learned Judges in the mofussil seem to do, simply detailed chronologically the evidence given by the witnesses for the prosecution without sifting or analysing it and without directing the jury in any way upon the value or weight which ought to be or might be attached to it, and by so doing has really failed to give that help to the jury which he ought to have given. As I have already pointed out in a recent case the spirit of the Code demands that there shall be more than a bare statement of facts in the learned Judge's charge. Otherwise he can be of little assistance to the jury.

The point raised in the learned Judge's direction in law refers to the following passage in his charge. He had explained Ss. 302 and 304 and eventually said this:

"If, however, you find he had neither the intention nor the knowledge requisite under S. 302 consider his liability under S. 304, I. P. C."

He then read and explained that section and continued

"If you hold that he intended to cause Karim Shah such bodily injury that death would be a possible but not the most probable result you will find him guilty under S. 304 part I or if you hold that he had no such intention but knew as a reasonable man that Karim's death would be a likely consequence of his act you will find him guilty under S. 304 part 2."

In our opinion this direction would have been quite correct if he had not used the word "possible," but had adhered to the words of the section and had used the word "likely."

It becomes clear, that the Judge's direction is wrong, if you apply it to a concrete instance. I may repeat here the example which I suggested during the discussion—If Natabar had struck a blow with the leja on Karim's skin it is clear that Karim might have died from septic poisoning arising from the wound. His death would be a possible result of what Natabar had done but not the most possible result. According to the learned Judge's direction such an act would come within S. 304 part I. We are clearly of opinion that it would not. It might possibly come within S. 304 part 2. But it is more than likely that such an act would not come within the purview of S. 304 at all. In view of the fact that the jury have convicted the accused of an offence under S. 304, part I, it cannot be said that this misdirection may not have misled the jury.

In these circumstances we are of opinion that the conviction and sentence must be set aside and the appellant retried.

Cuming, J.—I agree.

V.B./R.K. *Case remanded.*

A. I. R. 1930 Calcutta 138

RANKIN, C. J. AND PATTERSON, J.

Sunnat Mondal—Accused—Petitioner.

v.

Makar Sheikh—Complainant — Opposite Party.

Criminal Revn. No. 779 of 1929, Decided on 23rd August 1929.

Criminal P. C., S. 232—Charge under Penal Code, S. 498 alleging accused as taking away woman from complainant's custody — Evidence showing that she was taken from one *B*'s house—Scanty evidence con-

necting accused with offence—Retrial was not ordered on amended charge.

In a charge framed under S. 498 against the accused in the trial Court, it was alleged that he had taken the woman away from the complainant's custody, but the nature of the evidence showed that the charge was intended to relate to the alleged taking away of the complainant's wife from one *B's* house. There was, however, no finding that *B* had the care of the woman on behalf of her husband, the complainant, nor was there any evidence on the record that would justify such a finding.

Held : that from the very scanty nature of the evidence connecting the accused with the offence, it would not be proper to order a retrial on an amended charge. [P 139 C 1, 2]

Mrityunjoy Chattopadhya and *Monindra Nath Banerjee*—for Petitioner.

Patterson, J.—If the evidence is believed, the complainant's wife was enticed away by a woman named Hazari Bibi, was taken away from Hazari Bibi's house by the present accused and was then detained or concealed for several days in the house of one Mujahar Fakir.

In the charge framed against the accused in the trial Court, it was alleged that he had taken the woman away from the complainant's custody and having regard to the nature of the evidence, it must be supposed(though this has not been clearly stated,) that the charge was intended to relate to the alleged taking away of the complainant's wife from Hazari Bibi's house. There is, however, no finding that Hazari Bibi had the care of the woman on behalf of her husband, the complainant, nor is there any evidence on the record that would justify such a finding. On the contrary, the evidence goes to show that the woman had already been taken away from the complainant's custody by Hazari Bibi before ever the accused appeared on the scene.

It is possible that, if the charge had been framed differently, and if the matter had been more fully investigated the accused might have been convicted in respect of the subsequent concealment or detention of the woman in Mujahar Fakir's house, but it is clear that, in the present state of the record, the conviction and sentence under S. 498, I. P. C., cannot be sustained. The Rule must therefore be made absolute, and in view of the very scanty nature of the evidence connecting the present applicant with the offence, I do not think it would be proper to order a retrial on an amended charge.

The accused will be released and his bail bond discharged and the fine if paid will be refunded.

Rankin, C. J.—I agree.

V.S./R.K. *Conviction quashed.*

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* A. I. R. 1930 Calcutta 139

CUMING AND LORT-WILLIAMS, JJ.

Bikram Ali Pramanik and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 58 of 1929, Decided on 24th July 1929, against decision of Asst. Sess. Judge, Pabna, D/- 17th January 1929.

(a) Criminal P. C., S. 236 — Alternative charges under Ss. 395 and 457, Penal Code, are not bad in law.

Offence under S. 457 is really in some cases a minor offence to offence under S. 395 and there can be no reason why there should not be alternative charges of these two offences.

[P 140 C 1]

*** (b) Evidence Act, Ss. 149, 154—(Per *Cuming, J.*)—Leading questions may be asked without declaring witness hostile** — (*Lort-William, J.* contra).

Section 154 read with S. 143 provides that the Court may allow the party to put leading questions to his own witnesses. This does not necessarily mean that he must declare the witness hostile and cross-examine him. It is only when he declares the witness hostile and cross-examines him that he cannot rely upon his evidence. Where the public prosecutor asks a witness some questions with the permission of the Court desiring to get from him not a contradiction of what he said but something in addition, he cannot be said to have cross-examined the witness. The questions are merely leading questions. [P 140 C 2, P 141 C 1]

Per *Lort-Williams, J.*, contra.—Ss. 143 and 154 read together do not give power to prosecution to put leading questions to their own witnesses even with the assent of the Judge. The meaning of S. 154 is that with permission of the Court they may treat a witness hostile and cross-examine him. [P 141 C 2]

(c) Criminal P. C., S. 298—Charge to jury —Charge is defective where no direction as to weight to be attached to evidence of co-accused against accused is given.

Where in the charge to the jury the Judge does not give any direction to the jury as to how they should treat and the weight they should give to evidence of an accused person as against his co-accused it is impossible to say how far such omission does not prejudice the accused and retrial should be ordered.

[P 141 C 1]

Dinesh Chandra Ray—for Appellants.

Debendra Narain Bhattacharjee—for the Crown.

Cuming, J.—This is an appeal by two persons Bikram Ali Pramanik and Kudrutulla Khan. These two persons together with one Samatulla were tried by the learned Additional Sessions Judge of Pabna and a jury on charges of dacoity and house breaking by night. The jury unanimously found all the three persons guilty under S. 457, I. P. C., and not guilty under S. 395, I. P. C. The appeal of Samatulla has been summarily dismissed and that of the other two appellants is now before us.

The case for the prosecution briefly was that these persons together with a number of other persons broke into the house of the complainant on the night of 27th May 1928. The defence briefly was a denial of the whole occurrence ; and there was a suggestion in the case of Samatulla of enmity.

The first point raised by the learned vakil for the appellants is that the alternative charges under Ss. 395 and 457, I. P. C., are bad in law. Why it is bad in law I am unable to understand. Offence under S. 457, I. P. C., is really in some cases a minor offence to offence under S. 395. There can be no reason why there should not be alternative charges of these two offences.

The next point raised is that the learned Judge has not properly dealt with or has misdirected the jury with regard to a certain alleged confession. It is alleged that Samatulla, whose appeal has been rejected, on the night of the dacoity made a confession to a cousin of his one Ketab Ali Sarkar in which he admitted that he and the two appellants had committed dacoity in the house of the complainant. In dealing with this confession the learned Judge's charge to the jury is as follows :

"P. W. 15 Ketab Ali, a deed writer in the Salanga Registration Office says that the accused Samatulla is his cousin and that he went to him at about 3-30 a. m. on the night of occurrence and requested him to save him as his name had been mentioned in connexion with the dacoity. This person says that after pressure being put, the accused Samatulla stated that he with the other two accused and also two other persons had committed the dacoity. The witness admits that there was a quarrel between him and the accused Samatulla regarding the deduction of Rs. 10 from the price of three maunds of sweetmeats taken by Samat from his shop. This witness further admits that he (Samat) also said that his name had been falsely mentioned in the Ejahar at the Thana. P. W. 15 was not examined by the Sub-Inspector. It is for you to say whether the accused Samatulla went to this witness on the night of occurrence and made the confession."

With regard to the alleged confession itself it is to be found in the evidence of Ketab Ali Sarkar when examined before the Magistrate. There he stated that Samatulla on being pressed said that he, Bikram Ali, Kudar Ali Khan and two others committed dacoity in the house of Chandulla Sarkar. When examined in the Sessions Court he states as follows :

"Accused Samatulla is my co-villager. At about 3 and 3-30 a. m. the Nanigachi mela day I came to know of a dacoity in Chandulla's house . . . Accused Samatulla came to me that night. He is here. He said that his name had been taken in connexion with the dacoity in Chandulla's house. He asked me to go to the Prodhans of that Parah. I told him to come in the morning as I could not go at that hour of the night. He did not come to me any more. He said that three names were mentioned in connexion with the dacoity, viz., those of Bikram and himself and the man who was a Hindu before and converted to be a Mahomedan afterwards."

It would be noticed that in that statement Samatulla does not say that he and the other two appellants committed the dacoity. He only says that three names had been mentioned. The Public Prosecutor was evidently not satisfied with that statement ; for he asked the permission of the Court to put further questions to the witness and he then asked as follows :

"Did Samatulla tell you that he and Bikram and Kudratulla and two others had committed dacoity in the house of Chandulla Sarkar."

The answer was "yes, he said so." Mr. Roy who appears for the appellants contends that the Public Prosecutor having declared the witness hostile and cross-examined him it was not open to the prosecution to rely upon the evidence of this witness. The only effect of declaring the witness hostile and cross-examining him was to discredit the witness altogether. But it does not appear that the prosecution wished to cross-examine the witness for the purpose of discrediting his evidence. As far as can be seen what the Public Prosecutor did was to ask the permission of the Court to put questions to this witness which might be put by the adverse party. From this it cannot be said that he intended to declare the witness hostile and to cross-examine him. S. 154 read with S. 143, Evidence Act, provides that the Court may allow the party to put leading questions to his own witnesses. But that I

do not think necessarily means that he must declare the witness hostile and cross-examine him. It is only when he declares the witness hostile and cross-examines him that he cannot rely on his evidence. It will be seen from a perusal of the evidence that what the Public Prosecutor desired to get from the witness was not a contradiction of what he had said but something in addition. He was not cross-examining his own witness but with the permission of the Court was asking him leading questions. That is not necessarily to cross-examine. This is clear from S. 154 itself which does not say that a person who calls a witness may cross-examine him in certain circumstances but that he might put questions to him which might be put in cross-examination by the adverse party. That is not the same as cross-examining him. If it were, the Code would have said so.

Be that as it may, it has further been argued by Mr. Roy that the Judge has entirely failed to direct the jury as to how they should deal with the evidence of a co-accused. Here Mr. Roy stands on firmer ground. As far as can be seen from the charge of the learned Judge he gave no direction whatever to the jury on this point. It is clear from his charge that he did not tell the jury that the statement of Samatulla that he himself, Bikram, Kudar Ali and two others were the persons who had committed the dacoity could only be used against Samatulla and therefore apparently has allowed it to be used, as in certain circumstances it can be used, against the co-accused, but he entirely neglected to draw the attention of the jury to a very important matter, namely, the way in which this evidence was extracted from the witness. The witness first of all made no mention whatever of the fact that Samatulla had made a statement to him in which he said that he, Bikram, Kudar Ali and two other persons had committed dacoity ; and it is only in answer to the leading question by the Public Prosecutor which practically put into the witness's mouth the answer which he wanted that the witness stated that Samatulla had told him that he, Bikram, Kudar Ali and two others had committed the dacoity. Neither does he give any direction to the jury as to how they should treat and the weight they should give to the evidence of an accused person as against his co-accused. It is impossible for us to say that the omission of the Judge to bring this fact to the notice of the jury has not seriously prejudiced the two accused persons,

In these ciscumstances we must set aside the verdict of the jury and direct that the appellants be retried.

Lort-Williams, J.—I agree with my learned brother that this conviction should be set aside and the two appellants retried.

I desire to add that in my opinion Ss. 143 and 154, Evidence Act, read together do not give power to the prosecution to put leading questions to their own witnesses even with the assent of the Judge.

The meaning of S. 154 is that they may, with the permission of this Court, treat a witness as hostile and cross-examine him. The wording of S. 154 shows that the legislature did not intend to distinguish the law in this country from the law which obtains in England.

R.M./R.K. *Retrial ordered.*

A. I. R. 1930 Calcutta 141

GRAHAM AND LORT-WILLIAMS, JJ.

Emperor

v.

Balai Ghose and *another*—Accused.

Jury Ref. No. 31 of 1929, Decided on 7th August 1929, made by Addl. Sess. Judge, Burdwan, on 17th March 1929.

(a) Criminal P. C., S. 307 (2)—High Court should not interfere with verdict of jury unless it is manifestly wrong.

The High Court has to consider the entire evidence and to decide after giving due weight to the opinion of the Sessions Judge and the jury whether the charge was made out against the accused. High Court should not interfere with the verdict of the jury unless it is shown that the verdict was manifestly wrong and that there were no sufficient materials to justify it. [P 142 C 1]

(b) Criminal Trial—Retracted confession—Independent corroboration showing that confession is true should be required.

There is nothing to prevent a confession although retracted from being given effect to as against the maker. But where the confession has been retracted the general rule is that independent corroboration of the confession should be required in order that the Court may be satisfied that the confession is true. [P 142 C 1, 2]

(c) Criminal P. C., S. 103—Object is to obtain as reliable evidence as possible of search.

The object of the section is presumably to obtain as reliable evidence as possible of the search and to exclude the possibility of any

concoction or malpractice of any kind. It is incumbent upon the police to try to comply with the provisions of the section. There is no harm in the police officer who makes the search being called as witness at the trial but such officer cannot be deemed to be an entirely satisfactory witness for the purposes of proving the search. [P 143 C 2]

Debendra Narain Bhattacharya—for the Crown.

Graham, J.—This is a reference under S. 307, Criminal P. C. by the Additional Sessions Judge of Burdwan in connexion with a dacoity case which was tried by him in which the jury by a majority verdict of 4 : 1 were of opinion that the accused were entitled to the benefit of the doubt. The learned Additional Sessions Judge being of opinion that the verdict was erroneous and wholly against the weight of evidence has referred the case to this Court.

Under the provisions S. 307 of the Code we have to consider the entire evidence, and, to decide after giving due weight to the opinion of the Sessions Judge and the jury, whether the charge was made out against the accused, and whether the verdict was right or not. It has not been the practice of this Court according to the trend of decisions on the subject to interfere with the verdict of a jury unless it is shown that the verdict was manifestly wrong and that there were no sufficient materials to justify it.

The evidence which was adduced in this case by the prosecution consisted of : (1) confessions made by each of the accused Balai Ghosh and Motleb Sheikh of their guilt, these confessions having been subsequently withdrawn in the committing Court; (2) the evidence of Satya Bala Dasi and her father Fakir Jelia, who have deposed as eyewitnesses to the dacoity, and have each of them identified one of the accused, Satya Bala having identified Motleb Sheikh and her father having identified the other accused Balai Ghosh ; (3) thirdly in addition to this evidence there is as against the accused Balai Ghosh, the evidence that certain ornaments or pieces of ornaments, Exs. 9 to 12, were found on search in his house.

Now so far as the confessions are concerned there is nothing to prevent a confession although retracted from being given effect to as against the maker. But where the confession has been retracted the general rule is that that independent corroboration of the confession should be required in order that the Court may be satisfied that the confession is true. In view of the fact that both these confessions were promptly withdrawn when the accused came before the committing Magistrate we think that it would not be altogether safe to rely entirely upon them in the absence of any independent evidence to corroborate them. It becomes necessary therefore to examine the evidence in order to see how far the confessions are corroborated.

A very important part of the case consists of the evidence of Satya Bala Dasi and her father Fakir Jelia, and in that connexion the crucial point is whether Fakir Jelia was in his dughter's house on the night of the dacoity. If these witnesses have spoken the truth, and if their identification of the two accused is accepted, then this would undoubtedly furnish valuable corroboration of the truth of the confessions. But the evidence in the case and the facts and circumstances seem to give rise to the considerable doubt as to whether Fakir was at the place of occurrence on the night in question, as he alleges. In the first information, which he lodged before the police at 8.30 a. m., on 19th March 1928, he stated that he was not in his dughter's house when the dacoity took place, and he gave an account of the dacoity which purported to be as described to him by his daughter ; and further he concluded by saying that he had come to his daughter's house at noon on the day following the dacoity, and having heard the details of the occurrence he had come to the Thana to give information. In view of the explicit statement by Fakir Jelia that he was not present at the time of the dacoity it is difficult to accept his statement in evidence that he was there and saw what took place. The explanation which he has given for this change in his story is that on the way to the Thana the Chowkidar told him to inform the Daroga that he (Fakir) had not been in his daughter's house at the time of the dacoity. Now the Chowkidar Moti Chang is a man aged about eighty years and it is difficult to imagine any reason why he should have given any such instruction to the

informant. The learned Sessions Judge seems to have been of opinion that the Chowkidar was not a reliable witness and had suppressed the truth. There does not, however, seem to be any sufficient ground for such a conclusion.

There is one significant fact in connexion with the question, which as I have said is a very important question, as to whether Fakir was or was not present at the time of the dacoity, and that is the delay which took place in the lodging of the first information. The occurrence took place at midnight on 17th March and the first information was not lodged until 8-30 a. m., on 19th March, the police station being about 14 miles distant from the place of occurrence. If Fakir was present at the time of the occurrence it seems to be hardly probable that he would not have lodged the information sometime during the course of the following day, especially in view of the fact that he is not alleged to have been injured in any way. Dacoity is a serious matter, and, if he was there as alleged, the natural course would have been to lose no time in going and giving information to the police. On the other hand the delay in lodging information is consistent with the other version that Fakir was not present at the time of the occurrence, and that he came on the following day about midday after hearing of the dacoity, and then having learnt the particulars went to the Thana. There is therefore considerable doubt whether Fakir Jelia really was a witness of the occurrence, and although there is the evidence of witnesses who speak to his presence, in view of his own clear statement in the first information that he was not there, and the circumstances to which I have referred above which supports that statement, the only conclusion possible appears to be that he did not see the dacoity, and that he has been introduced as an eyewitness for obvious reasons. If that view is accepted then, of course, it materially affects the evidence of Satya Bala Dasi also, because she has throughout described her father as having been present and has given details of what he did. If those statements are untrue, no reliance can safely be attached to her evidence as a whole.

Then in connexion with the identification of the accused there is the fact that it is mentioned in the first information that the dacoits were Maikocha and Galpatto, and that being so their identification would naturally be a matter of extreme difficulty.

As regards the accused Balai Ghose there is the further evidence as to certain ornaments and pieces of ornaments, which are alleged to have been found at his house. With regard to this part of the case it seems to me that the evidence as to the house search is not altogether satisfactory. The section of the Criminal Procedure Code relating to such searches is S. 103 which lays down that before making a search the officer about to make it shall call upon two or more respectable inhabitants of the locality to attend and witness the search. The object of the section is presumably to obtain as reliable evidence as possible of the search, and to exclude the possibility of any concoction, or malpractice of any kind.

In this instance the witnesses who have been examined to prove the search are the Sub-Inspector of Police, witness 12 for the prosecution, and a witness named Probodh Chandra Gossain, witness 11 for the prosecution, who is described as a cultivator. There can of course be no harm in the Police Officer, who made the search, being called as a witness at the trial, but an officer who is connected with the investigation cannot be deemed to be an entirely satisfactory witness for the purpose of proving the search. It was incumbent upon the police to, at any rate, make some attempt to comply with the provisions of the section. It is possible that there were no persons living near the place of occurrence who would fulfil the definition of respectable inhabitants used in the section. In that case, however, some evidence to that effect ought to have been given. Furthermore it appears that although two persons apart from the Sub-Inspector were called as witnesses to the search, and though these persons signed the search list, only one of these persons was called as a witness at the trial. No explanation appears to be forthcoming of the omission to examine the other witness and there can be no doubt that it was the douty of the prosecution to produce him as a witness at the trial.

Taking the evidence as a whole and taking into consideration all the facts and circumstances it seems to me that a reasonable doubt does arise as to the guilt of the accused, and that it cannot be said that the jury were not justified in giving the benefit of that doubt to the accused. Certainly it cannot be said that their decision was in any sense perverse.

The result, therefore is that this reference must be rejected and the accused are acquitted and released.

Lort-Williams, J.—I agree.

R.M./R.K. *Reference rejected.*

A. I. R. 1930 Calcutta 144

RANKIN, C. J. AND PATTERSON, J.

Dhananjoy Pal and *another*—Party 2—Petitioners.

v.

Nagendra Sankar Roy and *others*—Party 1—Opposite Parties.

Criminal Revn. No. 624 of 1929, Decided on 15th August 1929.

Criminal P. C., S. 139-A — In enquiry under S. 137 provisions of S. 139-A ought to be complied with.

Before proceeding to make a relevant enquiry under S. 137 the Magistrate ought to comply with the provisions of S. 139-A. The Magistrate's duty is to find whether there is reliable evidence in support of the denial. When the Magistrate does not apply his mind to the question and does not come to any finding on the point, he does not follow the correct course. [P 144 C 1, 2]

Girija P. Sanyal and *Hari Das Gupta*—for Petitioners.

Hemendra Ch. Sen and *Satyendra Ch. Sen*—for Opposite Parties.

Rankin, C. J.—In my opinion this rule must be made absolute. The Magistrate has not complied with the provisions of S. 139-A Criminal P. C., before proceeding to make relevant enquiry under S. 137. What happened was that the Magistrate having made a conditional order, the present petitioners appeared before him. It is clear that they denied the existence of any public right of way. The question is whether the Magistrate found that there was any reliable evidence in support of this denial. True, it was no part of his business to try this matter. His business was to find whether there was any reliable evidence in support of the denial. Then, what happened was that he adjourned the case so that the petitioners might adduce evidence in support of this denial. Then the petitioners made a suggestion that the Magistrate might go to the spot and hold his enquiry. Thereupon he ordered a local enquiry to be held and as the result of that local enquiry he got a certain report. This report was to the effect that it was a foot way and not a way for carriages and carts and so on. Then the matter came back to the Magistrate but he never applied his mind, so far as I can see, to the question whether there was any reliable evidence in support of the denial, nor has he come to any finding on that point. On the contrary he did proceed thinking that he was proceeding under S. 137 and tried himself the question whether there was a public right of way or not. He says :

"Two points require determination viz., whether the public have lawfully used the way and whether the defendants caused any obstruction therein."

Under S. 137 the first matter does not arise at all. Then he observes :

"This fact is also proved by P. Ws. 2, 3, 5, 6 and 8. P. W's. have also proved that the disputed way was 7 or 8 cubits wide."

It seems to me that in these circumstances the complaint of the petitioners is made out. If this learned Magistrate was going to try the question whether there was a public right of way or not under S. 137, then he was going to do the very thing he was told not to do. That question has got to be decided one way or the other under S. 139-A. It is clear to me that the Magistrate did not take the correct course.

This rule is made absolute and the order absolute is set aside. The case must go back to the learned Magistrate in order that he may try it again according to law.

Patterson, J.—I agree.

R.M./R.K. *Case remanded.*

A. I. R. 1930 Calcutta 145

MUKERJI AND MALLIK, JJ.

Jyoti Prosad Singha Deo Bahadur—Plaintiff-Appellant.

v.

Gopal Acharya Goswami—Defendant—Respondent.

Appeal No. 359 of 1927, Decided on 20th March 1929, from appellate decree of Dist. Judge, Bankura, D/- 25th September 1926.

(a) Bengal Cess Act (9 of 1880)—Suit for recovery of arrears of cesses with penalty in respect of revenue free tenures—If value above Rs. 100, second appeal lies.

There is a second appeal in a suit for recovery of arrears of cesses in respect of revenue free tenures with penalty for non-payment under S. 58, treated as a suit for rent provided the value of the suit is over Rs. 100 : 16 *Cal.* 638 ; 20 *Cal.* 254 and *A. I. R.* 1923 *Cal.* 673, *Foll.* [P 145 C 2]

(b) Bengal Cess Act (9 of 1880), Ss. 50, 52, 54, 56, 58 and 62—Return by revenue free holder under S. 14—Valuation—Provisions of Ss. 50, 52, 54, 56, 58 and 62 apply.

Where the holder of revenue free tenure submits a return in pursuance of proclamation issued under S. 14, and there has been a valuation unless the lands come within the category of lands mentioned in S.33 of the Act, or comprise an estate borne on the general register of revenue free lands, S. 50 of the Act must necessarily apply. Further publication of notices under S. 51 and in certain cases also of notices under S. 54 is necessary. The liability of the holder of the rent free lands will arise only under S. 56 and his liability to penalty only under S. 58 and his liability to pay statutory interest under S. 62. [P 146 C 1]

Karunamoy Ghose—for Appellant.

Bejoy Kumar Bhattacharjee—for Respondent.

Judgment.—This appeal has arisen out of a suit for recovery of arrears of cesses for the years 1328 to 1331 B. S. in respect of a revenue-free tenure. The plaintiff's case was that the defendant was liable to pay cesses at Rs. 36-6-0 per annum, and he was also liable to pay a penalty of a like amount for non-payment of the same under S. 58 of the Cess Act. The defendant contended that he was ready to pay the cesses for the revenue-free tenure year after year to the plaintiff's gomastha but the latter refused to accept it, that he remitted the cesses for 1327 to 1329 by money order but the same was not accepted by the plaintiff, and that he also offered to pay the cesses for 1330 and 1331 to the plaintiff's gomastha but that the latter would not accept it. He alleged further that no valuation roll was published or notices were served such as were necessary to fix him with liability for payment of penalty, interest or costs.

The trial Court held that the plea of tender was not made out, that the amount remitted by money order was insufficient and that the question of publication of the valuation roll and service of notice etc. did not arise as the defendant was fully aware that he had to pay Rs. 36 and odd as cesses and had failed to pay the same. That Court therefore decreed the suit in full.

The District Judge on appeal held the question of publication of notices did arise as it was only after such publication that the liability on the part of the defendant, the holder of the rent-free tenure, would arise under S. 56. Holding that such publication had not been proved he dismissed the suit in its entirety.

The plaintiff has then preferred this appeal. A preliminary objection has been urged on behalf of the respondent to the effect that the suit was of a nature cognizable by a Court of Small Causes and so no second appeal lies. This is sought to be met on behalf of the appellant by asserting that the suit was one for rent and has been treated by the Courts below as such. Now the matter is not res integra but is concluded by authority, and the value of the suit having been over Rs. 100 a second appeal would lie : see *Mohesh Chunder* v. *Umatara* (1), *Rajani Kanta* v. *Jogeshwar* (2). Also *Birendra Kishore* v. *Trailokhya* (3).

On the merits what has been argued on behalf of the appellant, in the first place, is that the liability of the defendant is created by Ss. 5, 14, 41 and 47 of the Act, and that he is liable to pay the amount together with penalty and interest to the plaintiff inasmuch as the plaintiff has admittedly made the payment of cesses due to the Collector. It has been further argued that S. 50 has no application to the case as that section deals with a special class or special classes of rent-free tenures, and that therefore the plaintiff is under no necessity to invoke Ss. 52, 54, 56, 58 and 62 of the Act in his aid. We have considered the arguments, such as they have been advanced before us, but we cannot

(1) [1889] 16 Cal. 638.
(2) [1893] 20 Cal. 254.
(3) A. I. R. 1923 Cal. 673.

see our way to accede to them. We are clearly of opinion that where, as here, the defendant submitted a return in pursuance of the proclamation issued under S. 14 and there has been a valuation and unless the lands come within the category of lands mentioned in S. 33 of the Act or comprise an estate borne on the general register of revenue-free lands, S. 50 of the Act must necessarily apply. We are also of opinion the publication of notices uuder S. 52 and, in certain cases, also of notices under S. 54 is necessary. The liability of the holder of the rent-free lands, in our opinion, would arise only under S. 56 and his liability to penalty only under S. 58 and his liability to pay the statutory interest only under S. 62. The view which the District Judge has taken in our opinion, is right.

We, however, do not agree with the District Judge in the order that he has made. During the pendency of the suit in the trial Court the defendant admitted his liability to pay the cesses, though not the penalty or the interest and actually deposited in Court Rs. 164-6-3 by a petition dated 22nd October 1925. As the plaintiff insisted on the payment of penalty and interest he did not withdraw the amount. It remained in Court till after the District Judge had passed his orders and after that the defendant was allowed to withdraw it on 28th February 1927.

We are not inclined to give the plaintiff a further chance of proving the publication of the notices simply to enable him to saddle the defendant with liability for penalty and interest. At the same time we do not see why the plaintiff will not get the Rs. 164-6-3 as regards which the defendant admitted his liability and which he actually put in in Court.

We therefore, allow the appeal, set aside the decrees passed by the Courts below and order that a decree be entered in plaintiff's favour for Rs. 164-6-3 with interest from date till realization at the rate of 6 p. c. p. a. There will be no order for costs in favour of any of the parties in this litigation.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 146

LORT-WILLIAMS, J.

Ramackers & Co., Ltd., In re.

Appln. in Original Suit Decided on 31st January 1929.

Companies Act (7 of 1913), S. 104—Construction—Documents presented to Registrar after expiry of date fixed—Registrar should file them and inform officer of company to obtain extension up to date of presentation from Court in default of which applicant would be liable to prosecution.

The right construction of S. 104 is that the Registrar of Joint Stock Companies should file the documents therein referred when presented even though they might have been presented after the expiry of time fixed for their presentation, and that he should inform the officer of the company who presents the documents for filing that unless within the time to be specified by the Registrar the applicant obtains an order from the Court extending the time for filing up to the time when he actually did file, he will take steps to prosecute him for the default. [P 146 C 2]

Carey Morgan—for Petitioner.

Amir Ali—for Company.

Order.—In my opinion, the right construction of S. 104, Companies Act is that the Registrar of Joint Stock Companies should file the documents therein referred to when presented, in spite of the fact that they have not been presented for filing within the month specified, and that he should inform the officer of the company, who presents the document for filing, that, unless, within a time to be specified by the Registrar, the applicant obtains relief from the Court, he (the Registrar) will take steps to prosecute him for his default. The effect of accepting and filing the document is not to relieve the person in default from the liability imposed by the section, unless he obtains relief from the Court for the whole period during which he was in default, with an order extending the time for filing up to the time when he actually did file the documents.

With regard to the facts of this particular case, I am satisfied from the affidavits that, up to June 1927, this applicant was not aware of the provisions of the law, although that is not a reason for which the Court will necessarily give relief, and I am satisfied also that, at that time, he was informed by the Registrar that the documents could not be filed until he had obtained relief from the Court. I am not sure that I ought to give him relief for the whole of the intervening period from

June 1927, up to date, because, having been informed that it was necessary for him to obtain relief from the Court before he could file this document, he took no step to obtain that relief for a considerable period. However, in all the circumstances, I think I am justified in granting relief. Therefore, the time for filing these documents will be extended until the 14th February 1929.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 147 (1)

B. B. GHOSE AND S. K. GHOSE, JJ.

Ratikanta Moyra—Appellant.

v.

Sanatan Baidya and *others*—Respondents.

Appeal No. 129 of 1929, Decided on 30th July 1929, from appellate order of Addl. Sub-Judge, 1st Court, 24-Parganas, D/- 30th November 1928.

Civil P. C., O. 7, R. 10 (1)—Suit for partition—Preliminary decree passed—At final decree suit discovered to be undervalued and beyond pecuniary limits—Preliminary decree cannot be declared nullity and plaint cannot be returned for proper presentation.

Where in a suit for partition valued at certain figure, a preliminary decree is passed and it is found at the time of final decree that the suit was undervalued, it is not open to the Court if the value of the property exceeds the pecuniary limits of the Court, to declare the preliminary decree a nullity and return the plaint for presentation to competent Court.

[P 147 C 2]

Peary Mohan Chatterji and *Bankim Chandra Roy*—for Appellant.

Bankim Chandra Mukherji and *Tarapada Banerji*—for Respondents.

B. B. Ghose, J.—The facts in this case are so novel that I have never come across anything like it in my experience. A preliminary decree was passed in a suit for partition. That decree was appealed against and confirmed by the lower appellate Court. On second appeal, again, that decree was affirmed by the High Court. Thus the preliminary decree was affirmed by the highest Court in the land. When it went back to the trial Court to make the final decree for partition, the learned Munsif discovered that the property was worth more than the pecuniary limit of his jurisdiction and he took the extraordinary course of returning the plaint to be presented to the proper Court. The plaint had already merged in a decree and it is inconceivable how it struck the learned Munsif that the plaint could be returned at that stage. He held that the decree was a nullity, because he had no jurisdiction to entertain the suit when it was presented. No objection was taken to the valuation by the defendant and the preliminary decree, as I have already stated, was confirmed by the High Court. The plaintiff appealed as against the order returning the plaint to the learned Subordinate Judge and he held that the decree being a nullity, the learned Munsif was quite justified in observing that there has been an abuse of the process of the Court and as the plaintiff tried to defraud the Government by undervaluing the suit, his course in returning the plaint was right. Now this phrase "an abuse of the process of the Court" seems to me to have been abused in this case. There are a number of cases in which the matter of abuse of the process of the Court has been bealt with by this Court as well as by other Courts. But the undervaluation of a suit even if that was done, has never, so far as I know, been treated as an abuse of the process of the Court. When the preliminary decree has been made for partition, it only lies with the Court to make a final decree in accordance with it and it has no jurisdiction to return the plaint to be filed in another Court. This is an order which the learned Munsif has no jurisdiction to make.

The result, therefore, is that the order of both the Courts below is set aside and the case sent back to the Munsif to make a final decree according to law. The appellant is entitled to his costs of this Court as well as of the lower appellate Court, hearing fee in this Court being assessed at three gold mohurs.

S. K. Ghose, J.—I agree.

V.B./R.K. *Case sent back.*

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* A. I. R. 1930 Calcutta 147 (2)

MUKERJI AND JACK, JJ.

Provash Chandra Lahiri—Plaintiff—Potitioner.

v.

Municipal Commissioner of Howrah—Opposite Party.

Civil Rule No. 775 of 1929, Decided on 23rd August 1929, by First Sub-Judge, Howrah, in Pauper Suit No. 11 of 1928.

*** (a) Civil P.C., O. 33, R. 1, Explanation—In considering question of pauperism, matter as it stands when application is made, should be considered.**

In considering the question of pauperism one must look at the matter as it stood at the date when the application was made. If the circumstances of the petitioner on the date of the said application bring him within the terms of the explanation and are sufficient to have him declared as a pauper, the immunity that the law confers upon him for the purpose of court-fees will be enjoyed by him till the termination of the suit or until such time when sufficient materials would be forthcoming to justify an order cancelling the permission : *A. I. R.* 1926 *Mad.* 567 and 10 *Bom.* 207, *not Foll.* [P 149 C 2; P 150 C 1]

(b) Civil P. C., O. 33, R. 1, Explanation—Subject matter of case cannot be taken into consideration—Amount, not actually in possession, cannot be taken into account.

In regard to cases coming under the first part of the explanation the subject matter of the case cannot be taken into consideration and any amount which is not actually in the petitioner's possession, cannot be taken into account in making the calculation: *A. I. R.* 1923 *Rom.* 247, *Foll.* [P 151 C 1]

*** (c) Civil P. C., O. 33, R. 1—Court-fee prescribed—Actual possession of amount, whether subject matter of claim or not, has to be considered.**

Where court-fee is prescribed, it is the actual possession or power of control over the amount necessary for the payment of court-fee that has to be considered. Word "possession" indicates that an amount forming subject matter of suit not in actual possession of applicant cannot be taken into account. [P 149 C 2]

Surajit Chandra Lahiri — for Petitioner.

Manmatha Nath Roy and *Surja Kumar Aich*—for Opposite Party.

Judgment.—This rule was issued to show cause why a certain order passed by the Subordinate Judge of Howrah on 24th May 1929, should not be set aside or such other or further order made as to this Court may seem fit and proper. The order complained of was passed on an application which the petitioner Provash Chandra Lahiri had made for leave to sue in forma pauperis. The order was one by which the learned Judge refused the leave asked for.

The circumstances that are necessary to be set out for the purposes of this rule are the following: The petitioner is a Sanitary Inspector under the Howrah Municipality. He made an application for the purpose of obtaining permission to sue in forma pauperis the Chairman and the Commissioners of the Howrah Municipality, claiming damages for wrongful dismissal from service. He claimed damages to the extent of Rs. 32,000 odd. The said amount is made up of several items amongst which there is one of Rs. 1,290 as being due to him on account of balance of money at his credit in the provident fund. On receipt of the aforesaid application notice was given by the Subordinate Judge to the opposite party. The opposite party on 2nd February 1929, submitted a statement in which it was stated that as regards the sum of Rs. 633-8-0 which was subscribed by the said Provash Chandra Lahiri to the provident fund it was available to him and that he could get it at any time he chose. On 4th May 1929 the opposite party filed an additional written statement in which they stated that the provident fund money payable to the plaintiff was found to be Rs. 1,307-10-6 and that the said sum was available to the plaintiff at any time that he would ask for it. The amount of court-fees payable for the plaint in the contemplated suit is Rs. 1,590. The learned Subordinate Judge dealt with the application for pauperism by the order of 24th May 1929 in which he held that the municipality had not disputed their liability for the amount which was payable to the plaintiff on account of the provident fund and in fact were prepared to deposit it and furthermore that the municipality was also willing to pay a few rupees in excess. He was, therefore, of opinion that inas much as the said amount was available to the petitioner for payment of court-fees and inasmuch as that amount together with his other properties the value whereof amounted to Rs. 400 and odd were sufficient for the payment of the court-fees the petitioner was not really a pauper. He accordingly refused the petitioner's application for suing in forma pauperis. The question for consideration in the rule which the petitioner has obtained is whether in the circumstances which have been referred to above it can be said that the petitioner is a pauper within the meaning of that word as used in O. 33, Civil P. C.

It may be mentioned here that there was an investigation made by the Collector and that the Collector did not oppose the application of the petitioner to be permitted to sue in forma pauperis.

In support of the view that the learned Subordinate Judge has taken reliance has been placed by the learned

advocate, who has appeared on behalf of the opposite party, upon the decision of the Madras High Court in the case of *Mahalakshmi Ammal* (1) and it has been contended by him that the words "subject matter of the suit" to be found at the end of the explanation to O. 33, R. 1, of the Code cannot be said to form a part of the first part of that explanation and that, therefore, in a case in which the defendant places a part of the amount for which the suit is to be laid .at the disposal of the plaintiff that amount though it may form the subject matter of the suit, may and should be taken into consideration in determining the question whether the plaintiff is a pauper or not. Now the case of *Mahalakshmi Ammal* (1) it is true, is a decision which supports the contention of the opposite party, though there is one point of difference between that case and the present one and that lies in the fact that there the money was actually deposited in Court aud so was available to the petitioner while in the present case there was only an offer made by the opposite party to put in the money so that it might be available to the petitioner. For the purposes of the present Rule, however, I am not prepared to lay any stress upon this difference. In the case aforesaid the learned Judge, Jackson, J., sitting singly took the view that under circumstances such as those existing in that case it could be said that the petitioner was possessed of sufficient means to put in the court-fees.

The learned Judge relied upon a decision of the Bombay High Court, in the case of *Dwarka Nath* v. *Madhavaru Vishvanath* (2) which was to the effect that if any property is found at the enquiry to be such as regards which there is really no dispute, such property cannot be regarded as part of the subject matter of the suit and if a part of the articles for which the suit is to be instituted is deposited in Court so as to be freely at the disposal of the petitioner the value of such part cannot be excluded from consideration. Certain other decisions of the Bombay High Court which to him appeared to have taken a different view were also referred to by the learned Judge, but he was not prepared to make a reference to the Full Bench on the ground that *Dwarka Nath Narayan's* case had not been duly considered therein.

Now, it is true that there is a certain difficulty by reason of the wording of the explanation but it is plain enough that the wording of the first part of the explanation is very different from the wording of its second part. The first part says:

> "A person is a pauper when he is not possessed of sufficient means to enable him to pay the fees prescribed by law for the plaint in such suit."

and the second part says:

> "Where no such fee is prescribed, when he is not entitled to property worth Rs. 100 other than his necessary wearing apparel and the subject matter of the suit."

The first point that strikes one is that whereas in the first part the words used are "is not possessed of" the words used in the second past are "is not entitled to." In a case in which it is the second part of the explanation that has to be considered one has to see whether the petitioner is or is not entitled to property worth Rs. 100, and in order to find that out the necessary wearing apparel and the subject matter of the suit have to be excluded. In such a case, where it is a question of the petitioner's means being judged by taking into account what he is entitled to, the subject matter of the suit had to be excluded expressly by the legislature and *Dwarka Nath Narayan's* case (2) and other cases say that property which it is contemplated to include in the suit if really available to the petitioner is not to be excluded from consideration. The first part of the explanation, however, says that the applicant is to be treated as a pauper if he is not possessed of sufficient means to enable him to pay the court-fee. It is actual possession or power of control over the amount necessary for the payment of court-fees that is the question that has to be considered in connexion with this part of the explanation. It is true that the words "subject matter of the suit" have no concern with the first part of the explanation; but this does not mean that in dealing with the first part of the section the subject matter of the suit has to be taken into consideration; because the word "possession" which is used in that part sufficiently indicates that any amount which frms the subject matter of the suit and is not

(1) A. I. R. 1926 Mad. 567.
(2) [1886] 10 Bom. 207.

in the actual possession of the petitioner cannot be taken into account for the purposes of determining his means.

Again, in considering the question of pauperism one must look at the matter as it stood at the date when the application was made. If the circumstances of the petitioner on the date of the said application bring him within the terms of the explanation and are sufficient to have him declared as a pauper, the immunity that the law confers upon him for the purpose of court-fees will be enjoyed by him till the termination of the suit or until such time when sufficient materials would be forthcoming to justify an order cancelling the permission. These and other considerations which have been very well pointed out in the case of *Bai Balagauri* v. *Motilal Ghelabhai* (3) sufficiently indicate that even in regard to cases coming under the first part of the explanation the subject matter of the case cannot be taken into consideration and any amount which is not actually in the petitioner's possession, cannot be taken into account in making the calculation. We are of opinion, therefore, that the view which the learned Judge has taken cannot be supported and that the petitioner upon the facts to which reference has been made is entitled to institute the suit in forma pauperis. In view of the circumstances to which which we have already referred it seems to us desirable that the amount which the opposite party has offered to the petitioner on account of his provident fund dues should not be allowed to be withdrawn by the petitioner or spent in any other way until the disposal of the suit. We accordingly make an order to the effect that while the Subordinate Judge should grant the petitioner's application he would at the same time issue injunctions on the petitioner as well as the opposite party restraining them respectively from withdrawing or parting with the amount of Rs. 1,307-10-6 which the opposite party offered to pay the petitioner till such time as proper orders are passed with regard to court-fees after the termination of the suit. The Rule is made absolute in the above terms. We make no order as to costs of the Rule.

V.S./R.K. *Rule made absolute.*

(3) A. I. R. 1923 Bom. 247=47 Bom. 523.

A. I. R. 1930 Calcutta 150

LORT-WILLIAMS, J.

Shib Charan Das, In the Goods of

Application in Original Civil Suit, Decided on 5th February 1929.

Hindu Law — Reversioner — Next reversionar refusing to object to grant of probate —Person next in succession can intervene.

Where a Hindu reversionary heir refuses to object to a grant of probate to a person, the person next in succession to the person refusing to take any step can intervene : 6 *Cal.* 764 *(P.C.)*, *Rel. on.* [P 151 C 1]

H. D. Bose and *Westmacott*—for Administrator-General of Bengal.

Judgment.—In my opinion, the law on this point is not sufficiently clear and definite to induce me to discharge this caveat.

The next reversioner is an old man of 70 who has stated in writing that he has no expectation of surviving the young widow for whose benefit the will was made and that he has no expectation, therefore, of personally inheriting the property and that, because he wants peace of mind in the closing period of his life, he is not disposed to take any action in the matter, but is quite willing to surrender whatever rights he has in favour of the caveator, his brothers and cousins. In these circumstances, I think I am justified in applying the rule laid dow in *Rani Anand Kunwar* v. *Court of Wards* (1). At p. 772, Sir R. Collier says :

"Their Lordships are of opinion that although a suit of this nature may be brought by a contingent reversionary heir, yet that, as a general rule, it must be brought by the presumptive reversionary heir,—that is to say, by the person who would succeed if the widow wore to die at that moment. They are also of opinion that such a suit may be brought by a more distant reversioner if those nearer in succession are in collusion with the widow, or have precluded themselves from interfering. They consider that the rule laid down in *Bhikaji Apaji* v. *Jagannath Vithal* (2) is correct It cannot be the law that any one who may have a possibility of succeeding on the death of the widow can maintain a suit of the present nature, for, if so, the right to sue would belong to every one in the line of succession, however remote. The right to sue must, in their Lordships opinion, be limited. If the nearest reversionary heir refuses, without sufficient cause, to institute proceedings, or if he has precluded himself by his own act or conduct from suing, or has colluded with the widow, or concurred in the act alleged to be wrongful, the next presumable reversioner would be entitled to : see *Kooer Goolab Singh* v. *Rao*

(1) [1880] 6 Cal. 764=8 I. A. 14=4 Sar. 195 (P.C.).

(2) [1873] 10 B. H. C. 351.

Kuruu Singh (3) . . . . The Court must exercise a judicial discretion, in such a case . . . . and would probably require the nearer reversioner to be made a party."

In my opinion the facts of this case come within the first reason stated by their Lordships and I think that the next reversioner has refused without sufficient cause to institute proceedings. I say that because he has been communicated with at my suggestion. It has been pointed out to him that all he would have to do would be to sign two documents, that he would not incur any liability for costs, and would not be troubled in any way, but in spite of that he writes that he is unwilling to take even these steps. I think his refusal is without sufficient cause.

If I am at liberty to apply common sense to cases of this kind it seems to me unreasonable that this caveator, who is the next in succession to his father should be shut out because of what I have held to be an unreasonable refusal. I quite agree that some limit must be imposed, and that it would be impossible to hold that every person in the line of succession however remote should have the right to intervene. I think that in every case the circumstances of the particular case must be considered and because in this case the caveator is the next person in succession to the person who has refused to take any steps that it is not unreasonable to allow him to intervene. For these reasons, the application for discharge of the caveat is refused.

The matter is set down as a contentious cause. The father need not be added as a party. There will be cross order for discovery within 14 days. The suit will appear on the appropriate Warning List 14 days thereafter. The executor's costs will come out of the estate as between attorney and client including fees of two counsel.

V.B./R.K. *Order accordingly.*

(3) [1871] 14 M. I. A. 176=10 B. L. R. 1=2 Suther 474=2 Sar. 722 (P.C.).

A. I. R. 1930 Calcutta 151

B. B. GHOSE AND PANTON, JJ.

Hazarimull — Defendant 7—Appellant.

v.

Monohar Das and *others*—Plaintiffs—Respondents.

Appeal No. 184 of 1926, Decided on 27th March 1929.

(a) Bengal Land Revenue Sales Act (11 of 1859), S. 9 (3) and (4)—Mortgagee is entitled to make deposit.

A mortgagee of a revenue paying estate is interested in making the deposit of revenue and can save the property from being sold. [P 152 C 2]

(b) Bengal Land Revenue Sales Act (11 of 1859), S. 9—Remedy of mortgagee making deposit under S. 9 is same as under Transfer of Property Act, S. 72.

Mortgagee making deposit to prevent the properties from being sold is entitled to a charge on the property as against all the persons interested therein for the amount of money so paid and his remedy to realize it is the same as under S. 72, Transfer of Property Act: 11 *M. I. A.* 241, *Ref.* [P 153 C 1]

(c) Bengal Land Revenue Sales Act (11 of 1859), S. 9—Mortgagee making deposit—He must tack amount deposited to mortgage debt and cannot bring separate suit—Transfer of Property Act., S. 72.

The mortgagee making deposit to prevent property from sale cannot bring one suit for his mortgage money and another for the amount deposited. The amount deposited cannot be claimed as a separate debt. He must treat the whole sum as one entire debt by tacking the amount of the revenue he paid to the mortgage amount. [P 153 C 1, 2]

Sarat Chandra Bose and *Apurba Charan Mukherjee*—for Appellant.

Gunada Charan Sen and *Narendra Krishna Basu*—for Respondents.

Surya Kumar Aich—for Deputy Registrar.

B. B. Ghose, J.—This is an appeal by defendant 7 which arises out of a suit to enforce a charge by the plaintiff on certain properties under the following circumstances: Defendant 7 had a usufructuary mortgage of the properties in question which belonged to defendants 1 to 6. The mortgage was made by some of them and the predecessors of others. These properties with other properties were subsequently mortgaged to the plaintiff by a deed dated 30th January 1905. Subsequent to that the mortgagors executed several other mortgages in favour of defendant 7. The plaintiff brought a suit on his mortgage which was No. 90 of 1918 and obtained a final decree on 6th January 1920. He put the decree in execution under Execution case No. 253 of 1922 but did not proceed to sell the properties mortgaged. The mortgaged properties included two revenue paying estates. There were separate accounts opened with regard to the estates for the shares belonging to the mortgagors. There was default in payment of revenue with regard to the shares belonging to the mortgagors of

the revenue paying estates and the plaintiff deposited certain sums of money in March 1923 and March 1924 which included the revenue as well as cess payable on acconnt of the mortgagors' shares. In the meantime, defendant 7 obtained four decrees on the several mortgages that he had obtained from the mortgagors between 30th January 1905 and the dates when the money was deposited by the plaintiff for preventing the revenue sale. Those decrees were in one suit of 1917 and three suits of 1920.

The plaintiff brought the suit out of which this appeal arises for the recovery of the money that he paid in March 1923 and March 1924 for preserving the properties from sale and he asked for a decree declaring a charge for the principal amount and interest according to the provisions of the Revenue Sale Law and also prayed that a decree may be passed to the effect that if the properties in suit be sold in execution of his mortgage decree obtained in suit No. 90 of 1918, then the plaintiff will be entitled to realize the amount claimed in the present suit out of the surplus sale proceeds to the exclusion of defendant 7 who had other mortgages to the properties. Defendant 7 objected to the claim on the ground that the plaintiff need not have deposited the revenue as his mortgage interest would not have been affected by the sale as the sale would have been of the separate account belonging to the mortgagors and the purchaser would get the properties subject to his mortgage. It was further argued that under the provisions of S. 9, Revenue Sale Law (Act 11 of 1859) the amount paid by the plaintiff as mortgagee cannot be added to the amount of the original lien, as the original lien has been perfected by the decree of the Court. It was further argued that in any case the plaintiff cannot have a priority over defendant 7 for these advances made. The learned Subordinate Judge has made a decree partially in terms of the prayers made by the plaintiff. He has held that the plaintiff cannot get any charge for the cess paid but that he was entitled to a charge for the amount of revenue paid in priority over the claim of defendant 7. It ought to be stated here that certain other persons were made parties, viz., defendants 8 to 10 who have now no interest in the properties in question. The Subordinate Judge has made an ordinary mortgage decree in favour of the plaintiff as against all the defendants including defendant 7 and has not given any direction as to how the money should be realized, whether from the surplus sale proceeds on a sale being held in execution of the plaintiff's decree in suit No. 90 of 1918 or not. Defendant 7 has preferred this appeal against that decree. The mortgagors also appear as respondents but they do not contest the appeal of defendant 7 who is only resisted by the plaintiff.

The grounds urged on behalf of defendant 7, the appellant, are the same as taken in the Court below. With regard to the first ground, the Subordinate Judge has held that the interest of the plaintiff was endangered by the fact of non-payment of revenue and he paid the money in good faith for the purpose of protecting his own interest. As the Subordinate Judge puts it, that if by sale of the share of the mortgagors in the estate the arrears had not been realized, then the Collector would have proceeded under S. 14 of the Act and if any cosharer had refused to purchase the share in default, then the plaintiff would have no opportunity to make the deposit and the entire estate would have been sold by the Collector which would have the effect of wiping out plaintiff's mortgage. The plaintiff therefore was interested in making the deposit and he comes within the description of the "person" referred to in paras. 3 and 4, S. 9, Revenue Sale Law. It seems to me that the learned Subordinate Judge was right in his view. It is not necessary that the immediate effect of the sale would be such as to wipe out the mortgage. Although it is contended that even if the cosharers had refused to purchase the defaulting share, the Collector could under the law accept payment of the revenue in arrears from the mortgagee, still the mortgagee was not bound to run the risk of the Collector's refusal to accept any payment from the mortgagee after the sunset of the last day of payment. This point, therefore, must be decided against the appellant.

The next contention seems to me to be of more substance. What Cl. 4, S. 9, Act 11 of 1859 provides for is that :

"if the party so depositing, whose money shall have have been credited, shall prove before such a Court that the deposit was necessary in order to protect any lien he had on the estate or share or part thereof, the amount so credited shall be added to the amount of the original lien."

Now, what is the remedy which is given to a mortgagee under this clause? It is the same as is given under S. 72, T. P. Act to a mortgagee who spends money for the preservation of the property as provided in that section. There also it is provided that the mortgagee in the absence of a contract to the contrary is entitled to add the expenditure incurred to the principal money. The remedy in such cases given to the mortgagee is in accordance with the decision of their Lordships of the Privy Council. In the case of *Nugenderchunder Ghose* v. *Kaminee Dossee* (1) (at p. 258) their Lordships observed thus:

"Considering that the payment of the revenue by the mortgagee will prevent the taluk from being sold their Lordships would if that were the sole question for their consideration, find it difficult to come to any other conclusion than that the person who had such an interest in the taluk as entitled him to pay the revenue due to the Government and did actually pay it, was thereby entitled to a charge on the taluk as against all persons interested therein for the amount of the money so paid. But their Lordships are of opinion, that this is not the form in which the question comes before them, and that what they have to decide, is not whether such a charge existed or whether it does now subsist, but whether the appellant can enforce such a charge in the present suit."

Their Lordships next said this (and this is important for the purpose of this case):

"There were two courses open to her (the mortgagee) she might have instituted a suit to enforce the mortgage and to tack to the mortgage the amount of the revenue paid by her to save the estate, and to have the estate sold to pay that amount or she might proceed under S. 9, Act 1 of 1845 (now repealed by Act 11 of 1859)."

This last passage prescribes the procedure which a mortgage is entitled to adopt when he makes any payment for the preservation of the mortgaged property and it seems that Cl. 4, S. 9, Act 11 of 1859 has been enacted in accordance with it. It cannot be said that the mortgagee can bring one suit on his mortgage and obtain a decree on it and another suit for the money which according to the provisions either of the Revenue Sale Law or of the Transfer of Property Act he is entitled to add to his mortgage money. He must treat the whole amount which he is entitled to get out of the mortgaged property as one entire sum. If it were otherwise, then the mortgagee after obtaining a decree on his mortgage may remain idle for any length of time and by making periodical payments for the purpose of the preservation of the property may bring any number of suits to enforce his charge and obtain priority over all intermediate mortgagees by such different suits. That does not seem to me to be the right view of the provisions under Cl. 4, Act 11 of 1859. When a mortgagee obtains a decree his first duty is to realize the mortgage money as soon as possible by sale of the mortgaged property and after realization the surplus proceeds may be distributed among the puisne mortgagees but by the procedure that this mortgagee has adopted he desired to squeeze out all the intermediate mortgages. I do not think that that is the meaning of the provisions of the law which entitles him to add the money paid to the amount of the original mortgage lien. It cannot be claimed as a separate debt which could have a priority over all other mortgages but such payments the mortgagee could tack to his original mortgage in a suit brought on his mortgage.

The result, therefore, is that the decree made by the Subordinate Judge should be modified to this extent that the plaintiff would get a decree for the money as against defendants 1 to 6 and the suit as against defendant 7 should be dismissed. The decretal amount would be a charge on the surplus sale proceeds of the properties if any after satisfying the prior mortgage decrees of the plaintiff and the defendant 7, and it may also be recovered against defendants 1 to 6 personally. Defendant 7 is entitled to his costs in this Court as well as in the Court below. The other respondents will bear their own costs.

Panton, J.—I agree.

V.B./R.K. *Decree modified.*

(1) [1866] 11 M. I. A. 241=8 W. R. 17=2 Suther 77=2 Sar. 275 (P. C.).

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RANKIN, C. J. AND B. B. GHOSE, J.

Shawal Ram Dungarmal & Co.—Defendants—Appellants.

v.

Tansukdash Bhupatram & Co.—Plaintiffs—Respondents.

Appeal No. 277 of 1927, Decided on 2nd May 1929, from original decree of 4th Offg. Sub-Judge, Mymensingh, D/-27th May 1927.

(a) Contract Act, S. 258—Accounts of partnership in absence of later adjustment must be taken from commencement of partnership.

In a suit for partnership accounts unless it is shown that there has been an adjustment of accounts at a later date, the account for the partnership begins from the commencement of the partnership. [P 157 C 1]

(b) Contract Act, S. 258—Accounts—That accounts were open for inspection of partners is different from settlement or adjustment and in suit for partnership accounts, accounts must be taken from commencement of partnership.

In a suit for partnership accounts, that the members of partnership firm have clerks and others in charge of their book-keeping and of their business in detail, and that the other partners have opportunity to inspect accounts and account books, is quite different thing from a final or settled account or adjustment of accounts, and the fact does not exempt the firm, from partnership accounts being taken from the commencement of partnership and in the ordinary way. [P 157 C 1, 2]

Brojolal Chuckerbatty and *Satindra Chunder Khasnavis*—for Appellants.

Naresh Chunder Sen Gupta, Nripendra Chunder Das, Jogneswar Majumdar and *Probodh Nath Sanyal*—for Respondents.

Rankin, C. J.—In this case, it appears that two firms agreed to transact business in jute jointly upon certain terms. The joint business has been referred to as the Ejmali firm and this is a more convenient designation than the style which was adopted for that business and which appears to have been changed at least once. The business began in 1320 B. S. and the findings of the learned Judge of the Court below and the evidence make the course of business in its outline reasonably clear. The defendant firm who are the appellants before us were in business at a place called Pearpur where they had godowns and where they had facilities for the purchase of jute. The plaintiff firm was a firm in Calcutta which appears to have dealt in jute and indeed in other things not only in Calcutta but at various mokams or places in different parts of the province. The jute when it was purchased was sold by the plaintiffs. The plaintiffs provided the capital for the joint concern not in the sense that they put up a certain definite amount of capital at the beginning but in the sense that they financed the joint business as and when required. The terms of the partnership between these two firms were that the plaintiffs should have 12 annas share in the profits and losses and the defendants should have 4 annas share and that the defendant firm for its work in purchasing jute and in despatching it and so on was to be entitled to aratdari and expenses; and in this way, the business was carried on from 1320 until 1327 B. S. In 1327, whether because the business was not profitable or because of other reasons, it was agreed to close the business down and the defendant firm ceased to make any further purchase of jute. But the business was carried on for two years more, that is, until 1329 B. S. for the purpose of getting rid by sale of the stocks of jute that had been acquired. The plaintiffs bring their suit in 1924 and they bring their suit as a partnership suit for dissolution or for a declaration that the business had been dissolved in 1329. They also ask the Court to find that in 1329 there was a settled account between themselves and the defendants according to which there was a loss in the whole course of business of some Rs. 30,000 and they ask that, on the basis of this adjustment, the defendants be directed to pay to the plaintiffs Rs. 7,000 or Rs. 8,000 as their share of the loss.

Now, when the plaintiffs brought their suit, they endeavoured to represent in their plaint that at Pearpur all the business of the joint concern was in the hands of the defendants and that the plaintiffs or any representative of the plaintiffs had nothing substantially to do with the business at that place or the accounts of the joint concern which were kept at that place; and the learned Subordinate Judge has found, as indeed is tolerably clear, that this endeavour on the part of the plaintiffs to put the whole burden of the accounting as regards the firm's transactions upon the

defendants is entirely unsuccessful, that both the plaintiffs and the defendants worked from time to time and were constantly represented at Pearpur, that the accounts kept at Pearpur so far as the purchases of jute were concerned were based upon the books kept by the defendants and that the accounts so far as the sales were concerned were kept upon the basis of advices of sales which were sent from Calcutta by the plaintiffs to Pearpur. In these circumstances, the learned Judge had before him an ordinary partnership suit. It was extraordinary only, so far as I can gather, in the extreme prolixity of the pleadings and the apparent desire of the parties themselves to go as much as possible into the details of the account before the learned Judge instead of leaving it to its proper place after it had been decided whether the account had been settled or not, and whether a commissioner would have to take the account. In the result, the learned Judge held that the plaintiffs had failed to make out that there was an adjusted or settled account in 1329 B. S. Accordingly, he directed that the accounts of the firm should be taken before a commissioner. But he has given a direction that as regards the account up to the year 1327 B. S., the books of account at Pearpur are to be regarded as final and there is to be no liberty on the part of the defendants to challenge the accuracy of anything in the books up to that year. As regards the two concluding years of the business, the learned Judge has, in substance, directed an account to be taken in the ordinary way; that is to say, he has directed that whichever party is the accounting party in respect of a particular matter, that party will have to produce before the commissioner not merely the books which contain certain entries but any voucher or other matters which are required to support those entries. From that decision, the present appeal has been taken by the defendant firm.

The defendant firm complain of the directions given by the learned Subordinate Judge with reference to the years 1320 to 1327. They say that the learned Judge is not entitled to prevent their having the ordinary right of partners to have the accounts for these years taken in the ordinary way—vouchers gone into and to have the accounts sifted by the commissioner.

The plaintiffs have also preferred a cross-objection and the main point, and indeed it is the only point, upon which their cross-objection has been argued before us is this. They say that the learned Judge was wrong in coming to the conclusion that it was not proved that there was an adjustment in 1329 B. S.

I propose to consider, first, the question whether we ought to interfere with the finding of the learned Judge holding that it is not proved that the accounts were settled or adjusted in 1329. In my judgment the learned Judge's finding on that question must be supported.

It appears that the person who on behalf of the defendants is said to have agreed to and taken part in making up a final settlement in 1329 is one Tularam. Tularam is evidently not a reliable witness. He represented by his evidence that he did not go to Calcutta in 1329 at all, that he went to Calcutta in 1328 and that the account which the plaintiffs said was a settled account was not made in 1329. So far, therefore, the defendants are distinctly handicapped because their witness and their man is found to be telling a story that is deliberately untrue. It is reasonably clear, for the reasons given by the learned Judge, that Tularam did go to Calcutta in 1329 and it is quite certain that, when he went on that occasion, one thing which he did was to come to a settlement as regards certain claims which the defendant firm had against the joint concern. These claims were for aratdari and export expenses and there was a question about jamadar's pay and a question about interest. There is no doubt that, at the time to which the plaintiffs point, Tularam did go to Calcutta and did settle the defendant firm's claim against the joint concern at a sum of Rs. 655 which is entered as a settled transaction in the books of the joint concern. At the same time, there comes into existence an account which purports to be an account showing the final stages of the joint concern. It is partly in the handwriting of Tularam. I understand that the entries which have relation to the question of sale are mostly in his handwriting. It is partly also in the handwriting of

one Ladhuram. I think of the plaintiffl firm. At the end of that account it is concluded by showing that there has been a heavy loss and the loss is distributed in 12 annas and 4 annas shares in the account itself prima facie showing that the defendant firm are liable for the amount now claimed by the plaintiffs. That final part of the account is not in Tularam's own handwriting. The plaintiffs say that when Tularam came to Calcutta he took part not merely in making out these figures as a form of account but that he took part in this account agreeing to it and accepting it as a final adjustment of the transactions between these two firms with the truth of which he was satisfied. On that point, the learned Judge has found against the plaintiffs.

In my opinion, the learned Judge was right. It is not difficult to see that, in the circumstances, Tularam at Cal-Calcutta would be employed in trying to get out from the plaintiffs' books a statement of account; but it is very different thing to say that he was given such facilities and was so satisfied with the materials before him that he got this account out as an adjusted account or that he accepted it. The evidence of the plaintiffs' witnesses is that he went away promising to send the money. The first thing that one has to note is that the burden of proof is entirely on the plaintiffs. It is no use, in a case where no one of the witnesses appears to have impressed the learned Judge, endeavouring to prove the plaintiffs' story by laying stress upon the fact that the defendants' witnesses are unreliable. The second thing that has to be observed is this that, accordingly to any reasonable practice, if accounts had been running on for some nine years and had been finally adjusted and accepted, one would suppose that an ordinary note to that effect would be made and signed by the persons who were accepting the account. It appears that the defendants and the plaintiffs had other businesses together and it appears that a mablagbundi or acceptance of the account in writing has on other occasions, been given and it is too thin to say that business in jute is a different kind of business with different customs. In my judgment, in the absence of anything in the account to show that it was accepted and signed on behalf of Tularam, the plaintiff have a heavy burden of proof to discharge. I do not say for a moment that it may not be true that Marwaris or other people conduct their business sometimes with a considerable lack of ordinary business prudence. If they do so, they are not in as good a position on a matter of evidence as if they had not. Now, the evidence upon that question upon which the plaintiffs have to rely has been examined by the learned Judge and the first thing that he notices is that the evidence of the independent witness which, from the first has been vouched by the plaintiffs as their strong evidence of this agreement, namely, the evidence of the witness Chooni Lal Atal does not go nearly so far as the plaintiffs' case requires. He knew apparently of the settlement of the transaction about Rs. 655. His story is that:

"After inspection of the account, Ládhuram Babu said that there was a total lose of Rs. 20,951 and odd in the Pearpur business and asked Toolaram to pay the defendants' share of the loss i. e., Rs. 7,083 which was arrived at after deducting a sum of Rs. 655 which stood to the credit of defendants on account of press rent etc., from the fourth share of the total loss. Tularam replied that he was writing to Shawalram and Dungarmal at Pearpur and would inform after receiving letter of reply."

The learned Judge points out that this is very indifferent evidence to support the case made by the plaintiffs. Indeed the matter is worse when it is observed that the reason given by one at least of the plaintiffs' witnesses why no signature was taken from Tularam in accepting the account is that it was quite natural and ordinary that such a thing should be done, but it was not done in this instance because Tularam went away promising to pay the money. That is the evidence given by the witness Sumarmal. When we come to look at the evidence given by the plaintiffs' other witnesses, it is quite true that they do, on the face of their evidence, swear that Tularam accepted the account, after being allowed to look at the Calcutta firm's books. The learned Judge, in view of the evidence of Chooni Lal and in view of the circumstances, is not prepared to accept their evidence as true or as sufficient proof that this account made out in the manner and at the time referred to was in fact, accepted by Tularam on behalf of the defendants. There is no reason at all why this Court should inter-

fere with that finding of fact. The learned Judge said that:

"he was satisfied from the evidence that the adjustment was not completed as Ladhuram did not produce the books of the Calcutta firm for examination by Tulararam."

The quarrel about the plaintiffs' account books appears from the evidence of Chooni Lal who was examined by the plaintiffs on commission. This witness is a debtor of the plaintiffs and shows some bias for them. He tried generally to support the plaintiffs' case. But it appears from his evidence that:

"the accounts of the sales and expenses were not examined and there was a quarrel between Ladhuram and Tularam."

In these circumstances, it appears to me that we would depart altogether from sound practice, if we were to contemplate reversing the learned Judge's finding of fact based as it is, upon very solid grounds. I therefore, have no difficulty in saying that the cross-objection on that point cannot succeed.

That being so, the position is that the plaintiffs' suit goes on as an ordinary suit for partnership accounts. The defendants are not suing. The plaintiffs are suing the defendants to make them liable for a sum of Rs. 7,000 or some other sum as the defendants' one-fourth share of the loss in this joint business; and the first thing to be enquired into is what is the date from which the account should commence. The ordinary principle in these matters is that unless it is shown that there has been an adjusted account at a later date, the account of the partnership will begin from the commencement of the partnership. As is put by Lindley on Partnership, Edn. 9 at p. 631:

"The time from which the account is to begin will, in a general account of partnership dealings and transactions, be the commencement of the partnership unless some account has since that time been settled by the partners in which case the last settled account will be the point of departure.'

In this case, the defendants complain that the learned Judge while nominally directing an account from 1320 to 1327 B. S. has in fact, directed no account at all because he has said that whatever is in the books of the joint concern at Pearpur is to be accepted. On that point, it appears to me that the learned Judge has not correctly directed himself as to the rights of the parties. Members of a partnership firm may have clerks and others in charge of their book-keeping and of their business in detail. Books are kept in the ordinary course and it is perfectly true that either partner may have the right to and generally will have the opportunity to inspect them. That is a very different thing from a final or settled account which prevents a partner at the end of the day from having an account taken from the beginning of the partnership. In this case, the position as regards the evidence is this. The plaintiffs' witness Ladhuram says:

"In 1322, 1323, 1324, and 1325 B. S., the account books of the partnership business were compared with those of the plaintiffs' firm and of the defendants' firm. There was no such comparison of the account books for 1326 and 1327 B. S. because the defendants wanted 12 annas for commission and a higher rate for pressing and we did not agree to the rates wanted by them."

Tularam for the defendants says:

"The moneys received by us from the plaintiffs' firm at any time are entered in our rokars. We entered therein the sum spent out of those moneys. They were spent for purchasing jote. Those receipts and expenditures were also entered in the books of the Ijmali partnership. They were entered simultaneously in the books of the defendants' firm and of the Ijmali partnership. There were some discrepancies between the account papers of the defendants' firm and those of the partnership. But they were afterwards reconciled at the end of every year from 1320 to 1327 B. S. They were reconciled both in Pearpur and in Calcutta, They were reconciled in the presence of both the plaintiffs' and the defendants' men."

It is to be observed further that the plaintiffs' witness Ladhuram corroborates this by saying:

"The account books of the partnership and the defendants' firm were not compared regularly in every year. Sometimes they were compared twice a year, sometimes after two or three years. They were compared when they were brought to Calcutta by the defendants' men."

There can, therefore, be no doubt that from time to time the plaintiffs did have a look to see that what the defendants were entering in the Ejmali books was correct and in accordance with the entries in the defendants' own books themselves. What seems to me very dubious indeed from this evidence is the question whether the entries put from time to time in the Ejmali books at Pearpur were ever checked or compared or reconciled with the plaintiffs' books in Calcutta and I am bound to say that I find a complete absence of any evidence that the defendants at any time were given the sales accounts of the brokers or other immediate materials for examining or checking the

actual transactions of the plaintiffs in the matter of sale. That being the position as regards the trouble taken during these years with the books that were kept at Pearpur, I come to notice the way in which the learned Judge has dealt with this matter. He says :

"The evidence on the plaintiffs' side shows that during the whole of this period."

that is, until 1327 :

"the accounts of the partnership were written both by the plaintiffs' men and the defendants' men and under the supervision of each other. The books were kept in the defendants' premises at Pearpur and both parties had access to them and handled them. It also appears from Tularam's evidence that the transactions relating to the purchases were all entered in the books of the defendants' own firm and thence in the books of the joint firm and that the transactions relating to sales were entered in the books from the advices that were sent from Calcutta by the plaintiffs' firm. . . . . Tularam further deposes that there was periodical comparison of the items in the books of the joint firm with those in the defendants' firm and the plaintiffs' firm and discrepancies detected were reconciled."

I pause here to observe that the learned Judge is taking Tularam's evidence further than it goes because Tularam does not say that there was a comparison between the books at Pearpur and the books of the plaintiff firm at Calcutta. He says that these books wers reconciled with the defendants' books at the time they were taken. The learned Judge, thereupon, concludes that :

"all the items in the books from 1320 to 1327 B. S. were accepted by both parties. If there were any improper charges or omissions so long acquiesced in, they must be regarded as having been made by agreement. Therefore, so far as the items of transaction in the account books of 1320 to 1327 B. S. are concerned, there should be no investigation about their correctness in the present suit."

I can only say that it appears to me that the learned Judge has misapplied the principles which are to be applied in a partnership suit for account. The principle that is to be applied is not that the books have been there all the time, any party can inspect them, they are not to be examined at all ; but the principle to be applied is that, unless there has been a settled account, the account is to be taken from the commencement of the business. It is quite true that, where owing to the lapse of time materials or vouchers for checking the entries in the partnership books have been lost or are no longer available, it is open to the Court to give special directions that, for certain purposes, certain matters shall be proved by a particular kind of evidence.

In partnership cases where all partners have an opportunity of examining the books, it needs no special direction to make the books of the firm prima facie evidence. But, in the present case, if the fact be that the sales were done by the Calcutta firm of the plaintiffs, that the books at Pearpur were entered up upon advices sent from Calcutta and that the defendants never had an opportunity of checking the account of sales of brokers or otherwise going into the truth and accuracy of the advices sent from Calcutta, it seems to me that the accounts must be taken in the ordinary way. No doubt, if these accounts of sales were entirely unavailable, then there might be need for some special directions. But as a matter of fact, the defendants in this case called a witness from the brokers who produced the accounts, contract notes and so on ; and the learned Judge when they tendered the delivery book said that it was not required at the present moment and could be used before the commissioner. When I look into this matter, it seems to me that there is no need whatever to make any difference between the years 1320 to 1327 B. S. and the two following years. The learned Judge has gone into the various objections to the accounts taken, in the defendants' written statement and he has given general directions as regards the two remaining years showing to the commissioner the general extent and scope of his duty in view of the defendants' objections. It appears to me that what is required is to let it be understood that the account is to be taken in the same way throughout and that the commissioner is to deal with the years 1320 to 1327 B. S. exactly on the same lines as he has been directed to follow in connexion with the two later years. In my judgment, there is at present before us no reason for any special direction. I have no doubt at all that the commissioner will be a competent man. There is no question of the plaintiffs' Calcutta books not being available or the defendants' Pearpur books not being available. There is no question of the evidence from the

brokers not being available. In my judgment, there is no need for us to make any order except that the whole period is to be dealt with by the commissioner in the ordinary manner and there will be no exception with regard to the years 1320 to 1327 B. S. In this view, the appeal will be allowed with costs aud the cross-objection must be dismissed with costs. In the cross-objection, we assess the hearing fee at five gold mohurs.

B. B. Ghose, J.—I agree.

V.B./R.K. *Appeal allowed.*

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RANKIN, C. J. AND C. C. GHOSE, J.

Karnani Industrial Bank Ltd.—Appellant.

v.

Nawab Bahadur of Murshidabad—Respondent.

Appeal No. 49 of 1929, Decided on 15th July 1929, against original order of Lort-Williams, J., D/- 28th March 1929.

Murshidabad Act (15 of 1891)—Act 15 is no bar to appointment of receiver in execution of decrees of rent and profits.

A Bank was unsecured creditor of Nawab of Murshidabad for a debt represented by four decrees. The debt was adjusted and it was agreed that Bank was to realize by execution the money that would be outstanding. The Bank applied for an order that a receiver should be appointed in execution of the decrees of the rents of profits of certain properties all of which were within the ordinary original civil jurisdiction of civil Court. It was contended that having regard to the Murshidabad Act the rents and profits could not be taken in execution by means of receiver or at all.

Held: that there was nothing in the act which would prevent the Nawab from borrowing a sum of money and giving an assignment of the next months' rent of a certain house by way of consideration. The appointment of a receiver was a discretionary remedy and it was the only reasonable remedy in the particular case: *Davis* v. *Duke of Marlborough*, (1818) 1 *Swan* 74; *A. I. R.* 1925 *P. C.* 176, *Dist.*

[P 160 C 2]

S. N. Banerjee and *A. K. Roy*—for Appellant.

N. N. Sircar, *B. K. Ghose* and *B. K. Chowdhury*—for Respondent.

Rankin, C. J.—In my opinion, the appeal must be allowed.

The application is one by the Karnani Industrial Bank Limited who appear to be unsecured creditors of the respondent for a debt which was represented at one time by four decrees but which was adjusted on 5th July 1926 at the sum of Rs. 74,293 due on 31st May of that year. The arrangement between the parties was in writing and it is clear that, in default, the Bank was to be entitled to realise by way of execution the moneys that would be outstanding. The present question arose upon an application on behalf of the Bank for an order that a receiver should be appointed in execution of these decrees of the rents and profits of certain properties, all of which were within the ordinary original civil jurisdiction of this Court. The form of the application is what is known in England as equitable execution. It is a form of execution recognized by the Civil Procedure Code under S. 51 thereof. The contention on behalf of the respondent Nawab is that, having regard to the Murshidabad Act, the rents, issues and profits of these properties cannot be taken in execution by means of a receiver or at all. The Act in question is Act 15 of 1891 and the main function of the statute was to confirm an agreement between the Secretary of State and the then Nawab. I do not propose here to set out the history of the matter; but in the end the position adopted under that agreement is this that there were certain properties which did not belong to the Nawab's predecessors as of right but which belonged, in effect, to the public domain and these properties were given over upon terms of this agreement to the successive Nawabs upon certain limitations which would ensure, in the opinion of the legislature, that these properties should always be a support sufficient to maintain the dignity and position of the Nawab Bahadoor and his family. The Act and the agreement deal with matters apart altogether from the immovable properties and I confine what I have to say to the immovable properties. It was agreed and declared that the several immovable properties in Schs. 1 and 2 and also the immovable properties in Sch. 3 and all other immovable properties thereinafter mentioned:

"shall henceforth and for ever be held and enjoyed by the said Nawab Bahadoor and such one among his lineal heirs male as may be successively entitled to hold the said titles in perpetuity with and subject to the incidents, powers, limitations and conditions as to inalienability and otherwise hereinafter contained."

The limitations include a limitation which prohibits the Nawab or any successor from selling, mortgaging, devising or alienating any of the properties mentioned save by lease or demise for a term not exceeding 21 years and under a rent without bonus or salamee. It was further provided that :

"in case the Nawab or any of his lineal heirs male shall at any time in contravention of the terms of the agreement attempt to sell or alienate or shall by a course of extravagance or by waste or mismanagement of the said immovable properties disable himself in the opinion of the Secretary of State from duly maintaining the dignity of the said position and station, then it shall be lawful for the Secretary of State at his discretion to enter into and upon the said immovable properties, to take possession thereof and take the rents, issues and profits"

and so forth.

Now, before the learned Judge, a good deal was made of the case of *Davis* v. *Duke of Marlborough* (1) in which a similar question arose as regards the Duke of Marlborough's estate. I agree with the learned Judge that the position in the present case is distinguishable from the position with which Lord Eldon had to deal in 1818. In that case all that appears to have happened was that the aid of the legislature was given at the instance of the Duke to enable him to settle upon succeeding generations certain properties so that these properties would always go with the title whereas the Duke might by granting a settlement at his own hand have attempted the same result, it would have been possible in succeeding generation to bring to an end the limitations or restrictions (or some of them) which the donor had imposed. Accordingly, the aid of the legislature was invoked and there were put stringent limitations which had reference entirely to this that the property was rendered in the hands of each successor inalienable so as in no way to defeat the claim and enjoyment of the next in succession. Accordingly, Lord Eldon, having taken that view of the statute, had little difficulty in rejecting the contention that it was not open to him to appoint a receiver of the rents and profits.

In this case it is quite true that the statute makes it quite clear that these immovable properties are given for the due maintenance and support of the rank and station of the Nawab of Murshidabad. That is the general purpose of the whole grant. The first provision is a provision in aid of that purpose. It is a provision whereby no alienation can be made of these properties except by an ordinary lease for 21 years in the ordinary course and the effect of that provision is to make it clear that no Nawab would be able to defeat the claim of his successor to the whole of the properties nor would he be in any way able to prevent his successors from having freedom of management with the not unreasonable limitation that lease without salamee or bonus for a term not exceeding 21 years would be valid as against the successors of the man who granted it.

Now, in this case it is contended by Mr. B. K. Ghose on behalf of the Nawab that, apart altogether from showing that what is asked by way of relief in this case would be in conflict with the first of the conditions which I have quoted, I shall call it shortly the condition against alienation—there is in this Act an implied or indirect prohibition against any portion of the rents, issues or profits of these properties being taken in execution. It is said that the intention of the legislature is that the whole of that income is necessary for the maintenance and support of the dignity and station of the Nawab and that, apart from express prohibition in the clause to which I have alluded, there is an implied prohibition making it contrary to the Act and contrary to public policy that any portion of the income of these properties should be taken in execution for a decretal debt. To that proposition, I cannot assent. It appears to me that there is nothing in this Act which would prevent the Nawab from borrowing a sum of money and giving an assignment of the next month's rent of a certain house by way of consideration. I cannot see that it is laid down that he is never to have power to anticipate by a single month any portion of the rents and profits of these properties. I cannot see that it is the intention of the Act that no degree of extravagance on his part should in any way prevent the perpetual flow of this income into the Nawab's coffer ; and, in my judgment, the position is one which has been very carefully reviewed. The legis-

(1) [1818] 1 Swan. 74=2 Wils 120.

lature has not attempted to put any restrictions save those which are mentioned and which are ample to secure that each Nawab as he comes into succession will have the whole use of the properties which the legislature originally gave. As regards the course of extravagance by which a Nawab might cripple himself, anticipating the future income to accrue in his own lifetime, it appears to me that contingency is one of the things contemplated by the concluding provision—a provision which enables the Secretary of State to step in if by course of extravagance *A*, the Nawab of the day should disable himself from duly maintaining his dignity and position. It seems to me that in this case the reasonable remedy—and indeed the only reasonable remedy—is by the appointment of a receiver. That certainly is discretionary. It is not business to suppose that each tenant's rent as it becomes due could be taken in attachment.

A case has been cited to us which appears to me to be of a different character from the case now before the Court—the case of *Rajindra Narain Singh* v. *Sundar Bibi* (2). In that case, the Privy Council approved of the appointment of a receiver as a means of getting execution against certain properties out of which the debtor had a right to maintenance which right to maintenance was not liable to attachment by the provisions of 60 (1) of the Code. In the present case, it does not seem to me to be right or necessary that this Court should make provision for any provision of the rents and profits to be received by the receiver being reserved for the maintenance of the Nawab. We are dealing with a certain number of properties, with a debt of some Rs. 74,000 and, in my judgment, we ought to appoint a receiver of the rents, issues, and profits of those properties by way of execution in the ordinary course. The learned Judge has said that, if the Secretary of State were to take action under the Act, tha Court might be placed in a most invidious and derogatory position, if a receiver were appointed. I do not think that the Secretary of State would be likely at his own hand to interfere with the position of a receiver appointed by this Court; but there can be no doubt that if the Secretary of State did take action, the receivership would for all practical purposes come immediately to an end and this Court would be bound immediately to withdraw the receiver just as it would be bound to do if unfortunately the life of the present holder of the dignity were to come to an end.

In my judgment, this appeal must be allowed with costs in both the Courts and the Official Receiver must be appointed receiver of the rents, issues and profits of the properties mentioned in the application. We give the receiver the ordinary power to bring suits against tenants without special permission. He is not to interfere with possession. The receivership will come to an end the moment the money is realized.

C. C. Ghose, J.—I agree.

R.M./R.K. *Appeal allowed.*

(2) A. I. R. 1925 P. C. 176=47 All. 885=52 I. A. 262 (P.C.).

A. I. R. 1930 Calcutta 161

MITTER, J.

Gour Mohan Sarkar and *another*—Plaintiffs—Appellants.

v.

Hari Mohan Mondal — Defendant—Respondent.

Appeal No. 897 of 1927, Decided on 22nd May 1928, from appellate decree of Addl. Sub-Judge, Rajshahi, D/- 7th January 1927.

Bengal Tenancy Act, S. 5 (5)—Presumption under S. 5 (5) applies only where area held by tenant under single grant is in excess of hundred bighas—This presumption is rebutted by showing that tenant was holding land not in excess of hundred bighas but smaller area and that tenancy along with other land constitute 100 bighas in tenant's possession.

The presumption under S. 5 (5) only applies where the area held by the tenant under a single grant is in excess of 100 bighas. But this presumption is rebutted by showing that in respect of the tenancy in question the tenant is holding the land not in excess of 100 bighas but a smaller area and the tenancy in question along with other lands constitute the 100 bighas in possession of the tenant : *A. I. R.* 1927 *Pat.* 209, *Rel. on.* [P 162 C 2]

Bijan K. Mukerji and *Hari Prosanna Mukerji*—for Appellants.

Jatindra Mohan Choudhury — for Respondent.

Judgment.—This is an appeal by the plaintiff and arises out of a suit in ejectment.

Plaintiff's case is that he had a raiyati right over 88 bighas odd land bear-

ing a rent of Rs. 83-5-7½ pies per year and that the defendant is an under-raiyat under him, that the plaintiff served a notice under S. 49, Ben. Ten. Act, on the defendant for vacating the land at the end of Chaitra, 1329 B. S. and that the defendant did not give up possession and hence the suit was instituted. The defence of the defendant is that he is an occupancy raiyat and that no notice was served on him.

The Court of first instance found that the status of the plaintiff was that of a raiyat and that consequently the defendant was an under-raiyat, that notice under S. 49, Ben. Ten. Act, was served on the defendant and that the plaintiff was entitled to get khas possession of the suit lands by ejecting the defendants therefrom. A decree for mesne profiits was also given.

Against this decision of the Munsiff, an appeal was taken to the Court of the Additional Subordinate Judge of Rajshahi. The learned Subordinate Judge reversed the decision of the Munsiff and dismissed the plaintiff's suit.

Against this decision, a second appeal has been taken to this Court and it has been argued on behalf of the appellant that the lower appellate Court has committed an error of law in applying the presumption under S. 5, sub-Cl. (5), Ben. Ten. Act, to the facts of the present case, seeing that it has been established that the area of the jote under which the defendant holds was only 88 bighas. The Subordinate Judge says :

"The law does not require that the area of more than 100 bighas should be in one single jote. For the purpose of the presumption under S. 5 (5), Tenancy Act, to arise, it is sufficient that the tenant should hold area which exceeds 100 bighas. So, as in the present case we start with the presumtion that plaintiff is a tenure holder and as the presumption is not rebutted by showing that a portion is reserved to be cultivated by the tenant himself: vide *Bibudendra Man Singh* v. *Debendra Nath Das* (1) and as the presumption is not rebutted by the fact even of the lease or rent receipt describing the tenant as raiyat: vide *Gokul Mandar* v. *Pudmanund Singh* (2) and as a person, even if he requires land for cultivation but subsequently converts himself into a rent receiver, gives by such conduct the status of raiyat to under-tenant so far as the under-tenant and himself are concerned: vide *Mahesh Jha* v. *Manbharan Mia* (3) and as the only documents (Exs. 2 and 3) relied on by the learned lower Court to hold that plaintiff is a raiyat, show nothing but admission of third parties and plaintiff's acquiescence, which are not good evidence against defendant and as in order to apply the presumption of S. 5 (3), Tenancy Act in the case would be nothing short of putting the onus in the case on defendant in a circuitous way, which is not allowable, I hold that as the evidence and circumstances stand in the present case, the defendant has not been proved to be an under-raiyat for the land in suit."

It is argued on behalf of the appellant that the presumption under S. 5 (5) would only apply where the area held by the tenant under a single grant is in excess of 100 bighas. It seems to me that that is the correct interpretation which ought to be put on the provisions of S. 5 (5), Ben. Ten. Act. But even assuming that the presumption applies to a case where the tenant is shown to be in possession of the land in excess of 100 standard bighas, that presumption is rebutted by showing that in respect of the tenancy in question, the tenant was holding the land not in excess of 100 bighas but a smaller area and the tenancy in question along with other lands constituted the 100 bighas in possession of the tenant. The question in controversy was the subject of consideration before a Full Bench of the Patna High Court in the case of *Balunki Rout* v. *Kunja Behari Deb* (4). One of the learned Judges in that Full Bench states the law as follows :

"The presumption arises merely from the area held by a tenant being over 33 acres or 100 bighas : see the case of *Debendra Nath* v. *Bibudhendra Man Singh* (5)."

Clause 5, S. 5, says that :

"where the area held by a tenant exceeds 33 acress the tenant shall be presumed to be a tenure holder until the contrary is shown."

It is for those who want to displace the presumption arising from the area being over 33 acres, to show that the lands were not held under one grant or to show that the purpose for which the right of tenancy was acquired was not such as would make the tenant a tenure-holder as defined in Cl. (1), S. 5. These having not been shown in the present case the presumption of the tenant being tenure-holder under S. 5 (5) would prevail. Now, in the present case it is admitted that the tenancy in respect of which the plaintiff claims to be a raiyat was of the area of 88 bighas. The

(1) [1914] 20 C. L. J. 140=27 I. C. 432.
(2) [1893] 20 Cal. 707=29 I. A. 196=6 C. W. N. 825=8 Sar. 323 (P.C.).
(3) [1907] 5 C. L. J. 522.
(4) A. I. R. 1927 Pat. 209=6 Pat. 698 (F.B.).
(5) A. I. R. 1918 P. C. 8=45 Cal. 805=45 I. A. 67 (P.C.).

defendant sought to make out a case that the area consisted of 100 bighas and subsequently it was subdivided into two holdings of 88 and 12 bighas. The lower appellate Court, however, points out that he does not accept the evidence on which the defendant sought to establish this subdivision. Even assuming for the sake of argument that the tenant is shown to be in possession of 100 bighas, that presumption is rebutted the moment it is shown that the tenancy in respect of which the presumption is sought to be availed of was really much shorter than 100 bighas. In the Patna case reference may also be made to the observations of Chief Justice Sir Dawson Miller at p. 714 (of 6 *Pat.*) of the report where he points out that the statutory presumption would apply as soon as it is shown that the tenant holds 100 bighas and it is for the party challenging the presumption to prove the contrary. The learned Chief Justice observed as follows :

"In the judgment the subject of appeal 45 of 1924 the learned District Judge appears to have held that unless the party relying on the statutory presumption proved not only that the area was more than 33 acres but also that the whole area was held under a single grant the presumption would not apply. In my opinion this was misplacing the burden of proof. Once the area is shown to exceed 33 acres or 100 bighas, the presumption arises and it is for the party challenging it to prove the contrary."

This is also the view of Mr. Justice Jwala Prosad to which I have already referred. It seems to me, therefore, that the learned Subordinate Judge was in error, having regard to the fact that the tenancy consisted of 88 bighas, in holding that the presumption under Cl. (5), S. 5 if any that the holding was a tenure had not been rebutted by that circumstance. As the judgment of the Subordinate Judge is vitiated by this erroneous view about the presumption arising under S. 5 (5), Ben. Ten. Act, his decree and judgment must be set aside and the case remitted back to him in order that he may rehear the appeal with reference to the other evidence in the case and without allowing the defendant to avail himself of the benefit of the presumption of S. 5 (5), Ben. Ten. Act. The lower appellate Court will decide on the evidence whether the plaintiff has been able to establish his case that he is a raiyat in respect of this tenancy. If he holds that the plaintiff has failed to establish such a case, plaintiffs' suit will be dismissed. If, on the other hand, on the rest of the evidence the lower appellate Court comes to the conclusion that the plaintiff has established that he is a raiyat, plaintiffs' suit will be decreed. The appeal will be decided in the light of the observations made above. Costs of this appeal will abide the result.

V.S./R.K. *Decree set aside.*

A. I. R. 1930 Calcutta 163

MUKERJI AND MITTER, JJ.

Badaraddin Mandal—Petitioner.

v.

Nazir Hossain Joaddar -- Opposite Party.

Civil Rule No. 1055 of 1928, Decided on 1st February 1929.

Bengal Tenancy Act (8 of 1885), S. 170(3) —Occupancy holding put to sale in execution of decree by landlord—Under-raiyat whose interest is not created by registered lease or consent of landlord can make deposit under S. 170 (3).

If an under-raiyati interest has not been created by a registered lease or with the consent of the landlord, and the landlord decree-holder seeks to put up to sale the holding of the occupancy raiyat under whom the under-raiyat held, the interest of the under-raiyat is voidable at the sale and he is therefore entitled to make a deposit under S. 170 (3) : *A. I. R.* 1926 *Cal.* 934 (*F.B.*) and *A. I. R.* 1927 *Cal.* 513, *Dist.* [P 164 C 1]

Mohinimohan Bhattacharya and *Jatindaranath Bagchi*—for Petitioner.

Panchanan Ghoshal — for Opposite Party.

Judgment.—In this case an under-raiyat applied to make a deposit under S. 170, Cl. (3), Ben. Ten. Act, when the landlord decree-holder sought to put up to sale the holding of the occupancy raiyat under whom he held. The Munsif held that the under-raiyat had no locus standi to make the deposit, as his under-tenancy was not created by a registered instrument or with the consent of the landlord. The under-raiyat has then obtained this rule.

The learned Munsif has referred to and proceeded upon the authority of the case of *Bhuban Mohan Guha* v. *Sheikh Badan* (1). That was a case where the landlord, who had purchased an occupancy holding at a rent sale, proceeded to sue the under-raiyat for khas possession without annulling the under-tenancy under S. 167

(1) [1919] 46 Cal. 766=53 I. C. 334=30 C. L J. 201.

or serving notice under S. 49, Ben. Ten. Act. It was held that as the under-raiyati holding was not created by a registered lease or with the landlord's consent, there was no subsisting sub-tenancy which stood good against the landlord and which required to be put an end to either under S. 167 or under S. 49. That case, in our opinion, has little bearing upon the question which arises in the present case, where a sale has not yet taken place, and there is no knowing who will, if a sale does take place, be the purchaser therein. In a recent decision of this Court, in the case of *Jnanendra Chandra Ghosh* v. *Royman Sheikh* (2), it has been held that the interest of an under-raiyat, which was created by a registered lease in contravention of S. 85, sub-S. (2), and which purported to be a perpetual lease, is not an interest which the law recognizes and consequently is not an interest coming within the description of "incumbrance," which, unless steps are taken to avoid it, subsists after the sale. Following the decision of the Full Bench in the case of *Jharu Mandal* v. *Khetra Mohan Bera* (3) it has been held that such an under-raiyat cannot be held to have an interest voidable at the sale and so is not entitled to make a deposit under S. 170, Cl. (3). That case again is distinguishable, because the lease in that case, having been in contravention of sub-S. (2), S. 85, was void, while, in the present case, the lease is only invalid against the landlord. It is an interest which would amount to an incumbrance and would have to be annulled by every purchaser except the landlord himself before it would cease to exist. The rights of a purchaser, who purchases in execution of a decree under Chap. 14 of the Act, are regulated by S. 159 and not S. 85 of the Act. We are of opinion that the interest of the under-raiyat in the present case is one which is voidable at the sale and the under-raiyat, therefore, is entitled to make the deposit.

The rule is made absolute and the order of the learned Munsif being set aside, it is ordered that the petitioner be allowed to make the deposit. There will be no order as to costs in this rule.

V.B./R.K. *Rule made absolute.*

(2) A. I. R. 1927 Cal. 513.
(3) A. I. R. 1926 Cal. 934=54 Cal. 15 (F.B.).

A. I. R. 1930 Calcutta 164

CUMING AND PEARSON, JJ.

Makhan Lal Paul—Plaintiff—Appellant.

v.

Rup Chand Maji and *others*—Defendants—Respondents.

Appeal No. 247 of 1927, Decided on 7th March 1929, from the appellate decree of 2nd Offg. Sub-Judge, Hoogly, D/- 1st October 1926.

Evidence Act, S. 101—Suit for recovery of land as forming part of mal land—Defendant claiming it to be lakheraj—To shift burden of proof on defendant plaintiff must prove not only that the land lay within ambit of zamindar's regularly assessed estate but also that it formed part of the mal asset at decennial settlement.

Where a zamindar or a person claiming through the zamindar brings a suit for recovery of certain land as forming part of his mal land and the defendant contends the suit on the ground that it was the lakheraj property of which they were the shebaits or which they held through the shebait, it is not enough for the plaintiff to show that it lay within the ambit of the zamindari but they must prove that the land lay within the zamindnr's regularly assessed estate or mahal and that it formed part of the mal assets at the time of the decennial settlement. The burden then will shift on defendants to prove that it was lakheraj property : *A. I. R.* 1922 *P. C.* 272, *Expl.*: *A.I.R.* 1924 *Cal.* 328, *Ref.* ; 14 *M. I. A.* 152, *Dist.* [P 165 C 1, 2]

Rupendra Coomar Mitter—for Appellant.

Satindra Nath Mukherji—for Respondents.

Cuming, J.—In the suit out of which this appeal has arisen the plaintiff sued for the recovery of some 4 bighas odd of land. His case was that the land in suit formed part of the mal land of the zamindar of the village. The plaintiff took a lease from the patnidar, defendant 1 being, he alleged then, the patnidar's gomashta and having granted the lease, plaintiff has been dispossessed by defendant 1 and hence this suit.

The defence was that the lands in suit did not form part of the zemindar's mal land in village Kharagore but that it was lakheraj lands of which they had taken settlement from the shebait.

The trial Court found the plaintiff had not made out any title and dismissed the suit.

On appeal to the District Court the appeal was dismissed. In dealing with the appeal the learned Judge found that it had not been proved that the land in

suit was the mal land of the zamindar. The view that he took was that it was not sufficient to shew that the land was within the ambit of the zamindari. The fact that the land was within the ambit of the zemindary would not of itself shew that the land was mal land. Hence he dismissed the appeal.

The plaintiff has appealed and his main ground of appeal to this Court is that the learned Subordinate Judge was wrong in the view he has taken of the law. He contends that it is sufficient for him to shew that the land is within the ambit of the zamindari and then the burden of proof is on the other side to shew that the land is lakheraj. The first case on the point to which we have been referred is *Hurryhur Mukhopadhya* v. *Madhub Chandra Babu* (1). This case certainly does not help the appellant. The Privy Council held that the burden was on the zamindar to prove that the land was mal (p. 172). It is certainly no authority for the proposition that it is sufficient for the zamindar to shew that it is within the ambit of the zamindari. The next case to which we have been referred in the case of *Jagdeo Narain Singh* v. *Baldeo Singh* (2), also a decision of the Privy Council. The portion of the judgment on which reliance has been placed by this appeal will be found on pp. 930 and 931 (of 27 *C. W. N.*) of the report. Their Lordships remark:

"Once, however the landlord has proved that the land which is sought to be held rent free lies within his regularly assessed estate or mahal the onus is shifted. In the present case the lands in dispute lie within the ambit of the estate which admittedly belongs to the plaintiff . . . . and for which they pay the revenue assessed on the mouzah. In these circumstances it lies upon those who claim to hold the lands free of the obligation to pay rent to show by satisfactory evidence that they have been relieved oi .this obligation either by contract or by some old grant recognized by Government."

This decision has been discussed and interpreted by Walmsley, J., in the case of *Sashi Bhusan Hazra* v. *Kazi Abdullah* (3). Walmsley, J., is clearly of opinion that what their Lordships intended to lay down was that the zemindar must prove the land lies within his regularly assessed estate or mahal and that it was not sufficient to show merely that it lay within the ambit of his zamindary. It must be shown that it formed part of the mal assets at the time of the decennial settlement. Reading the judgment of the Privy Council in *Jagdeo Narain Singh's* case (2) as a whole I think this is the correct interpretation. No doubt the sentence: "in the present case the land lies within the ambit of the estate etc., etc., ..." read by itself might lend some support to the appellant's contention but read with the sentence which comes before it, it is quite clear that the Privy Council do not lay down any other rule than the rule to be found in *Hurryhur's* case (1).

It is not, therefore, sufficient to shift the onus of proof to show that the lands lie within the ambit of the zamindari. To shift the onus of proof it must be shown that the land formed part of the mal assets at the time of the decennial settlement. The learned Judge was right.

This point is decided against the appellant; lastly it has been argued that defendant 1 being the gumashta of the landlord at the time of the settlement with the plaintiff is estopped from saying that the land is not mal.

Whether he is or is not is a question of mixed law and fact. It would appear that the plaintiffs gave up this point in the trial Court. They cannot be heard to urge it now, therefore. The result is this appeal fails and is dismissed with costs.

Pearson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

(1) [1871] 14 M. I. A. 152=20 W.R. 459=2 Suther 482=2 Sar. 718 (P.C.).

(2) A. I. R. 1922 P.C. 272=2 Pat. 38=49 I.A. 399 (P.C.).

(3) A. I. R. 1924 Cal. 328.

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*A. I. R. 1930 Calcutta 165

JACK AND MITTER, JJ.

Abinash Chandra Ghosh—Defendant 1—Appellant.

v.

Narhari Mether and *another*—Plaintiff and Defendant 2—Respondents.

Appeal No. 702 of 1927, Decided on 22nd March 1929, from appellate decree, First Addl. Dist. Judge, 24-Parganas D/- 22nd November 1926.

(a) Limitation Act, Art. 143—Relationship of landlord and tenant not existing—Art. 143 does not apply,

Article 143 has no application where the relationship of landlord and tenant does not exist. [P 167 C 1]

*** (b) Limitation Act, Art. 141—Adverse possession against Hindu widow cannot be**

tacked against one claiming through reversioner.

Adverse possession against a Hindu widow cannot be tacked to the adverse possession against a person or his predecessor-in-title through whom he claims, when the predecessor-in-title has inherited the disputed property not from the Hindu widow but from her husband whose reversionary heir he was. 23 *Bom.* 725 (*P. C.*), *Rel. on* : *A. I. R.* 1925 *P. C.* 249, *Expl*: *A. I. R.* 1928 *Cal.* 670, *not Foll* ; 9 *W. R.* 505 ; 21 *Cal.* 8 (*P. C.*), and 23 *All.* 448, *Ref.* [P 167 C 1]

Brojendra Nath Chatterjee, *Satindra Nath Roy Chowdhury* and *Banku Beharry Mullick Chowdhury*—for Appellant.

Rupendra Kumar Mitter—for Respondent.

Mitter, J.—The plaintiff, now respondent, having sued to recover possession of a plot of land now in dispute in this suit after declaration of his title to the same, had his suit dismissed by the Subordinate Judge of 24 Paraganas on the ground of limitation there being a finding in his favour on the question of title. This decision has been reversed by the Additional District Judge of 24 Parganas on appeal and plaintiff's suit has been decreed.

Against this decision defendant 1 has preferred this appeal. Two points have been argued on this appeal : (1) that the decision of the lower appellate Court that the suit is not barred by limitation is wrong ; (2) that the lower appellate Court was clearly in error in not allowing the appellant to support the judgment of the Subordinate Judge on the ground that the plaintiff had failed to establish title to the disputed land, a ground which had been decided against him by the Court of first instance and in so doing has misunderstood the plain provisions of O. 41, R. 22, Civil P. C.

The material facts necessary for determining the questions raised by this appeal are these: The property in suit admittedly belonged to one Rup Narain Basak and by successive transfers devolved on Padmabati. On her death it devolved on her son Lakhinarain Goswami. Lakhinarain died leaving behind him a widow Dinomoyee who obtained a Hindu widow's estate in the property now in question. She executed a deed of surrender of all her husband's estate in favour of one Atal Goswami. Atal, who was the next reversioner died in the month of Asar 1327 B. S. On Atal's death the property devolved on his widow Mrinalini, as Atal left no son but only two daughters besides the widow behind him. Mrinalini sold the disputed plot to the plaintiff for legal necessity. This is plaintiff's title. Plaintiff's case is that defendant 1's father executed a kabuliyat in favour of Dinomoyee but as this deed is an unregistered document it has been rightly excluded from evidence and nothing more need be said about it. Plaintiff's case further is that a registered kabuliyat in respect of the disputed land (Ex. 6) was executed by defendant 1 in the year 1298 B. S. in favour of Dinomoyee in the benami of defendant 2. In 1910 Dinomoyee brought a suit for rent against defendant 2 on the basis of the kabuliyat. In that suit on the objection of defendant 2, defendant 1 was impleaded on 28th June 1910. The suit, however, was decreed against defendant 2 and dismissed against defendant 1. as he denied the relationship of landlord and tenant. The decree was executed against defendant 2 and the land and the hut standing thereon was attached as the appellant states. The respondent says that only the hut was attached on 14th July 1910. It does not appear clear on the proceedings whether the land and hut were both attached. On the other hand the register shows that the hut only was attached. A claim was preferred by defendant with the result that defendant 1 was found to be in possession on his own account and the attached property —whatever it was, was released.

The present suit was instituted originally on 3rd August 1922 and the Subordinate Judge held that as the suit was filed more than 12 years after 28th June 1910 the date when the denial of tenancy by defendant 1 was given effect to the suit was barred by limitation. On the other hand the learned District Judge has reached the conclusion that Art. 143, Sch. 1, Limitation Act, applied and the forfeiture was incurred not on the date when the denial was given effect to by the judgment of the Munsiff but on the date when some overt act was done by Dinomoyee i. e., on the date when she served a notice on defendant 1, i. e., on 15th January 1911 and as such the suit was well within the period of limitation. The appellant contends that this view cannot be sustained.

It seems to us that Art. 143 has no application to the present case because the relationship of landlord and tenant does not exist and has not existed between the plaintiff and defendant 1. It was so decided in the Rent Suit 672 of 1910 in the Munsiff's Court at Sealdah. Defendant 1 has been in adverse possession for more than 12 years before the present suit. Dinomoyee died on 1st April 1918 and the present suit has been instituted within 12 years from the date of her death. The question is whether the adverse possession against Dinomoyee could be tacked to the adverse possession against the plaintiff or his predecessor-in-title so as to extinguish plaintiff's right. Atal Goswami through whom the plaintiff claims did not inherit the disputed property from Dinomoyee but from Lakhinarain whose reversionery heir Atal was. In these circumstances the adverse possession of defendant as against Dinomoyee cannot be tacked to the adverse possession as against Atal who died in 1920 or of his successors-in-interest. It is argued, however, for the appellant that the adverse possession which barred the widow Dinomoyee would also bar the reversioner Atal or the plaintiff who claims through him. This contention, however, seems to be opposed to the decision of their Lordships of the Judicial Committee in the case of *Ranchor Das* v. *Parvati Bai* (1), where the defence of limitation was raised but their Lordships held that it did not apply saying :

"It is not necessary to consider what might be the case if the widows or the survivor of them were suing, as the plaintiff does not derive his right from or through them, and the extinguishment of their right would not extinguish his."

It is said on behalf of the appellant that this decision has been explained in another recent decision of their Lordships of the Privy Council in the case of *Vithialinga* v. *Srirangath Anni* (2) and it is contended that the true effect of the later decision of their Lordships is to hold that adverse possession for more than the statutory period which would bar a widow would also bar the reversioner. In support of this contention reliance has been placed on a recent decision of Mr. Justice Page in the case of *Aurabindo Nath Tagore* v. *Manorama Devi* (3). It seems to us that the decision in *Vaithia linga* v. *Srirangatha Anni* (2), above referred to turned on the circumstance that the decree of 1892 as to adverse possession was binding on the estate. In this case their Lordships were really considering the rule in the Shivaganga case namely :

"Where the estate of a deceased Hindu has vested in a female heir a decree fairly and properly obtained against her in regard to the estate is, in the absence of fraud or collusion, binding on the reversionary heir."

Although it is not right to speak of a Hindu widow's estate as a mere estate for life for as has been pointed out by their Lordships of the Judicial Committee of the Privy Council in the case of *Moniram Kolita* v. *Kery Kolitani* (4). She holds an estate of inheritance to herself and the heirs of her husband; still for the purposes of limitation it must be taken to be an estate of an ordinary tenant for life and as Sir Charles Farran, C. J., of Bombay pointed but that Art. 141 appears to be intended for limitation purposes to do away with the anomalies which surround a Hindu widow's estate and other estates analogous thereto and to assimilate it for these purposes and for these purposes only to that of the estate of an ordinary tenant for life : see *Vundravan Das* v. *Curson Das* (5) at p. 669. This decision was affirmed on appeal by their Lordships of the Judicial Committee in *Ranchor Das* v. *Parvati Bai* (1) already referred to. The decision of the Judicial Committee in *Ranchor Das's* case has always been understood in India as an authority for the proposition that the statute of limitation can never begin to run against the reversioner in consequence of dispossession of the limited owner whether a Hindu widow or daughter and that in all cases the reversioner has 12 years from the death of the Hindu widow or daughter or mother as the case may be in which to sue for recovery of possession of property from which the Hindu female was dispossessed. : see *Radha Kissen* v.

(1) [1899] 23 Bom. 725 = 26 I. A. 71= 7 Sar. 548 (P. C.)
(2) A. I. R. 1925 P. C. 249 = 48 Mad. 883=52 I. A. 222 (P. C.)
(3) A. I. R. 1928 Cal. 670=55 Cal. 903.
(4) [1880] 5 Cal. 776=7 I. A. 115=4 Sar. 103. (P. C.).
(5) [1897] 21 Bom. 646.

Nauratan Lal (6) *Kedar Nath* v. *Jatindra* (7) at p. 238. Adverse possession cannot run against the reversioner until after the death of the widow or daughter as the case may be but where the adverse possession was the result of a decree which is binding against the reversioner the reversioner is barred. It was to this latter state of circumstances that their Lordships of the Judicial Committee were referring in *Vithia Linga's* case (2) as will appear from the following observations of Sir John Edge :

"The result of the cases to which their Lordships have referred shows, in their opinion, that the Board has invariably applied the rules of the *Shivaganja* case as sound Hindu law where that rule was applicable"

and the *Shivaganga* case laid down that a decree fairly obtained against a Hindu widow was binding against the reversioner if the decree is not tainted by fraud and collusion. A case is an authority for what it actually decides and not for what would logically follow from such decision. *Vithia Linga's* case (2) does not in my opinion lend support to the proposition that adverse possession which barred the widow will also bar the reversionary heir under the present Limitation Act. I am not unmindful of the fact that Page, J., has in the *Tagore* case already referred to arrived at the conclusion that the adverse possession against the widow would be effective as against the reversioners but with great respect to my learned brother it is difficult to read *Vaitha Linga's* case (2) as supporting the broad proposition that adverse possession for more than the statutory period which was not the result of an adverse decree against a Hindu widow would bar the reversioner.

It is true that the Judicial Committee in *Vaitha Linga's* case (2) quoted the following observation of Sir Barnes Peacock in the Full Bench case of *Nobin Chunder* v. *Issuar Chunder* (8) and said that those observations were very instructive. Sir Barnes Peacock said :

"It is said that the reversionary heirs could not sue during the lifetime of the widow (for possession), and that therefore they ought not to be barred by any adverse holding against the widow at a time when they could not sue. But when we look at the widow representative, and see that the reversionary heirs bound by decrees relating to her husband's estate which are obtained against her without fraud or collusion we are of opinion that they are also bound by limitation by which she, without fraud or collusion, is barred."

At the time of that decision the Limitation Act was the Act of 1859 under which it was held that the adverse possession which barred the widow or other females having limited estates barred also the reversioners. In the later Limitation Acts of 1871, 1877 and 1908 a reversionary heir was permitted to sue within 12 years from the time when his right to possession accrued i. e. from the date of the death of the Hindu female (Art. 141). In *Harnath Chatterjee* v. *Mathur Mohan* (9), Lord Watson said :

"But you must show that the new law gives a right of action to a reversioner notwithstanding that the widow's right of possession had been extinguished by decree."

These observations of Lord Watson are referred to in *Vaitha Linga's* case (2), From this it appears that the actual decision in *Vaitha Linga's* case (2) proceeded on the principles of the *Shivaganga* case, namely, that the decree of 1892 as to adverse possession was binding upon the estate.

The Allahabad High Court reads *Ranchor Das's* case (1) as laying down that under Art. 141, Sch. 2, Lim. Act 1877, a suit can be brought by a reversioner for possession of immovable property to the possession of which a female heir had been entitled within 12 years from the date ef the death of the female heir, although she may have been out of possession for more than twelve years : see *Amrit Dhar* v. *Bindesri* (10).

It is not necessary to consider in this case whether Art. 141 would apply where the widow died a civil death by surrendering all her husband's estate in favour of the next reversioner or would apply only to the case of natural death for in this case both the civil death and the natural death of Dinomoyee took place within 12 years of suit.

In this view we think that the decision of the lower appellate Court was right although our reasons are very dif-

(6) [1907] 6 C. L. J. 490.
(7) [1909] 9 C. L. J. 236=4 I. C. 44=3 M. L. T. 362.
(8) [1868] 9 W. R. 505=B. L. R. Sup. Vol. 1008 (F. B.).
(9) [1894] 21 Cal. 8=20 I. A. 183 (P. C.).
(10) [1901] 23 All. 448=(1901) A. W. N. 133.

ferent from those of the learned District Judge.

With regard to ground 2 taken, the learned District Judge was clearly in error for under O. 41, R. 22, it was open to defendant 1 who was the respondent before the lower appellate Court to support the decree of the Court of first instance on the ground of defect in plaintiff's title although such ground has been decided against him and we would have remanded the case to the lower appellate Court but for the circumstance that it is proved by defendant's own documents that the disputed land belonged to Lakhinarain Goswami through whom plaintiff claims and the Munsif rightly points out the frivolous nature of the defence regarding title to the property in question. In these circumstances it would be useless to send back the case for a hearing of the appeal on the question of title.

The result is the appeal fails and is dismissed with costs.

Jack, J.—I agree.

V.S./R.K. *Appeal dismissed.*

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RANKIN, C. J., AND B. B. GHOSE, J.

Tanwangini Debi—Defendant 1—Appellant.

v.

Abhoya Charan Sardar and *others*—Plaintiff and Defendants 2 to 6—Respondents.

Appeal No. 287 of 1927, Decided on 1st May 1929, from original decree of First Sub-Judge, Khulna, D/. 30th July 1927.

(a) Bengal Tenancy Act, S. 148-A — Cosharer landlord can sell holding notwithstanding his inability to get his cosharers to join in suit.

The purpose of S. 148-A is to enable a cosharer landlord to get the advantage of the right to sell the holding notwithstanding that he is unable to get his cosharers to join with him as plaintiffs instituting a suit. [P 170 C 1]

(b) Bengal Tenancy Act, S. 148-A—Decision as regards rent in former suit between cosharer landlord and tenant is not binding on other cosharer landlord though joined as defendant with tenant.

The decision as regards the rate of rent in a former suit brought by a cosharer landlord who proceeds with it for his share of the rent only under S. 148-A cannot operate as binding on the other cosharer landlord who is joined as defendant with the tenant. There is no provision in the law under which any plea set up by the tenant defendant is to be served on the defendant landlord. Under such circumstances it cannot be said that any issue was raised as between the tenant defendant and the landlord defendant which was decided in the suit brought by the cosharer landlord under the provisions of S. 148-A. [P 171 C 1]

Jogesh Chunder Roy, *Brojo Lal Chukerburtty* and *Bepin Chunder Bose*—for Appellant.

Sarat Chunder Roy Choudhury and *Bhudhar Haldar*—for Respondents.

Rankin, C. J. — In this case, the plaintiffs are the 12 annas cosharer landlords and they bring their suit for rent for 1329 to 1332 B. S. to the extent of their share basing their claim upon the terms of a kabuliat of 23rd November 1905. The terms of that kabuliat are to this effect : the area which is being let or settled is 2134 bighas. The tenant states that he had been in possession of that land before from the landlords' predecessor. The rate of rent is 11 annas two and half gandas per bigha and, on the 2134 bighas the jama is Rs. 1483. There is a clause in the kabuliat to this effect :

"If it becomes necessary to make any survey from the Government or from your Sarkar,"

that is, the landlords :

'I shall be present in person and shall cause the survey to be made and I shall pay the costs of survey. If, on measurement, the area be found to be less, I shall get abatement ; if there be increase, then I shall pay rent separately at the aforesaid fixed rate."

In this case, the first thing that happened was a suit framed under S. 148-A, Ben. Ten. Act, and brought by the four annas landlords in 1918. The present plaintiffs were parties defendants in that suit. But the present plaintiffs took no interest in the suit and, in the end, what happened was that the four annas landlords were met by a defence on the part of the tenant that the area in his possession was less than the amount mentioned in the kabuliat. Thereupon, by a process of reasoning which does not seem to be altogether watertight, a local investigation was ordered and it was found that the area was, in fact, 1,700 bighas and no more upon which basis the four annas landlords got a judgment for their share of the rent on the footing that the total rent must be reduced from Rs. 1,483 mentioned in the kabuliat to Rs. 1,228. The first question and the most important question to be considered in this case is what is the effect in law of that decision. Mr. Roy who appears for the defendant appellant contends before us

that the effect in law as between defendant and defendant in that suit was that there was a fresh settlement or assessment of rent and that the position was just as though a suit had been brought and a re-assessment of the rent had been arrived at which was binding upon the parties. Mr. Roy Choudhuri who appears for the plaintiffs respondents contends on the other hand that, while it is true that the present plaintiffs were parties to that suit they were parties for the purposes of S. 148-A, Ben. Ten. Act, only and that the judgment in that suit, whether it is right or wrong, is not as between his clients and the tenant any assessment of rent upon a new basis : the judgment may be made binding between the tenant and the four annas landlord, but as between the 12 annas cosharers and the tenant it is not a judgment which operates as a fresh assessment.

In my opinion, the view pressed upon us by Mr. Roy Choudhury is to be preferred. When one looks at the purpose of S. 148-A, Ben. Ten. Act, one finds that its purpose is this : to enable a cosharer landlord to get the advantage of the right to sell the holding notwithstanding that he is unable to get his cosharers to join with him as plaintiffs in instituting a suit. The section is intended to deal with cases, in particular, where the plaintiff cannot find out whether rent is due to the other cosharer landlords whether it has been paid or whether it has not been paid, and the consequence is that he may bring his suit asking for the whole of the rent but in the end limiting himself to proceed with his suit for his share only and to get the right to sell the holding. In the present case, if it be assumed for the sake of argument that the present plaintiffs who were defendants in the previous suit had been in receipt of their proper proportion of the rent at the kabuliat rate, then, when the four annas landlords joined them as defendants, we are to ask ourselves did they by staying away and taking no part in that litigation run the risk that the judgment obtained by the four annas cosharers would operate as against them as a new assessment of the rent of the holding. I am not prepared to say that it would so operate. It seems to me that, in a case under S. 148-A, Ben. Ten. Act, to hold that it would operate as a new assessment of rent between co-defendants would be carrying the law further than there is any authority for so doing.

The question then arises: is this matter carried any further by the fact that in 1927 the present plaintiffs brought a suit against, among others, the present defendant. In that suit, they set out that the area of the land was 2,143 bighas, that is, the kabuliat figure ; but they did say that the rent was Rs. 1,228 which was the figure fixed in the four annas landlords' suit of 1918. They explained, however, in the plaint in that case that they were not served in the suit of 1918, that the proceedings took place behind their back and that the plaint was filed on the assumption that until the decree was set aside it was binding on the parties. I have given already my reasons for thinking that this view that the decree in the suit of 1918 is binding upon these plaintiffs in the sense that it reassessed the rent so as to be binding upon them is wrong. But this plaint, so far from being an adoption of what took place in the suit of 1918, was made upon the footing that the suit of 1918 produced a wrongful result as against the plaintiffs and that they were determined to set it aside if they could. In my judgment, the position is this : the fact of this suit of 1927 adds nothing to the argument that the decree in the suit of 1918 operated as a re-assessment of the rent. It appears to me that there is nothing to show that the plaintiffs if it be true in fact that the tenant is in occupation of the whole of the area mentioned in the kabuliat should not get the kabuliat rent.

In my opinion, the reasoning of the learned Judge of the trial Court is somewhat precarious by reason of the fact that he puts the case on the assumption that the previous decree was a re-assessment of the rent and that the present claim can be made as for a fresh re-assessment of the rent in view of the result of the measurement at the district settlement proceedings. If that were the right view, as at present advised, I think that Mr. Roy's answer would be good, namely, that the plaintiffs cannot get a re-assessment upon the ground of increase of area on the basis of remeasurement without all the landlords being plaintiffs. In my judgment, the present

plaintiffs are not in the position of having to assert a claim to reassessment of the rent on the basis of the measurement at the district settlement proceedings. It appears to me that, when the matter is examined, they are entitled to stand upon their ordinary right as landlords under the kabuliat of 1905.

I think, therefore, that this appeal fails and must be dismissed with costs.

B. B. Ghose, J.—I am of the same opinion. In my judgment, the decision as regards the rate of rent in a suit brought by a cosharer landlord who proceeds with it for his share of the rent only under S. 148-A, Ben. Ten. Act, cannot operate as binding on the other cosharer landlord who is joined as defendant with the tenant. When a cosharer landlord who has obtained his proper share of the rent is joined as a defendant in a suit for rent by his cosharer for his undisputed share and no relief is asked for as against the defendant landlord he need not take any interest in the litigation between the cosharer plaintiff and the tenant. There is no provision in the law under which any plea set up by the tenant defendant is to be served on the defendant landlord. If the tenant defendant in the suit brought by a cosharer landlord says that the rate of rent is not so much as is alleged by the plaintiff, the defendant landlord has no means of knowing that such a plea has been urged nor is there any procedure by which a defendant landlord can fight the tenant defendant on that single issue.

Under such circumstances, it cannot be said that any issue was raised as between the tenant defendant and the landlord defendant which was decided in the suit brought by the cosharer landlord under the provisions of S. 148-A, Ben. Ten. Act. The only advantage which a cosharer landlord gets when he obtains a decree for his share under the provisions of that section is as regards the remedies for enforcing it, that he can proceed to execute the decree in the same manner as if the decree has been obtained by the sole landlord or the entire body of landlords. It would be extending the scope of that section to say that the decree would have the same effect as if it was obtained by the entire body of landlords in the same manner if the defendant landlord was also a plaintiff in the case and all the findings in the judgment in the suit would operate as against the defendant landlord. The result may be anomalous, as in this case, that one cosharer landlord gets under the decree a different rate of rent from what the other cosharer landlords would be entitled to. But there are anomalies in the Bengal Tenancy Act and this possible anomaly cannot be made a reason for holding that the decree should be binding upon the defendant landlords.

V.S./R.K. *Appeal dismissed.*

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LORT-WILLIAMS, J.

Nripendra Kumar Bose, In re.

Insolvency Suit No. 16 of 1929, Decided on 9th April 1929.

(a) Presidency Towns Insolvency Act, S. 52—English Bankruptcy Act (1813), S. 44—There is no difference between the two sections.

There is no difference in effect between the two sections. The English arrangement of the section is preferable because more lucid. S. 44 (1) English Act, and S. 52 (1) (a), Indian Act, can never be in conflict with S. 44 (iii) and S. 52 (2) (c) respectively because where one holds property in trust he is the real owner and, therefore, the real and reputed ownership are in the same person and S. 44 (iii) and S. 52 (2) (c) do not apply: *Joy* v. *Campbell*, (1804) 1 *Sch.* and *Lef.* 328, *Rel. on.* [P 173 C 1]

(b) Presidency Towns Insolvency Act, S. 52 (2) (c)—Where property in goods delivered is to remain in sellers until payment insolvent is reputed owner.

Where the insolvent executes a pronote in exchange for delivery of goods and the pronote contains a trust receipt stating explicitly that the property in goods or the proceeds thereof is to remain in the sellers untill payment, the property in the goods does not pass to the insolvent and the goods remain in his reputed ownership within the meaning of S. 52 (2) (c). [P 173 C 1]

(c) Contract Act S. 78—Delivery of goods or document giving control of goods to be in exchange of payment of price or security—Seller reserves right in property till payment is made or security given.

Where the delivery of goods or of a document giving control of the goods is to be in exchange for payment of, or security for the price of the goods, the seller, unless a contrary intention appears, reserves the right of disposal in the property in goods until payment or security be made or given accordingly. [P 173 C 1]

B. C. Ghose—for Petitioner.

W. Gregory with *P. N. Chatterjee*—for Official Assignee.

Judgment. — This insolvent was adjudicated on 25th January 1929,

Prior to his insolvency, he carried on business in Calcutta under the name and style of Gobinda Chunder Bose & Company.

In the course of such business, he used to obtain goods through the petitioners Messrs. Bettmann & Kupfer, who also carry on business in Calcutta.

The method by which such goods were obtained was as follows :

Bose sent an indent to the petitioners, addressed to them, and on a form supplied by them—requesting them to order on his account certain goods therein mentioned, packed as directed at the price stated, C. I. F. C.I. Calcutta —60 days D/A in sterling and otherwise on terms and conditions stated on the reverse of the form. These terms inter alia provided, that all risks of voyage, &c., were to be borne by Bose. That he would accept their invoice as correct and accept on presentation and pay at maturity the draft (or on demand the pronote) drawn for the invoice value—That in the event of the goods arriving before the bill fell due, he would retire the same or, if no draft were drawn, he would pay the invoice amount on arrival of the steamer. That he would raise no obiection to quality, &c., unless the draft (or pronote) had been first accepted (or signed) and paid by him. In case the indent mentioned D/A terms, that is to say, delivery against acceptance, the petitioners had the option to allow these terms or not, and Bose agreed to pay the draft on arrival of the steamer. In default of Bose accepting or paying the draft at maturity or pronote on demand, he agreed to pay the value of the goods according to the invoice as for goods bargained and sold, and authorized the petitioners to resell the goods on his account, and agreed to pay any deficit and waive all claims to any surplus which might arise on re-sale. In answer to the indent order, the petitioner used to send what they called a report stating that the order had been placed. In practice, the goods ordered were made over to Bose, either against cash or upon his executing a pro-note for their value. This note contained particulars of the invoice, the goods and the ship and a promise to pay the sum stated therein to the petitioners on demand against the goods and in addition, at the foot thereof, a statement which, so far as it is material is as follows :

"I engage myself to hold these goods in trust for and on their behalf and keep the goods insured against fire and confirm that these goods until sold by me and the proceeds thereof when sold, shall remain their property and that the said proceeds shall be kept by me separate, the intention being that they may take possession of the goods and or the said proceeds whenever they wish to do so and that production of this note shall make null and void any claims that may be made on the goods and or the said proceeds by my creditors whether or not they had notice of this trust. The trust created shall cease to exist after I have paid in the above amount."

This document is called by the petitioners a trust receipt, and is a variant of the trust receipts sometimes taken by bankers in exchange for goods delivered to the buyers in advance of payment.

In accordance with the above arrangement, the petitioners delivered goods to Bose and at the time of his insolvency, the goods had not been paid for and the notes had not been met. Thereupon the petitioners made a claim upon the Official Assignee for the return of the goods and for the amount due on the promissory notes. This claim the Official Assignee has rejected—and the petitioners now ask that his decision be reversed.

Their contention is that the goods are trust property and held by Bose as such, and, therefore, form no part of his assets divisible among his creditors : S. 52, (1) (a), Presidency-Towns Insolvency Act, 1909. The Official Assignee contends either that the property in the goods had passed from the petitioners to the insolvent prior to his adjudication, or that they are goods which were at the commencement of the insolvency in the possession, order and or disposition of the insolvent in his trade and or business by the consent and permission of the petitioners, as the true owners thereof under such circumstances that the insolvent was the reputed owner thereof, within the meaning of S. 52 (2) (c), Presidency Towns Insolvency Act, 1909 and that the trust if it ever existed, had been discharged prior to the insolvency.

It has been contended on behalf of the petitioners that the law on this point, in the Presidency-towns in India, differs from the English law, because the phrasing of the analogous sections in the Indian and the English Act is slightly different. Thus, in the English

Bankruptcy Act, 1883, S. 44, the property of the bankrupt divisible amongst his creditors shall not comprise : (1) property held by the bankrupt on trust, but it shall comprise (iii) all goods being at the commencement of the bankruptcy in the possession order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof. Whereas, in the Presidency Towns Insolvency Act, trust property is not divisible, but "subject as aforesaid," property of which the insolvent is the reputed owner as aforesaid is divisible. In my opinion, there is no difference in effect between the two sections, and I think the English arrangement of the section is preferable, because more lucid. S. 44 (1), English Act and S. 52 (1) (a), Indian Act can never be in conflict with S. 44 (iii) and S. 52 (2) (c) respectively, because where any one holds property in trust, he is the real owner, and, therefore, the real and the reputed ownership are in the same person—and S. 44 (iii) and S. 52 (2) (c) do not apply : *Joy* v. *Campbell* (1). If, in this case, Bose held the goods in trust, the question of reputed ownership cannot arise.

But if Bose was a trustee, then he was the real owner, and the property in the goods, was in him. Whereas the trust receipt printed upon the pro-note states explicitly that the property in the goods—and/or the proceeds thereof is to remain in the petitioners until payment.

If, therefore, the property in the goods never passed to Bose, in my opinion, it is clear upon the facts that the goods were in his reputed ownership within the meaning of S. 52 (2) (c).

On sale of goods, the property in the goods passes, when the parties intend that it shall pass, as shown by the terms of the contract, and the circumstances of the case.

Where the delivery of the goods or of a document giving control of the goods is to be in exchange for payment of, or security for the price of the goods, the seller, unless a contrary intention appears, reserves the right of disposal and the property in the goods, until payment, or security, be made or given accordingly. In the absence, therefore, of the trust receipt, the property in these goods would have passed to Bose on signing the pro-note and not before. But the effect of the trust receipt was to postpone the transfer of property until payment. Apart, however, from these considerations, the arrangement made by the petitioners, was only an ingenious attempt to defeat the provisions of the Insolvency Act. While putting it in the power of Bose to obtain credit on the strength of the goods with which they supplied him, they tried nevertheless to secure a preference for themselves over all other creditors. Even if they had succeeded in drafting a document, which would have been sufficient to create a trust, in my opinion, such a trust would not have been legal or valid. A trust must be created in good faith. This application, therefore, is dismissed with costs.

R.M./R.K. *Application dismissed.*

(1) [1804] 1 Sch. and Lef 328.

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RANKIN, C. J., AND B. B. GHOSE, J.

Madan Mohan Saha Banik and *others*—Defendants—Appellants.

v.

Rakhal Chandra Saha Banik and *others*—Plaintiffs—Respondents.

Appeal No. 205 of 1927, Decided on 17th May 1929, from original decree of First Offg., Sub-Judge, Dacca, D/- 15th June 1927.

Hindu Law—Alienation—Gift by widow of property to ancestral deity is also governed by ordinary rule of small fraction.

Dedication of property by widow to the ancestral deity of the family for the due performance of the Sheba and puja of the family deity is a meritorious act conducive to the benefit of the soul of the deceased owner and although it is for ancestral deity of the family it is on no different footing than the other gifts. To support such a gift according to law it must be of a fraction of the property, and the rule cannot be extended so as to take into consideration the necessity of the idol : *A. I. R. 1922 P. C. 261, Rel. on.* [P 176 C 2]

Brojo Lal Chakravarti, *Susil Kumar Bose* and *Satindra Nath Rai Choudhury*—for Appellants.

Jogesh Chandra Roy and *Bepin Chunder Bose*—for Respondents.

B. B. Ghose, J.—This is an appeal by the principal defendants arising out of a suit for partition and accounts decreed by the learned Subordinate Judge, First Court, of Dacca. The plaintiffs asked

for partition of the immovable properties consisting of three houses described in items 1, 2 and 3, Sch. Ka in the plaint and for accounts against the defendants of the five karbars described in Sch. Ga of the plaint and also for an account with regard to some gold and silver articles mentioned in Sch. Kha of the plaint. The learned Subordinate Judge has made a decree in favour of the plaintiffs with regard to the entire claim except with regard to karbar No. 4 described in Sch. Ga.

The plaintiffs' right to partition arose on these facts : There were four brothers Krishna Charan, Tokani, Rashiklal and Beharilal who formed a joint Hindu family. Krishna Charan died long ago leaving him surviving his widow Anandamayee and two daughters. Anandamayee died, according to the finding of the Subordinate Judge, in 1317 B. S. Her two daughters survived her. The plaintiffs are the sons of one of the daughters Bansimoni. On the death of their aunt who died later than their mother in the year 1332 B. S. the plaintiffs became entitled to the properties left by Krishna Charan, that is, a fourth share of the joint properties belonging to the four brothers. Of the other three brothers of Krishna Charan. Tokani died in 1321 B. S. leaving his son defendant 3. Rasiklal died long ago and his descendants are represented by defendants 1, 4, 5, 6 and 7. The youngest of the brothers of Krishna Charan is Beharilal who is defendant 2 in this case. Defendant 8 is an idol Raj Rajeshwar Jiu the family idol of Krishna Charan which was established, according to the evidence, long ago by some ancestor—when, the evidence does not show. Defendants 9 and 10 are persons unconnected with the family-defendant 9 was a servant in one of the karbars and defendant 10 is a tenant in the house described in plot 3, Sch. Ka in the plaint. The plaintiffs alleged that of the number of karbars mentioned in Sch. Ga of the plaint, karbar 4 was closed down long ago when plaintiff 1 was an infant. Karbars 1 and 2, according to the defence, were closed in the year 1320 and karbar 3 was closed down in the year 1316 while, according to the plaintiffs, karbar 3 was closed down about the year 1308 ; and that evidence has been accepted by the Subordinate Judge. The defendants did not dispute the plaintiffs' right to partition of the house described in item 1, Sch. Ka of the plaint. Before us, on appeal defendant 1 in whose possession it was admitted that there were certain gold ornaments which formed the assets of karbar 3 did not dispute his liability to account therefor ; but the defence of the defendants was that the houses in plots 2 and 3, Sch. Ka were dedicated to the family idol for its worship and sheba by a deed (Ex. B) dated 11th February 1902 executed by all the then surviving male members of the family along with the maternal grandmother of the plaintiffs Anandamoyee, except one of those who was a minor, namely, defendant 6 who subsequently affirmed the dedication by a separate deed on attaining majority. It was pleaded by the defendants that these two properties were not partible. With regard to the karbars, they alleged that the first three karbars were closed down long before the plaintiffs succeeded to the interest of their maternal grand father. The business in all these firms was losing one, they said, when they were closed down and the debts swelled to a greater amount than the assets and the gold ornaments which were kept with defendant 1 were not demanded by any of the other cosharers because that defendant had paid off the joint debts of the karbars which exceeded the value of the gold ornaments. With regard to the karbar 5 the plaintiffs' allegation was that it was started by defendant 1 with the assets of karbar 3 which was according to the plaintiffs' story, closed down in 1308 B. S. It is admitted that karbar 5 was opened in 1308 and it is a karbar carried on by defendant 1 alone for himself. In the plaint, the plaintiffs do not allege that they have got any share in that business. The other members of the family disclaim all interest in this business.

In this state of the pleadings, several issues were raised before the Subordinate Judge. It is necessary now only to consider Issues 8 and 10 in this appeal. Issue 8 thus :

: "When were the businesses in Sch. Ga closed down ; does this suit for dissolution and accounts lie and are the plaintiffs entitled to sue as reversioners and to get the accounts claimed.

The learned Subordinate Judge has come to the conclusion that the plaintiffs as the grandsons of Krishna Charan have got a 4 annas share in these karbars, that the defendants are liable to render accounts to the plaintiffs for their share with respect to karbars 1, 2, 3 and 5 only in Sch. Ga and with respect to the ornaments in Sch. Kha, that karbar 4 in Sch. Ga was abolished long before and that the defendants are not liable to account for it.

It is contended on behalf of the appellants that the learned Subordinate Judge is in error in holding that the plaintiffs had any interest in these karbars when, as a matter of fact, they were closed down before the succession to them had opened, that is to say, long before the year 1332. It seems to me that this contention is sound. The karbars ceased to exist so long ago that if there was any right to claim accounts in respect of those karbars, that right accrued to the ladies who were then the next reversioners that is, the mother, of the plaintiffs and their aunt. It cannot be said that this right accrued to the plaintiffs afresh after the death of the last surviving daughter of Krishna Charan. The claim, therefore, for accounts of karbars 1 to 3 must fail.

With regard to karbar 5, the plaintiffs' allegation was that it was started with the assets of karbar 3 which belonged to the joint family. If this could have been proved then the plaintiffs might possibly have asked for an account of the assets which belonged to the joint family that were used for the purpose of opening karbar 5 and carrying it on. The evidence, however, to support that case is almost nothing. Plaintiff 1 who has examined himself states that it was Madan, defendant 1 who told him that all the articles of the old karbar were brought by Madan in order to open this karbar 5. He says, however:

"I do not remember when and in which year this was said and who were then present."

Madan, defendant 1, contradicts this statement and, as I have already said, the other members of the family do not claim any interest in this karbar, although they are all separate. From this fact, it is quite clear that the plaintiffs have not been able to make out any case for demanding an account from defendant 1 or from any other defendant with regard to karbar 5 or any of the other karbars. It is not necessary, therefore, in the circumstances, to deal with the question which was sought to be argued here that karbar 5 had been interpolated in schedule ga in the plaint after it had been filed.

The decree, therefore, made by the Subordinate Judge making the defendants liable to render accounts for these four karbars must be set aside.

I have already said that defendant 1 here undertakes to render an account of the ornaments which he admitted were put into his possession at the time when the business No. 3 was closed. The decree of the Subordinate Judge with regard to the account as regards the ornaments must, therefore, stand.

The next question that has been urged on behalf of the appellants is that property No. 2, Sch. Ka is one which is indivisible. This property, according to the evidence, is the Thakurbari of the family and apparently the family idol has been located and is still existing there from before the time of the four brothers. The house is not used for any other purpose and, therefore, according to the general principles of Hindu Law, this must be considered as an impartible property. According to the old text:

"A dress, a vehicle, ornaments, cooked food, water and females (slaves), properties destined for pious uses or sacrifices, and a pasture ground then declare to be indivisible: Manu, Ch. 9. Verse 219, Sacred Books of East Vol. 25."

"A place of sacrifice, a field, a vehicle, cooked food, water and women are not divisible among kinsmen though transmitted for a thousand generations. Dayabhaga Ch. 6, S. 2, Verse 25. See, also, Mitakshara Ch. 1, S. 4 Verse 28."

It is true that there is a difference of opinion as to the meaning of the word *Yogakshemam*; but the preponderance of opinion is in favour of the interpretation as above and that is an interpretation which has been accepted by all modern scholars—Indian and European. Further, in the case of *Anund Moyee Choudhurain* v. *Boykuntnath Roy* (1) this Court refused to direct a partition of five buildings which were sought to be partitioned. Those buil-

(1) 8 W. R. 193.

dings were raised as places of worship. The learned Judges refused to direct a partition on the ground that to divide them would be to render them utterly unsuitable for the purpose for which they were originally built. The learned Judges further held that:

"according to the Hindu Law, places of worship and sacrifice are not divisible, and the parties may enjoy their turn of worship unless they can agree to a joint worship."

This case has been referred to in various subsequent cases in this Court and in Allahabad and Madras and has never been dissented from. I am, therefore, of opinion that, whatever may be the right of the plaintiffs with regard to the other joint properties, the Thakurbari which is described in item 2 of Sch. Ka of the plaint is not divisible. But I am of opinion that there is another ground which I shall deal with presently on which this property should also be held to be not capable of partition.

The most important question that was argued before us by Mr. Brojolal Chakravarti on behalf of the defendants appellants was raised in issue 10 which runs thus:

"Is the debuttar a legal and valid gift and binding on the plaintiffs; can the plaintiffs impeach it now?"

As I have stated before, this deed of gift was executed on 11th February 1902 by the lady Anandamoyee along with the male members of the family. The law as regards the right of qualified owners to make a gift of properties inherited from the last male owner for pious purposes has been the subject of consideration in the several High Courts in this country recently. The cases are *V. Tattaya* v. *Ramakrishnamma* (2); *Khublal Singh* v. *Ajodhya Misser* (3) and *Kunj Behari Lal* v. *Lailu Sing* (4). All these cases have been approved by their Lordships of the Judicial Committee in the case of *Sardar Singh* v. *Kunj Behari Lal* (5). The result of the authorities is, in the opinion of their Lordships, that Hindu Law recognizes the validity of the dedication or alienation of a small fraction of a property by a Hindu female for the continuous benefit of the soul of the deceased owner. In this case, it can hardly be disputed that the dedication would be conducive to the benefit of the soul of the deceased owner Krishna Charan. It was an ancestral deity of the family and to make provisions for the due performance of the sheba and poojah of the deity would be a meritorious act which, according to Hindu idea, would confer benefit as the soul of the deceased owner.

The question, therefore, resolves itself into this, as to whether the lady was justified in making a dedication of the property having regard to the pecuniary circumstances of the family; or, in other words, whether it was a fraction of the property belonging to the deceased owner or it was such a substantial portion of the property that this alienation in favour of the Thakur cannot be supported according to law. The reason why this limitation has been put on the powers of a Hindu female will appear from the fact, as stated by the learned Judges of the Madras High Court in the case of *Tattaya* v. *Ramakrishnamma* (2) above cited, that almost every gift, according to Hindu notions, is capable of conferring spiritual benefit more or less to the deceased owner. It is contended by Mr. Brojo Lal Chakravati that the gift in the present case stands on a higher ground than an ordinary gift by a qualified owner for pious purposes. He points out that it was the ancestral Thakur of the family and that it was the bounden duty of the members of the family to see that the sheba and bhog and pujah were carried on adequately of the ancestral Thakur. It is pointed out to us that the pujah expenses derived from the property dedicated are not of such an extravagant nature as to call for any comment. On the other hand, he shows from some of the accounts that the pujah is performed on a very limited scale and that, even then, that the expenses are not all covered by the income of the dedicated property. When I asked him whether there was authority either in the texts or in any decided cases that gift to a family idol should be looked at from a point of view different from other pious gifts, he admitted that he had not been able to find any. Under these circumstances, I do not think that

(2) [1910] 34 Mad. 288=20 M. L. J. 798=6 I. C. 240=(1910) M. W. N 222.
(3) [1916] 43 Cal. 574 = 31 I. C. 433=22 C. L. J. 345.
(4) [1919] 41 All. 130 = 48 I. C. 847 = 16 A. L. J. 996.
(5) A. I. R. 1922 P. C. 261=44 All. 503=49 I. A. 383. (P. C.).

it would be proper for us to extend the rule laid down in the cases I have mentioned by saying that, where the gift is in favour of a family idol, we should not look to the proportion of the property inherited by a female which was dedicated but we should look to the necessity of the idol in order to judge whether the dedication was proper or not.

It is next argued that, even if we take the standard of a small fraction of the property belonging to the late owner, then also this dedication may be supported and, in support of this, Mr. Brojolal Chakravarti points out from the evidence of plaintiff 1 himself that, during the lifetime of the lady Anandamoyee and also during the lifetime of the plaintiffs' mother down to the year 1920 B. S. the monthly payment for the maintenance of these ladies made out of the joint karbars was Rs. 15. The rent derived from property No. 3 was only Rs. 19 a month and it was argued that some portion of it must be kept apart for repairs and other expenses. Taking that to be the standard, it was argued that we might take Rs. 16 a month as the income derived from property No. 3 If that is so, Anandamoyee's share was Rs. 4 a month and, as she was getting Rs. 15 this Rs. 4 a month would be about a fifth of the total income that she was dedicating in favour of the idol. This argument has the merit of ingenuity but the difficulty of accepting it is this, that the defendants do not give any evidence as regards the circumstances of the family at the crucial moment, that is, the year 1308, when this dedication was made. It is true that the plaintiffs admit that Rs. 15 per month was paid to the ladies on account of their maintenance; but whether this sum was paid out of the profits or out of the assets of the karbars there is no evidence to show. As a matter of fact, the karbars ceased to exist some years after this dedication. It seems to me that this dedication was thought of because the family was going down in prosperity. As it appears that the Thakur was an old established Thakur, no permanent provision was made by the family for carrying on its sheba and pujah because probably the founder thought that their prosperity would continue. But when the male members of the family found that they were going down in prosperity as pious men they thought that some permanent arrangement should be made for the sheba of the idol and therefore, they joined together and made this dedication. As male members, they were free to deal with their own property. The question is whether the qualified owner, the widow, was able to do so. In the absence of any evidence, as I have said, as to the nature of the properties then owned by the family, it appears that they had only the three houses and the income from the shops was a doubtful one. In one house, they were living. The second was the Thakurbari in which the idol was located and the only source of income was property No. 3 apart from the shops. It is, therefore, difficult to hold that this dedication of property No. 3 was proper under the circumstances of the case on the part of Anandamoyee so as to bind the next reversioners. In my opinion, therefore, this dedication cannot be binding upon them and this property is liable to be partitioned.

Property No. 2, Sch. ka of the plaint, however, stands on a different footing. It was in the occupation of the idol. It was yielding no income and, therefore, even assuming that this property was not impartible, as I have already said, it cannot be said that the dedication of this property to the idol by the lady Anandamoyee was improper. As a matter of fact it might be that when the idol was located in the house for generations before these brothers came into possession of this property, there might have been a verbal dedication by the person who had established the idol. But no case has been made to that effect. However that may be, in my judgment the plaintiffs cannot assail the deed of endowment to which Anandamoyee was a party with regard to property No 2, as this was not capable of producing any income.

In my view, therefore, the decree of the Subordinate Judge should be modified in this way. There will be a partition of property No. 1 and property No. 3, Sch. ka of the plaint. No accounts will be directed as regards the karbars Nos. 1, 2, 3 and 5, Sch. ga. Defendant 1 alone would be liable to render an account of the ornaments that were placed with him with the consent of the other cosharers. at the time when karbar No. 3

was closed. In making the partition, the learned Subordinate Judge will direct the commissioner to take into account any improvement made by defendant 1 or any other of the defendants, and the improvement that was made at the expense of a defendant will be allocated to the share of that defendant in making the partition. The plaintiffs will get a fourth share of the dwelling houses in plot 1 and plot 3, Sch. ka. Each party will bear its own costs in both the Courts up till now. Furture costs will depend upon the directions to be made by the Court below.

Rankin, C. J.—I entirely agree.

V.B./R.K. *Decree modified.*

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* A. I. R. 1930 Calcutta 178
Full Bench

RANKIN, C. J. AND C. C. GHOSE AND BUCKLAND, JJ.

Ganga Sagor, Ananda Mohan Shaha, In the matter of.

Income-tax Ref. under S. 66 (3), Decided on 4th July 1929, made by Commissioner of Income-tax, Bengal.

*** Income-tax Act (11 of 1922), S. 25-A—Business started by brothers forming undivided family governed by Dayabagha school of Hindu Law—Heirs continuing business separated in mess, worship and forming as many branches as original brothers—Separate accounts with respect to business and in addition separate independent business—Main business accounts not adjusted—Separate returns in compliance to notice under S. 38—Separate assessment with regard to each separate independent business of each branch together with share in main branch for particular period—Assessment of main business as unregistered firm held justified.**

Four brothers, governed by the Dayabagh school of Hindu Law, forming members of an undivided Hindu family started a business. On their death the business was continued by their sons and grandsons. For many years the heirs of the said brothers had drawn money separately from the business, the moneys being debited to separate accounts of the four branches in the books of the business. The heirs separated in mess and had been living in separate houses (the heirs of each brother living in the same house and in the same mess) the costs of constructing which were drawn from the business and debited to the accounts of the heirs separately. The cost of messing was made separately by each branch and likewise the expenses of education of the children and marriages. No family idol was maintained. In addition to the main business the branches carried on independent business of their own. The accounts of the main business were never adjusted. At previous assessment each branch was assessed with regard to one-fourth share of the main business together with income from independent business and the bona fide annual value of the house property belonging to the branch. The four separate branches filed separate returns and in compliance to the notice of S. 38, each separate branch was shown as the proprietor of the one-fourth share in the main business giving names of male, female and the minor partner in the branch. The assessees contended that in law the said branches ought to be regarded as members of Hindu undivided family, that the business in question ought not to be assessed as an unregistered firm.

Held: (1) that the original undivided Hindu family in question had ceased to exist and in place thereof thsre were four undivided Hindu families: 31 *Cal.* 262 (*P.C.*) and 5 *B. L. R.* 347 (*F.B.*), *Ref.*;

(2) that specific properties had been assigned to specific coparceners;

(3) that the business accounts were not adjusted did not outweigh the inference that they had specific portions separately assigned;

(4) that for the purpose of the assessment to income-tax it was correct to treat the main business as an unregistered firm. [P 180 C 1, 2]

N. C. Bysack, Gopal Chand Das and *Satyendra Kumar Ghose*—for Assessees.

S. N. Sirkar and *N. N. Bose*—for Commissioner of Income-tax.

C. C. Ghose, J.—In this matter the Commissioner of Income-tax, Bengal, was directed by an order made by this Court on 13th December 1927, to state a case for the opinion of the Court whether or not the assessees were entitled to be treated for income-tax purposes as a Hindu undivided family. The Commissioner of Income-tax has accordingly stated a case for the opinion of the Court.

The facts found by the Commissioner of Income-tax are as follows: It appears that four brothers governed by the Dayabhagha school of Hindu Law named Ganga Sagar, Ananda Mohan, Broja Mohan and Hari Mohan Shaha, who were members of a Hindu undivided family started a business many many years ago. These four brothers are dead and their sons and grandsons are now carrying on the business. The places of business at present are, among others, Calcutta, Dacca, and Backerganj, the head office being at Dacca. For many years past, the heirs of the said four brothers have drawn moneys separately from the business the moneys being debited to the separate accounts of the heirs of the said four brothers in the books of the business. These heirs separated in mess about 15 or 16 years

ago and have been living in four separate houses (the heirs of each of the four brothers living in the same house and in the same mess), the cost of constructing which was drawn from the business and debited to the accounts of the heirs of the said brothers respectively. The cost of messing is met separately by each of the four branches and likewise the expenses of marriages and education of children. No family idol being maintained by any of the separate branches of the family, no question of joint worship arises.

The Commissioner of Income-tax states that in the books of the business there is no capital account either in the name of a joint family or in the names of the separate branches, but there are accounts in the names of the heirs of the said four original proprietors showing their drawings from the business. The credit side shows either nil or some paltry sum while the debit side in every case shows a large sum. The accounts of the business have never been adjusted and the accounts in the names of the heirs of the said four original proprietors have not also been adjusted. The balances are carried forward from year to year. Further the said four branches have got separate businesses of their own which are separately assessed to income-tax. In each of these assessments, a one-fourth share of the main business together with the income of the separate business of the particular branch of the family and the bona fide annual value of the house properties belonging to that branch are taken into account. The house properties were acquired with moneys drawn from the main business debited to the account of the respective branches.

The Commissioner of Income-tax also points out that the business has throughout been assessed as an unregistered firm and that the four separate branches have filed separate returns of their own income and have been assessed separately since the year 1923-24. In July 1927, the assessees in compliance with a notice under S. 38 of the Act gave a list of "angshidars" (the word "angshidars" literally translated means sharers). In this return each separate branch of the family was shown to be the proprietor of one-fourth share in the business in question. It also shows not only the names of the male sharers or partner but also of female and minor partners.

On the case as submitted by the Commissioner of Income-tax it has been argued on behalf of the assessees that in law the said four branches ought to be regarded as members of a Hindu undivided family and that the business in question ought not to be assessed as an unregistered firm.

Now every Hindu family is presumed to be joint in food, worship and estate. Under the Dayabagha Law each coparcener takes a defined share. The essence of a coparcenary under the Mitakshara Law is unity of ownership whereas under the Dayabhagha Law the essence of a coparcenary is unity of possession. So long as there is unity of possession, no coparcener can say that a particular share of the property belongs to him. That he can say only after a partition. Partition then, according to the Dayabhagha Law, consists in splitting up joint possession and assigning specific portions of the property to the several coparceners. But there is no presumption that a family, because it is joint, possesses joint property or any property. Where there is joint estate and the members of the family become separate in estate, the family ceases to be joint. Mere severance in food and worship does not operate as a separation. Cesser in commensality is an element which may properly be considered in determining the question whether there has been a partition, but it is not conclusive: *Ganesh Dutt* v. *Jewaeh Thakurain* (1) and *Rang Nath* v. *Narayanswami* (2). If, however, after cesser in commensality any member of the family is in possession of any portion of the property separately, the presumption referred to above is considerably weakened. No doubt it is true that the mere fact that a property is purchased in the name of a member of the family and that there are receipts in his name respecting it, does not render the property, by itself, his separate property; but if in addition to the fact that certain property stands in the name of one of the members, there be these further facts, namely, that some other members of the family have properties standing in their sepa-

(1) [1904] 31 Cal. 262=31 I. A. 10=8 C.W.N. 146 (P.C.).

(2) [1908] 31 Mad. 482=31 I. A. 10.

rate names and are found to deal with the same as their own without reference to the rest of the family and that the members of the family are allowed to appear to the world to be the sole owners of the said separate properties, the presumption that the properties are joint is almost gone and the burden of proving that the properties are still joint will lie on those who allege that they are joint. If the family remains joint, no charge can be made against any coparcener because in consequence of his having a larger family to maintain than others, a larger share of the joint income was spent on his family. Such expenditure is considered to be the legitimate expenditure of the whole family. If, however, the expenses of the marriages of the daughters and of the education of the children are paid for separately by the coparceners, that is a circumstance which must be taken into consideration for the purpose of finding out whether the family still remained joint: *Abhoy Chandra* v. *Peyari Mohan* (3).

These being the guiding considerations, each case must depend upon its own facts; and in my opinion the facts set out by the Commissioner of Income-tax taken together are only consistent with the position that the original undivided Hindu family in question has ceased to exist and that in place thereof there are four undivided Hindu families. It is not necessary to go over the facts again. But there can be hardly any doubt that specific portions of the property or specific properties have been assigned to specific coparceners. That amounts to cessation of joint estate. It is true that the moneys required for the acquisition of the said properties came from the main business. But where one finds, as in this case, that the business has descended to the third generation who are in enjoyment of separate house properties and who have, in addition, separate businesses, the fact that the accounts of the main business have never been adjusted throughout these long years is not a circumstance which can be allowed to outweigh the inference properly deducible from the other facts referred to above. Further, the events which have taken place since 1923-24 about the separate assessment of the said four branches can hardly be overlooked. In my opinion, all the circumstances set out above indicate that the income-tax authorities are right in treating the main business as an unregistered firm. In my opinion, the assesses must lose and must pay the costs of this reference.

(3) [1870] 5 B. L. R. 347=13 W. R. 75 (F.B.).

Rankin, C. J.—I agree.

Buckland, J.—I agree.

V.B./R.K. *Reference answered.*

A. I. R. 1930 Calcutta 180

RANKIN, C J., AND C. C. GHOSE, J.

Panchanan Banerjee and *another*—Appellants.

v.

Surendra Nath Mukerjee and *others*—Respondents.

Appeal No. 84 of 1928, Decided on 11th April 1929, against original decree in original Suit No. 1853 of 1927.

(a) Hindu Law — Religious endowments—Shebait—Stranger cannot succeed to office.

In order to be entitled to succeed to hereditory shebaitship it is not necessary to show that the claimant is one of the heirs of the founder's heirs. It is enough if he can make out that he is the heir of the last shebait. But where the person claiming the right is a mere stranger to the shebaitship and the dedicated properties he cannot succeed in his suit. The rights of the parties are to be governed by the founder's will : 22 *C. L. J.* 404, *Foll.* [P 182 C 1; P 185 C 1]

(b) Hindu Law — Religious endowments—Shebait—Shebait (widow) cannot sell office even to next successor for pecuniary benefit—Hindu Law—Widow—Compromise.

A shebait is incompetent to sell his religious office for his own pecuniary benefit even if he sells to the person next in succession to the office. Where a widow who is representative of the debuttar estate in certain testamentary proceedings withdraws her caveat and receives a certain sum of money in satisfaction of her right of residence, maintenance and all other claims including claim to the debuttar estate it is a bad bargain on her part and cannot be supported. The transaction cannot be upheld on the ground of a bona fide compromise : 1 *Mad.* 235 (*P.C.*); 17 *Cal.* 557 ; 23 *Bom.* 131 and 1 *C. W. N.* 493, *Foll.* ; *A. I. R.* 1926 *Cal.* 490 ; 35 *Cal.* 226, *Ref.* 36 *Cal.* 975 ; 6 *Bom.* 298 and 15 *Mad.* 183, *Dist.* [P 182 C 2; P 184 C 2]

(c) Cosharer — Adverse possession — In order to treat possession of one co-owner as adverse, ouster must be proved.

In the case of co-ownership the possession of one co-owner is possession of all. In order that it may be treated as adverse possession there must be ouster or the equivalent to an ouster. The party pleading adverse possession should, therefore, prove that the posses-

sion of persons through whom he claims is adverse and amounts to ouster. Where the plaintiff is a stranger he cannot tack the possession of persons through whom he claims.
[P 185 C 1,2]

N. N. Sircar, S. C. Bose and *S. C. Mitter*—for Appellants.

S. N. Banerjee, S. Ghose, S. M. Bose and *S. B. Sinha*—for Respondents.

Rankin, C. J.—In this case the plaintiff Panchanan Banerjee brought his suit making as co-plaintiff the deity or Thakur Sri Sri Issur Sitaram Chandra Jiu. The object of the suit is to have a declaration that the plaintiff Panchanan Banerjee is the sole shebait of the deity in question and the main purpose of the plaintiff in seeking this declaration is explained by the fact that certain property dedicated to this deity has been acquired by the Calcutta Improvement Trust and that an award of Rs. 84,000 has been made as compensation therefor. This money is now lying in a certain Court and the plaintiff has brought this suit to establish that he is the person who is in charge of or managing the properties of the deity and that he is entitled and solely entitled to collect this money. So far as the property is concerned it appears from an affidavit of assets which was filed (in the Goods of Soshi Bhusan) in 1922 that the items 1, 2 and 3 and 3/1, Balaram De Street were assessed to rates by the Corporation of Calcutta upon certain annual values—those annual values total a sum of Rs. 2,294. But beyond this reference in the affidavit of assets I am not aware that there is any real evidence as to the income that has in the past been obtained from these properties, nor is there before the Court any statement of account showing what has been done with that income during the last 20 years or so.

The endowment with which we are concerned was made by one Ram Chand Mukerjee and if we desire to know the conditions of the endowment and the order of succession to the shebaitship we have to study the will of Ram Chand Mukerjee. It appears that the founder Ram Chand Mukerjee died so far back as 1862. He left a son Panchanan by his first wife and two sons Ramlal and Sashibhusan by his second wife. Panchanan it appears had no son. His branch is made a party to this suit by his daughter's sons of the name of Ganguli who though impleaded have taken no part in the proceedings. They were impleaded at the instance of the learned Judge aud not at the instance of the defendants. Ramlal and Sashibhusan died in 1895 and 1911 respectively. Ramlal's branch is represented by his grandson Surendra and two sons Greedharee and Juggernath who are defendants to the suit and contest the plaintiff's claim to be the sole shebait of the idol. Sashi, as I have stated, died in 1911. He had a son Kherode who predeceased him. Kherode had a son Ramsevak and a daughter Ganesjanani. Ramsevak died in 1923 leaving his widow Mayabati. Ganesjanani had married a man named Ram Kali and the plaintiff is their son.

It appears that after Ram Chand's death there was a partition suit between his sons and his secular properties were divided not on the basis that by his will absolute interest went to Ram Chand's grandsons but on the basis that his sons took an absolute interest in the property. The properties having been divided it further appears that litigation ensued between the brothers and in the end the interest of Ramlal in the property left by his father was purchased in execution by his brother Panchanan. By the will of Ramchand Mukerjee apart from his gift to his sons to which I shall refer in a moment Ram Chand left a legacy of Rs. 30,000 to be invested in company's paper or landed properties and reserved separately for the maintenance of the deity with which we are concerned. The interest or rent accruing due on the Rs. 30,000 was intended by him as an endowment to the deity. His three sons were all executors to the will and they were all responsible for the fact that this sum of Rs. 30,000 was not at first set aside but after the property had been partitioned between them in the manner to which I have referred and after Ramlal's interest therein had been purchased by Panchanan, Panchanan and Sashibhusan agreed that the properties now in question should be given over to the idol in satisfaction of the legacy of Rs. 30,000 which had been given by their father under his will. I mention this to show that there can be no doubt that the properties with which we are concerned

are governed by the terms of Ram Chand's will and that the rights of the parties as regards the management of this debuttar property are to be found in the first instance by scrutiny of Ram Chand's will. Now the passage in the will is to the effect that there are certain idols of an ancestral character and there is this idol to which I have referred and which has been established by Ram Chand himself. The will goes on to say: "Seba or service I make over to my three sons for interest" and it appears that by this he means that he makes them over to his sons for their lifetime. The will then states:

"after their death my sons' sons will get absolute the said real property and the seba and services of Sree Sree Ishore Jeeoos or Deities."

It goes on to point out that if any of his sons die without leaving a son or adopted son or son's son then his share will be included in his "estate" and his two surviving sons will enjoy and possess and that after their death their sons will get absolutely the shares of their respective fathers.

The first question which arises upon this direction in the will of Ram Chand is whether or not the plaintiff has to make out, apart from a claim by adverse possession, that he obtained shebaity right by being an heir of Ram Chand Mukerji. In my view it is wrong to say that according to the direction of the founder no person in time to come shall be a shebait unless he is an heir of Ram Chand and it appears to me that it is consistent with the direction of Ram Chand and with the ordinary principle applicable to this matter that the plaintiff should be entitled to make out a right to be one of the shebaits of this Thakur by showing that he is an heir of Soshibhusan. In the case of *Kunjamani Dasi* v. *Nikunja Behari Das* (1) this question was discussed and it will suffice to refer to that case as being a reason for rejecting the contention that it is necessary for the plaintiff to show that he is one of the heirs of the founder himself.

Now the plaintiff's case is made out in this way. He says that at the time of Ram Chand's death Panchanan had no son, and that the right to shebaitship became vested in Ramlal and Sashibhusan. He says that Sashibhusan during his lifetime was the only person who in fact enjoyed and possessed the office of shebait and that, whatever be the reason up to 1895 while Ramlal was alive and after Ramlal's death from 1895 to 1911, there is no evidence of Ramlal or any of his sons taking part with Sashibhusan in the management of the debuttar property. Sashibhusan in his will claimed to have a right to nominate his successor and he nominated Kherode by his will and Kherode's son Ramsevak. From 1911 to 1923 Ramsevak conducted the worship and managed the property of the deity and during all this time there was no claim on the part of any of the sons of Ramlal or any representative of Panchanan to have an interest in the worship or in the management of the property. Then it is said that after Ramsevak's death his widow Mayabati Debi became his heir and made an arrangement with this plaintiff in the probate suit (No. 3 of 1925) by which she gave up her claim to shebaitship in favour of Ramsevak's estate and in this way Mayabati has effaced herself and the plaintiff is entitled not only to succeed Ramsevak in his office but also to claim exclusive possession of this office.

Now there are two main questions in this case. One is whether the transaction with Mayabati is a good transaction so as to enable the plaintiff to claim as representing the line of Ramsevak and Sashibhusan and secondly if so whether the possession of the office by Sashibhusan and Ramsevak enables the plaintiff to set up a right by adverse possession.

In my opinion, the bargain between Mayabati and the administrator to the estate of Ramsevak to the effect that Mayabati would give up her right to the shebaitship is a bad bargain and cannot be upheld. The learned Judge has treated it as being an attempt to sell a religious office, an attempt on the part of a person who has succeeded to the office of shebaitship to sell her right for own pecuniary advantage. In my judgment, that is the right way on the facts of this case of treating this transaction. The learned Judge says :

"It was first argued that this was a good sale for the benefit of the deity, but that is an untenable position. Shebaits cannot traffic in dedicated properties".

(1) [1915] 22 C. L. J. 404=32 I. C. 823 = 20 C W N. 314.

He then dealt with various other matters and said:

"It was then argued that the lady surrendered her right. This was said to be analogous to the surrender of her estate by a widow. But that doctrine depends on the effacement of the widow and the complete surrender of her estate and cannot, therefore, be arranged for cash. Then it was said to be a family arrangement but the entire family was not consulted and even the coshebaits were not consulted and therefore it was not valid as a family settlement. It was suggested that it was a compromise of a claim and not an alienation. But the sum and substance of the transaction was the sale of a religious office for money and that is entirely wrong and utterly invalid and in matters of this description it is the substance of the matter that decides its validity and it matters not what it is called and it is hopeless to try to give an open and shameless sale a mere politic name after it has been perpetrated."

Now the language of the learned Judge is somewhat strong but I do not dissent from it. Ramsevak had for several years been at enmity with his wife. It appears that she had to take recourse to a police Court to make him pay her maintenance and that he was ordered to pay her Rs. 20 a month. When he made a will he provided that she would be paid this Rs. 20 a month for her maintenance and that she would get nothing more, and that the plaintiff, his sister's son would take the estate. Mayabati entered a caveat against the will of her husband and the caveat raised the question whether the will was duly executed. On that qnestion the Court was proceeding to give a decision and Mayabati then took the position of a person who agreed as part of the settlement that the Court should pronounce in favour of the will holding it to be a perfectly good will but stipulated as a term of her giving consent to the grant of probate of the will that she would get no less than Rs. 20,000. Now it is true that by this Rs. 20,000 she would compound the right which she would get under the will. It was also a term of the settlement that she would get Rs. 20 a month until the entire sum of Rs. 20,000 was paid to her and accordingly, the bargain was carried out. The original terms of settlement read that:

"in consideration of the sum of Rs. 20,000 to be paid to the defendant Mayabati absolutely she withdraws her caveat"

but that was changed subsequently and it was settled that Mayabati should

"receive payment of Rs. 20,000 absolutely from the estate of Ramsevak deceased; that Rs. 20,000 shall be a charge on certain property and that the payment of the sum of Rs. 20,000 will be in full discharge and satisfaction of all her claims against the estate of the deceased for her right of residence and maintenance as a Hindu widow and all other claims whatsoever including claim to the debuttar estate."

Now in any reasonably strict sense she had no claim or pretence of claim to or against the debuttar estate but she had the right to the office of shebait or trustee of that estate. She had lent no money to the estate or to the previous shebait as such. I will assume, however, that her claim to the office of shebait was intended to be politely clothed by the expression used. Also that her release of her right to the administrator under Ramsevak's will was meant to operate as a transfer or surrender of the office to the plaintiff. I ask myself:

"what had this lady's claim to the debuttar estate to do with the validity or invalidity of the execution of Ramsevak's will ?"

The answer is "nothing whatsoever." What she was attempting to do was to make some money out of her obstruction to the grant of the probate of the will, and what the administrator the person bargaining with her has done in the matter is only too clear. He endeavoured to buy her off by obtaining her consent to abandon, relinquish or transfer all her claim to the estate. She wanted Rs. 20,000. He was willing to give her that sum if it included a bargain that she would not make any claim to "the debuttar estate." A document was afterwards made out in the form of a release in which it was witnessed that in consideration of a sum of Rs. 20,000 she released to the administrator all her claims against the estate of the deceased Ramsevak "including her claim to the debuttar estate." We have to make up our minds whether it is a valid arrangement under Hindu law either for the effacement of Mayabati or for transfer of her right to the shebaitship. I am of opinion that this is not an arrangement which can be supported upon principles which are applicable to the subject. If a person sells religious office it is contrary to what was laid down by the Privy Council in the well-known case of *Rajah Vurma Valia* v. *Ravi Vurmah* (2). The doctrine on the subject has recently been considered by my learned brother Page, J., in the case

(2) [1876] 1 Mad. 235=4 I. A. 76=3 Sar. 687 (P.C.).

of *Nagendra Nath Palit* v. *Rabindra Nath Deb* (3). This is a clear case of a sale by which a shebait is trafficking for gain in her own office and that is the fundamental and real character of the transaction. It is said that just as there is an anomalous doctrine by which a widow many accelerate the opening of the reversion to her husband's estate by surrendering the whole interest which is vested in her, effacing herself and assuming a character that is at times compared to civil death, so with reference to the office of a shebait if she abandoned the office or surrendered it so as to let in the next reversioner the transaction may be considered good although in the ordinary way the sale of a religious office for gain will not be valid. I am of opinion that the transaction before this Court is in no way analogous to a valid surrender by a Hindu widow of her whole interest in her husband's estate. This case to my mind is a mere device by which Mayabati was trying to get as much cash as possible from the estate. It is then said that Mayabati if she had a claim to represent Ramsevak's estate so far as the shebait is concerned might make a bona fide compromise not contrary to the interest of the idol. (She was not of course in any way thinking of acting for the benefit of idol in making up her mind to convert the office into cash.)

But I cannot see that there was any question which could call for compromise in a probate suit and which had any reference to the deity. Whether the will was a good will or a bad will the claim to represent the deity stood untouched. It was thrown into the probate suit merely as something to bargain with because it was coveted by or on behalf of the plaintiff and it was capable of being turned into money. It is quite true that where a surrender by a Hindu widow of her whole interest is bona fide, as for example when it is necessary to enter into a reasonable compromise as to litigation as to her husband's estate the transaction will not be upset because of a reasonable provision for maintenance: *Sureswar* v. *Maheśrani* (4) and there are cases with even any reasonable provision for her debts. But that is not this case. I do not think that the transaction can possibly be upheld unless we are to say that a shebait may sell his office so long as he sells to the person next in succession to the office. This proposition I refuse to accept. A person cannot be compelled to accept the office of shebait and may be entitled to refuse to continue in it. It may well be that in such a case the office goes to the person then next in succession. But a sale of the office is in my judgment a different thing and the purchaser cannot enforce it. In *Mancharam* v. *Pranshankar* (2) and *Narayana* v. *Ranga* (6) such a sale was thought to be good but in my judgment these authorities should not be followed. In *Rajeshwar Mullick's* case (7), Maclean, C. J., said:

> "No doubt, there are cases and authorities for the proposition that a shebait may by an act inter vivos alienate the shebaitship; but I think I am fairly stating the result of those cases when I say that such alienations are not regarded with much favour, and that somewhat special circumstances must exist to support them."

In *Nirad Barani Dasi* v. *Shibadas Pal* (8) an alienation had been made to a coshebait and it was upheld expressly on the grounds that it was in the interest of the worship and :

> "seems to have been made without any idea of personal gain."

In *Khetter* v. *Hari Das* (9) Banerjee, J. said :

> "It is true that Hindu law prohibits the sale of an idol and also the partition of it though when there are several idols partition is recognized by custom. But there is no absolute prohibition against the gift of an idol."

The learned Judge was himself no mean authority of the most difficult questions of Hindu Law and he supported these propositions by quoting very high authority. In *Rajaram* v. *Ganesh* (10), Ranade, J., said that :

> "the text law admittedly prohibits both partition and alienation"

and vested the validity of such transaction in custom. On this view, that there is a difference between a sale and a transaction not tainted by the motive

(3) A. I. R. 1926 Cal. 490=53 Cal. 132.
(4) A I. R. 1921 P. C. 107=48 Cal. 100=47 I. A. 233 (P.C.).
(5) [1882] 6 Bom. 298.
(6) [1891] 15 Mad. 183=2 M. L. J. 19.
(7) [1907] 35 Cal. 226=7 C. L. J. 315=12 C. W. N. 323.
(8) [1909] 36 Cal. 975=3 I. C. 76=13 C. W. N. 1084.
(9) [1890] 17 Cal. 557.
(10) [1898] 23 Bom. 131.

of private benefit to the transferrer is a proposition for which *Rajah Vurma's* case (2) is sufficient authority.

In my judgment, the plaintiff is not entitled to stand in the shoes of Ramsevak for this purpose. He is a mere stranger to this religious office and dedicated property and on that ground alone his suit cannot succeed. It cannot succeed on any ground of adverse possession because there has not been 12 years' possession since Ramsevak's death, and if the plaintiff is a mere stranger it is quit clear that he cannot tack the possession of Sashibhusan and Ramsevak so as to get any right to the shebaitship of the deity.

I shall now proceed to deal with the question whether or not the learned Judge was wrong in refusing to hold that the plaintiff has established that the branches of Ramlal and Panchanan forfeited their rights in this shebaitship by suffering the branch of Sashibhusan to hold possession adversely for over 12 years. In my judgment the case is governed by Art. 124, Sch 1, Lim. Act. What has to be shown is that if Ramsevak's representative or Panchanan's representative had brought a suit in 1927 they would have been barred from asserting their right to be shebaits. If this is made out under Art. 124 then it appears to me that under S. 28, Lim. Act, their right would come to an end. The question is whether there has been a lapse of 12 years from the time when Sashibhusan or his representative took possession of the office adversely to the branch of Ramsevak or Panchanan. There is no dobut that the branch of Sashibhusan had possessed this office for much longer than 12 years. The question is :

"Did they possess it adversely to the branch of Ramsevak or Panchanan?"

Now the learned Judge has drawn our attention to the decision of the Privy Council in *Corea* v. *Appuhamy* (11) which was not a case about possession of an office but about possession of land and other properties and has pointed out that if a person who has title takes possession, his possession will as long as possible be attributed to his title rather than attributed to a wrongful act or assertion of right which was not possessed by him.

In the case of co-ownership the law is very familiar in this Court, namely that the possession of one co-owner is possession of them all. In order that it may be treated as adverse possession there must be ouster or the equivalent to an ouster. It is familiar law in this Court that when one party out of several has in fact the enjoyment of the property the circumstances may be such and the exclusive enjoyment may be for so long a period as to be some evidence that his holding is adverse to the co- owners though the view taken in this Court is that the possession is not necessarily or usually deemed to be adverse from its commencement. I regard this question as a question of fact and I have to see whether it is established beyond doubt by the plaintiff that the circumstance that Sashibhusan and Ramsevak were allowed to manage this property and conduct the worship of this deity was an open assertion to the knowledge of the other branches that they were claiming a right to exclude the other branches from the shebaitship. As to that the plaintiff's case at the beginning is very unsubstantial indeed, because we find from the will of Sashibhusan that when he died in 1911 he professed to have carried out the duties of shebait by the consent of his brother Ramsevak in his lifetime, so that, it does not seem to me that the plaintiff makes any headway at all during the lifetime of Sashibhusan. Then we find that Ramsevak from the year 1911 to 1923 carried out the worship and the management of this idol just as Sashibhusan did. We remember that the possession of this branch began by arrangement or consent. It is quite clear that Ramsevak's continuance of what has been done by Sashibhusan cannot be assumed to be adverse straightway. Sashibhusan's will was not proved till 1922. There was no effort made to show that the terms of the will were drawn to the attention of anybody or that Ramsevak openly or at all was claiming to be acting under a gift of the shebait contained in Sashibhusan's will. There is no evidence that the branch of Ramlal or Panchanan knew or was likely to know what remarks were put upon the receipts

(11) [1912] A. C. 230=81 L. J. P. C. 151=105 L. T. 836.

from tenants. We have to deal with this matter broadly, and we find that there is a complete absence of any evidence of steps taken by Ramsevak which would call the attention of the members of the other branches to the fact that he was claiming that the branch of Ramsevak alone had any right to the sebaitship of the foundation of Ram Chand.

There is one important matter which remains to be considered. There is no evidence showing what the annual profit of Ramsevak was. In point of theory the shebait's duty was to spend the whole of the income on the worship of the deity. I suppose, however, that if the deity had a substantial income it is quite clear that the right to disburse that income in the worship of the deity would be a valuable right. Now the learned Judge has dealt with this case on the footing that there was no profit and that Ramsevak was permitted by the other members of the family to carry on the worship as an "honorary shebait" just as Sashibhusan had been doing. It is difficult to be sure whether in Ramsevak's time or at any given time the income produced by this property was very substantial. I have said we know what the Corporation assessment was, and what actual value was put upon it by the Calcutta Improvement Trust but whether this property dedicated to the deity yielded an income much more than was necessary to conduct the worship is a matter on which the evidence is scrappy and inconclusive. The learned Judge says :

"Presumably the shebait makes no profit out of his office and it is not suggested that Ramsevak did so."

He further says :

"In all the circumstances specially as there were no profits to share everything concurs to show that there was no ouster."

Looking at the matter as a whole it does not seem to be of very great importance whether the idol was removed to Sashsbhusan's house or whether it was left in the Thakurbari with other family idols. It is quite clear that Sashibhusan was the only person who conducted the worship. Ramlal had in a sense no strong claim in his lifetime because he was the person whose property and been sold to his brother Panchanan. It was really Panchanan and Sashibhusan who had to make up the legacy of Rs. 30,000. It seems to me that the other branches of the family might leave it to Sashibhusan's branch without depriving themselves of their rights under Ramchand's will. The learned Judge's judgment was very full and clear on this part of the case and his conclusion was that Ramsevak stepped into the shoes of his grandfather and that it was usage and course of dealing which he vouched to explain his conduct.

In these circumstances I am not prepared to dissent from the judgment of the learned Judge upon this question of fact. I do not think that a heavy burden has been discharged. The plaintiff's case was brought in 1927. If it be not clear that up to 1916 there was adverse possession then Ramlal's branch is not barred by 12 years' adverse possession. A period of 12 years' adverse possession must be proved up to the hilt and conclusively proved by the plaintiff. I am not prepared to say that from 1911 to 1916 it is shown that Ramsevak's possession was adverse.

The learned Judge after coming to the conclusion that the plaintiff had no right proceeded to dispose of the rights of other parties by declaration. Now none of the members of Panchanan's branch of the family appeared before the Judge and no one of Ramlal's branch, asked for any relief of this sort nor did Mayabati. In these circumstances I think it is unreasonable, the plaintiff having been found to have nothing to do with the matter, that the Court should insist in a difficult matter and upon materials which may be very incomplete upon defining the rights of these parties and as objection is taken by those who have appeared I am of opinion that that part of the learned Judge's judgment which gives a declaration as to the rights of these defendants should be discharged altogether.

The result is that the appeal by the plaintiff is dismissed with costs and the suit stands dismissed with costs and the declaration which the learned Judge has made is set aside.

The cross-objection is allowed but without costs.

C. C. Ghose, J.—I entirely agree The matter has been dealt with at such length by the learned Chief Justice that it may be considered unnecessary for

me to add a second judgment. But as this case has been argued for over two days with great vigour by Mr. S. C. Bose, it might not be out of place if I stated briefly my conclusions on one or two points.

The geneology of the parties is to be found in the learned Chief Justice's judgment. In my opinion the plaintiff is clearly incompetent to maintain this suit until and unless he is in a position to satisfy the Court, that there is no interest still outstanding in Mayabati as shebait of the Thakur or idol founded by Ramchand Mukherji. It is conceded by Mr. Bose that Mayabati would be shebait of the Thakur in question, but it is said that having regard to the terms of settlement appearing on p. 234 of the Paper Book and of the Indenture dated 21st December 1925 on pp. 236 and 237 of the Paper Book, Mayabati has not now any interest whatsoever as shebait of the Thakur. The arrangement under which Mayabati is said to have put an end to her interest as shebait of the Thakur has been referred to by the learned Chief Justice and I agree with him in the view he has taken that the arrangement is one which cannot be sustained in a Court of law. If, therefore, it be correct in law that Mayabati has still some interest left in her as shebait of the Thakur (he the plaintiff, being unable to show that interest has been put an end to or has been extinguished in manner known to law) the plaintiff cannot maintain the present suit. It is unnecessary to multiply cases. To my mind the best exposition of the law on this point is to be found in the judgment of Banerji, J., in the case of *Srimati Mallika Dasi* v. *Ratanmani* (12), Banerjee, J., points out that it has been held in a uniform current of decisions both in this Court and in the High Courts of Bombay and Madras that a priestly office with emoluments attached to it is inalienable. Page, J., has referred to this decision of Banerjee, J., in one of the recent cases, *Nagendra* v. *Rabindra* (3), where the earlier and later authorities are collected. In my view Mayabati still remains a shebait. If she is still a shebait, then, so far as the plaintiff is concerned, he is a mere stranger and he cannot step in the shoes of Ramsevak and claim as shebait. This conclusion would be sufficient to enable the Court to dispose of the plaintiff's suit by saying that it is incompetent.

The plaintiff, however, urges that by reason of the adverse possession of Sashibhusan and Ramsevak the rights of the sons of Ram Lal, who are the contesting defendants in this suit, have been extinguished and that they have no further interest in the property and cannot claim to have possession thereof as shebaits. Sasibhusan died in 1911. There are materials on the record to show that during Sasibhusan's lifetime, there was no, and could not have been, any adverse possesssion. The circumstances shew further that up to the moment of the death of Ram Lal there was no adverse possession. I am further of opinion that between the death of Ram Lal and the death of Sashibhusan there was no adverse possession as against the heirs of Ram Lal. The circumstances disclosed on the record show that. Therefore, there was no adverse possession up to September 1911 when Sashibhusan died.

Now in order to put an end to the rights of the contesting defendants 1, 2 and 3, it would have to be shown conclusively that between September 1911 and September 1923, there had been adverse possession. Now Ramsevak died on 15th April 1923. It is clear therefore that the full period of 12 years from the death of Sasibhusan had not expired when Ramsevak died. The evidence further does not show that after the death of Sashibhusan and during this period there was adverse possession as against the heirs of Ram Lal. There are no accounts of the debuttar estate produced before us. One does not know whether there was any income derivable from the properties which had been dedicated to the Thakur. It may be that the income derived from the rents was not such as to leave any balance after defraying the expenses of the shebait. At any rate the evidence is very scrappy and the conclusion that there was adverse possession as against the heirs of Ram Lal cannot be safely drawn. There are three cases in which the doctrine of adverse possession is referred to at very great length: *Jagannath* v. *Chandi Bibi* (13)

(12) [1897] 1 C. W. N. 493.

(13) A. I. R. 1921 Cal. 647.

Joy Narayan v. *Srikantha* (14) and *Jogendra* v. *Rajendra* (15). Bearing in mind what was said in those cases and applying the rule laid down to the facts appearing on the present record, I am unable to say that the circumstances point to the fact that there was an open ouster or that the possession of Sashibhusan and Ramvesak of the dedicated properties was of such a character that the only inference that can be drawn therefrom is that there was an assertion of hostile title against an ouster of the sons of Ram Lal. That being so I agree with the learned Chief Justice in the conclusion he has arrived at and am of opinion that the plaintiff's appeal and suit must be dismissed with costs in both Courts. I agree with the learned Chief Justice in the order he has made as regards the cross-objection.

R.M./R.K. *Appeal dismissed.*

(14) A. I. R. 1922 Cal. 8.
(15) A. I. R. 1922 Cal. 54.

A. I. R. 1930 Calcutta 188

GRAHAM AND LORT-WILLIAMS, JJ.

Kali Bilash Hazra—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 39 of 1929, Decided on 5th August 1929.

(a) Criminal P. C., S. 211—Accused, complying with S. 211, is entitled to have attendance of witnesses at Sessions trial enforced—Non-compliance not prejudicial to accused does not vitiate conviction.

An accused, who has complied with the requirements of S. 211 of the Code, and has put in at once his list of defence witnesses, is entitled as of right to have the attendance of those witnesses at the Sessions trial enforced in the event of their ignoring, or failing to comply with the summons. Failure to enforce such attendance when not prejudicial to accused does not vitiate conviction.

[P 188 C 2, P 190 C 1]

(b) Criminal P. C., S. 211—Accused must put in his list of defence witnesses on the day of order of commitment—If accused fails, Magistrate has discretion to allow such application or not.

It is ordinarily incumbent on the accused to put in his list of defence witnesses at once, that is to say, on the day when the order of commitment is made, and that if he does not do so, the Magistrate will have a discretion to allow or not to allow any such application if it is made on any subsequent date. If, however, such an application is made and is allowed, then the application whether under sub-S. (1) or sub-S. (2) will be governed by the same principle. [P 189, C 1]

Mrityunjoy Chattopadhya and *Manindra Nath Banerji*—for Appellant.

Debendra Narain Bhattacharya—for the Crown.

Graham, J.—This is an appeal by one Kali Bilash Hazra who has been convicted by the unanimous verdict of the jury under S. 471, I. P. C., and sentenced to two years' rigorous imprisonment. There was also a charge under S. 193, I. P. C., in respect of which the accused was found by the unanimous verdict of the jury to be not guilty.

The only point which has been taken on behalf of the appellant is that the learned Additional Sessions Judge was in error in not allowing the accused further opportunity to examine two witnesses named Hari Das Banerji and Rai Rakhal Mandal, who were alleged to have been material witnesses for the purpose of the defence, and who, though duly summoned by the Magistrate, had failed to attend the Sessions Court on the date fixed for the hearing of the case. The relevant sections of the Code of Criminal Procedure are Ss. 211 and 291. S. 211 is as follows :

" (1) The accused shall be required at once to give in, orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial. (2) The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time etc."

Section 291 lays down :

" The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance ; but he shall not, except as provided in Ss. 211 and 231, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial."

Section 231 referred to herein has no application in this case.

There can be no doubt I think that, an accused, who has complied with the requirements of S. 211 of the Code, and has put in at once his list of defence witnesses, is entitled as of right to have the attendance of those witnesses at the Sessions trial enforced in the event of their ignoring, or failing to comply with the summons. When processes have been issued by the Court it is the duty of the Court to enforce them. Now in the present case the facts relating to the summoning of these witnesses are these: The commitment order was passed on 7th July. It was the duty of the defence, as required by

S. 211, to at once file the list of witnesses who were required to be summoned to attend in the Sessions Court. The list of defence witnesses was, however, as the record shows, filed on 10th July and summonses were duly issued. The trial commenced in the Sessions Court on 7th January and upon that date an application was made to the Court drawing attention to the fact that two of the defence witnesses namely Hari Das Banerji and Rai Rakhal Mandal were not present and asking that they might be summoned if necessary by an urgent telegram. The Additional Sessions Judge thereupon directed the prosecution to take necessary steps in the matter and a telegram was sent. On the following day 8th January these witnesses were not in attendance, and another application was filed on behalf of the defence asking that their attendance might be enforced and alleging that the accused would otherwise be prejudiced. It appears that two other witnesses were present on that day and the Additional Sessions Judge directed that the accused might examine those two witnesses, but they were not examined by the defence and the trial was concluded without any evidence for the defence being recorded.

On behalf of the Crown it is contended in the first place that the list which was filed by the accused on 10th July was not a list in respect of which he was entitled as of right to ask the Court to enforce the attendance of the witnesses; and secondly it is urged that these two witnesses, upon whose attendance so much stress has been laid, were not material witnesses, and that therefore the appeal ought not to be entertained.

With regard to the first point it seems clear from S. 211 that it is ordinarily incumbent on the accused to put in his list of defence witnesses at once, that is to say on the day when the order of commitment is made and that if he does not do so the Magistrate will have a discretion to allow or not to allow any such application if it is made on any subsequent date. If, however, such an application is made and is allowed, then the application whether under sub-S. (1) or sub-S. (2) will be governed by the same principle. The learned Additional Sessions Judge having exercised his discretion and issued summonses on the defence witnesses mentioned in the list of 10th July was in my judgment bound to enforce the attendance of these witnesses who were in contempt. I do not therefore think that there is any substance in the first contention.

The second ground, however, is to my mind of greater importance. The question is whether these two witnesses Hari Das Banerji and Rai Rakhal were really witnesses of material importance in the case, whether the accused has been prejudiced by the omission to examine them, and whether the appeal should be allowed on that ground. It is very difficult to ascertain anything definite or tangible from the record to show that these witnesses were in any sense important witnesses for the purpose of the defence. The accused in his statement in the committing Court said nothing about them. Speaking for myself I do not attach much importance to that fact because I do not consider that the accused is under any obligation to indicate the nature of the defence which he is going to make in the Sessions Court. Indeed there may be very good reasons why he should prefer not to do so. But when we come to the Sessions Court the position is somewhat different. He there again made a statement and again there was no reference whatever to these two witnesses. It might perhaps be reasonably expected that he would then say that he had paid the money to the complainant, and that he had done so in the presence of these two persons.

But there is another circumstance even more important in connexion with this aspect of the case, and it is this—that in the previous civil suit the accused made a definite statement, which has been proved in this case and has been marked as Ex. 5, in which he stated that he paid this sum of Rs. 135 to the decree-holder, that is to say the complainant in this case and obtained a receipt, and in cross-examination he further stated that when he paid the money to the decree-holder, the decree-holder, his brother, and son were present. No mention whatever was made in that statement of these two persons Hari Das and Rai Rakhal, and if these two persons were present when the money was paid it seems to be in-

conceivable that no mention would be made of the fact. If therefore we allow this appeal and send the case back for retrial, the accused would be confronted with the statement which he made at the trial of the civil suit and it would necessarily be very difficult to accept the evidence of these witnesses even if it supported the accused in the face of that statement previously made by the accused himself. Having regard to all these facts we are not satisfied that these two persons are material witnesses and that we should be justified in setting aside the conviction and sentence upon the ground which has been urged before us.

The appeal therefore fails and the conviction and sentence are affirmed. The appellant will surrender to his bail and serve out the remainder of his sentence.

Lort-Williams, J.—I agree.

V.S./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 190

MUKERJI AND MALLIK, JJ.

Baikuntha Chandra Nag and *others*—Defendants—Appellants.

v.

Chandra Nath Bandopadhya and *others*—Plaintiffs—Respondents.

Appeal No. 565 of 1927, Decided on 12th March 1929.

(a) Practice—Appeal—Question not purely of law, and requiring investigation into facts should not be allowed in appeal after several stages of litigation.

A question not a pure question of law but depending on an investigation into facts should not be allowed to be raised in an appeal after several stages of litigation extending over a considerably long period. [P 192 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 87—Abandonment.

The provisions of S. 87 are not exhaustive as to abandonment: 4 *C. W. N.* 493; 19 *C. W. N.* 1319; 18 *C. L. J.* 193 and 37 *I. C.* 942, *Foll.* [P 192 C 2]

Sarat Chandra Basak and *Jitendra Kumar Sen Gupta*—for Appellants.

Ghunada Charan Sen and *Promode Kumar Ghose*—for Respondents.

Judgment.—The suit which has given rise to this appeal was instituted so far back as the year 1920. When originally instituted it was a simple suit in which the plaintiffs asked for khas possession of an 8 annas share of some lands on the ground that the plaintiffs were 8 annas patnidars and one Ram Charan Mandal who held the lands under them in non-transferable occupancy right at an annual jama of Rs. 3 made an unauthorized sale thereof in favour of the defendants and abandoned possession in their favour. The lands were described in the plaint as survey plots 1320 and 1348 and a half of survey plot 1321. The defendants pleaded that Ram Charan had permanent and transferable rights to the lands and that they themselves had acquired rights of occupancy having been recognized by the plaintiffs' predecessors and also by the plaintiffs themselves.

The trial Court held that Ram Charan had no permanent or transferable rights and that the defendants had not been recognized by the plaintiffs or their predecessors. There was a contention raised that the disputed lands did not constitute an entire holding but were part of a holding which belonged jointly to two brothers Ram Charan and Guru Charan. This contention was not definitely disposed of by the trial Court but it observed that there was evidence to show that the mudafat of Ram Charan was separate from the mudafat of Guru Charan, and held that in any case there was abandonment of the lands by Ram Charan and his family after the transfer. The trial Court decreed the suit.

There was an appeal by the defendants. From the judgment of the Additional District Judge who dealt with the appeal it appears that the position that the defendants, as appellants, took up before him, was that the homestead of Guru Charan, and a share of a certain tank and the disputed lands formed one holding, and that the defendants after their purchase of Guru Charan's share in 1314 and Ram Charan's share in 1315 had been recognized by the landlords and so were protected from eviction. The Additional District Judge held against the defendants so far as transferability and recognition were concerned. On the other questions that arose he observed:

"So from the materials on the record which are not consistent I can only say that the plaintiffs have failed to prove that the disputed lands appertained to one jama of Rs. 3 in the name of Ram Charan Mandal; and the defendants have also failed to establish satisfactorily that Guru Charan's lands and Ram Charan's lands formed one holding, and none proves what was the jumma payable for the same."

One should have thought that after these conclusions, if they are to be treated as findings, nothing more was left

be found for the dismissal of the plaintiffs' case. But the Additional District Judge proceeded to order a remand which was made in these words:

"Now the question is, whether the plaintiff has satisfied the requirements of law, which would entitle him to get khas possession, in this case. No doubt, Ram Charan had a non-transferable occupancy holding. The question of transferability has not been pressed before me. But the plaintiffs have purchased a part of Ram Charan's land, though its legal effect has not been considered. Moreover, as I have found, there is nothing to show what quantity of land was included in Ram Charan's holding and what was the jumma for it. There was no material on the record to show whether all the lands of Ram Charan's holding have been sold away or not. There is nothing to show, whether the heirs of Ram Charan have abandoned their holding altogether or not. These points are necessary to be decided, before an order for khas possession in favour of the plaintiffs can be passed. The case therefore should go back to the original Court for consideration of these points, and then deciding according to law.

Hence ordered:

That the appeal be allowed in part, and the case remanded to the original Court for decision after considering the points noted above. Costs to abide the final result. It is now to be decided, what was the quantity of land in Ram Charan's holding and what was the jumma for it; whether all the lands of Ram Charan's holding have been sold away; whether the heirs of Ram Charan have abandoned the holding altogether and what is the legal effect of plaintiffs having purchased a portion of Ram Charan's land. The case is to be decided according to law, after that."

The whole judgment of the learned Additional District Judge, however, is to be read together and the very terms of the order of remand make it plain that the learned Additional Judge was not confident about the correctness of what he recorded as his conclusions and intended to leave the points that were mentioned in his order to be dealt with afresh by the trial Court. In any event no appeal was taken from the decision and the parties went to trial again before the Court of first instance.

A fresh stage of the litigation commenced from this point. The question now raised was a somewhat different one. It was now found that at one time the jama of Ram Charan's holding was Rs. 5. By the purchase of a plot called Kendur Kola plot the jama of the holding became Rs. 5-8. By two sales, portions of the holding were transferred to two persons named Salimuddi and Abuali. These persons got their names registered in the landlord's sherista and Ram Charan's holding came to be divided into two separate holdings one belonging to Salimaddi and Abuali at a rental of Rs. 2-8-0, and the other to Ram Charan himself, the latter bearing a rental of Rs. 3. The question that was now raised was whether the whole of what was left to Ram Charan, as a holding with a jama of Rs. 3 was sold by him to the defendants, and whether after such sale Ram Charan and his family abandoned that holding. The defendants' contention at this stage was as the learned Subordinate Judge put it.

"The defendants do not dispute the plaintiff's case that after the sale of the lands to Salimuddi and Abuali, the jama of Ram Charan became Rs. 3, but the main plank on which they take their stand is that plot 1322 (bhiti in the northern bank) was never sold to Abuali and Salimuddi as alleged by the plaintiffs. It is stated by them that that plot is still possession of Ram Charan's sons."

The Subordinate Judge found that plot 1322 was sold to Abuali and Salimuddi. He held also that the story of Ram Charan's sons being in possession of that plot after the transfers was not true. On the aforesaid findings the Subordinate Judge again decreed the suit.

The defendants again preferred an appeal. Two contentions were put forward in the appeal; one was that there was no valid recognition of the transfers in favour of Abuali and Salimuddi and the other was that Ram Charan's sons were still in possession of plot 1322, as a plot which had not been included in the sale of 1315. These two contentions were overruled, it being held that Abuali and Salimuddi got recognition of their purchase, a separate holding being formed of their tenancy out of the original one with a rental of Rs. 2-8-0, and also that plot 1322 was included in the purchase of Abuali and Salimuddi who, however, sold the said plot subsequently to the plaintiffs in 1318 and Ram Charan's sons then came to possess the plot under the plaintiffs under a separate agreement. A further contention was now raised, and now for the first time, that Ram Charan's tenancy was not a "holding" within the meaning of the Bengal Tenancy Act, and so there could be no abandonment of it within the meaning of S. 87 of the Act and the plaintiffs were not entitled to re-enter. The contention was overruled and the decree of the Court of first instance was upheld.

The defendants have then appealed to this Court. It has been urged on behalf of the appellants first that Ram Churn's tenancy was not a "holding;" second: that in any case what was left of Ram Charan's holding after the sale to Abuali and Salimuddi was not a "holding"; third that the rent receipts granted to Abuali and Salimuddi do not show that there was a sub-division within the meaning of S. 88; and fourth: that apart fron S. 87, Ben. Ten. Act, there could be no abandonment. On all these grounds it is said that the plaintiffs were not entitled to khas possession.

As regards the first of these contentions we find that there is no indication in the record that any time till now was the contention ever raised. The judgments of the several Courts satisfy us on this point. We do not think we should allow this contention to be raised at this stage.

As regards the second contention, it was first put forward in 1926, when the case came on before the lower appellate Court on the second occasion, and there is no indication anywhere that the defendants at any time before that took their stand on this contention. The sale by Ram Charan to Abuali and Salimuddi was by two kabalas. By the kabala of 1306 he sold one plot of land and by the kabala of 1308 he sold three plots and 8 annas share of each of two other plots. The holding of Ram Charan since then consisted of two plots and a half of another plot. It has been argued that the holding consisted of an undivided share of the plots. It was not a holding within the meaning of the Bengal Tenancy Act and so S. 87 has no application to the case. This question, as we have said, was never raised at any time during the first six years of the suit, and as it is not a pure question of law but depends on an investigation into facts as to whether the shares of the two plots were in fact, divided or undivided, it should not not have been allowed to be raised by the lower appellate Court. The kabala Ex. H by which the defendants purchased from Ram Charan militates against the appellant's contention inasmuch as it describes the tenancy as lying within specified boundaries and divided off from the surrounding lands. In one of the boundaries of plot 2 in that document is mentioned the purchase jote lands of Abuali Sircar. On the materials before us we are not able to say that the the defendant has made out a case that the lands of the tenancy of Rs. 3 that was left to Ram Charan did not comprise a holding as understood in the Tenancy Act.

As regards ground 3, we have examined the dakhilas and the evidence relating to the alleged recognition of the purchase of Abuali and Salimuddi and we see no reason to differ from the view which the Courts below have taken namely that two new tenancies were created on division of the earlier one of Rs. 5-8-0. Whatever irregularity there may have been in this subdivision it is clear that it has been fully acted upon. Moreover the plaintiffs having executed the agreement of 1318 under which they were holding plot 1322 are not competent to urge that the old tenancy of Rs. 3-8-0 still subsists.

As regards the fourth contention, the authority cited on behalf of the appellants is the case of *Romesh Charan* v. *Daiba Charan* (1). That case, however, did not actually decide that there may not be abandonment apart from the terms of S. 87, Ben. Ten Act. That the provisions of the section are not exhaustive have been laid down in a large body of decisions amongst which may be mentioned; *Samujan* v. *Munshi Mahaton* (2); *Matukdhari* v. *Jugdip Singh* (3); *Pran Krishna* v. *Mukta Sundari* (4) and *Priya Nath* v. *Anath* (5). The question, however, does not arise in view of the opinion we have expressed on the other contentions.

The land which forms the subject matter of the suit is not the homestead of the defendants, which we are told is at a distance from the place, and it is used only for the purpose of keeping cattle. On the findings of fact arrived at by the two Courts below it is impossible for the defendants to resist a decree for khas possession to the extent of the plaintiff's 8-annas share. The appeal, therefore, is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

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(1) A. I. R. 1924 Cal. 900.
(2) [1900] 4 C. W. N. 493.
(3) [1915] 19 C. W. N. 1319=28 I. C. 343=21 C. L. J. 261.
(4) [1913] 18 C. L. J. 193=21 I. C. 544.
(5) [1917] 37 I. C. 942.

* A. I. R. 1930 Calcutta 193

C. C. GHOSE, J.

On difference between

CUMING AND S. K. GHOSE, JJ.

Emperor

v.

Dukari Chandra Karmakar—Accused.

Jury Ref. No. 24 of 1929, Decided on 24th June 1929, made by Sess. Judge, Birbhum, D/- 16th March 1929.

*** Criminal P. C., S. 367 (5)—Court must consider question of sentence with reference to circumstances and not by S. 367 alone—Accused young and of good character—Provocation at unsympathetic treatment from his murdered wife's relation—Transportation held to be sufficient.**

Apparently the provision in S. 367 (5) contemplates that death sentence is to be passed as a matter of course unless there is sufficient reason to the contrary. But the Court must consider the question of sentence with reference to the circumstances and if these circumstances justify the passing of a sentence other than the sentence of death, the Court must pass that sentence. Therefore, in fixing the measure of punishment one is to be guided not by S. 367, but by various other matters, for instance, the enormity or otherwise of the offence and the particular circumstances under which the accused committed it. [P 198 C 1]

D, a mere lad of twenty, went to retire with his wife and shut himself in the upper room. In the morning the door was found open and the girl was found murdered. *D* was found absconding and remained hiding for some six weeks :

Held : that on consideration of his age, good character, the provocation at the unsympathetic treatment he had been getting ever since his marriage from his wife's relations, a sentence of transportation for life instead of death, would meet the ends of justice.

[P 198 C 1, 2]

A. K. Dhar—for Accused.

Khundkar, Anil Chandra Roy-Chowdhry and *Nirmal Kumar Sen*—for the Crown.

Cuming, J.—This is a case of one Dukari Chandra Karmakar whose case has been referred to us by the learned Sessions Judge of Birbhum under the provisions of S. 307, Criminal P. C. The accused Dukari was tried before the Sessions Judge sitting with a jury on a charge of murdering his wife Sakti Kumari. Five of the jury found the accused not guilty. The remaining four of the jury found him guilty under S. 302, I. P. C. The learned Sessions Judge apparently agreeing with the minority has referred the case to this Court under S. 307, Criminal P. C.

I would draw the attention of the learned Sessions Judge to the provisions of S. 307, Criminal P. C., and point out to him that it is necessary for him to state clearly what offence, in his opinion, the accused is guilty of. It is not correct for him to state that he is "inclined to agree with them."

The facts of the case are briefly these : The accused Dukari was married to the deceased Sakti Kumari a girl at present some 15 or 16 years of age some 6 or 7 years ago. It would seem that there was an arrangement at the time of the marriage that Dukari should reside in his father-in-law's house as a ghar jamai, and apparently he so remained for one and a half months. His father-in-law lives in the village of Panchpara. Apparently, however, this arrangement did not satisfy Dukari and he wanted to go away to his house which he did. The girl remained with her family while the accused went away to the village of Bamnigram some 6 or 7 miles away. It would seem that from time to time the girl did go to her husband's house. But the relation between Dukari and his father-in-law and the girl's aunt Rohit Kumari did not seem to have been very cordial. Rohit Kumari brought up Sakti the deceased and gave Sakti her own ornaments at the time of the marriage and she refused to allow Dukari to take away his wife without giving ornaments to her; the girl on her part would seem to be unwilling to go to her husband's house without ornaments. There was at one time a criminal case between the parties and a petition was lodged by Dukari under S. 552, Criminal P. C., to the District Magistrate of Birbhum. This matter appears to have been settled. The girl went to live with her husband for some time and then again returned home. On 26th Jaistha 1335 corresponding to 9th June 1928 the accused Dukari came to his father-in-law's house. He stayed in the house that day and he also remained on 27th Jaistha the 10th June. He went out in the evening and returned at about one prahar at night, took his meal with his father-in-law and then retired to rest in an upper room where his wife Shakti Kumari, the deceased, shortly joined him and the door was bolted. The next morning the aunt Rohit Kumari seeing that the girl Shakti did not come down went upstair to call her. On pushing

the door she found it open and on going inside she found the girl lying dead with a number of wounds on her body in a pool of blood. The accused Dukari was not there. Information was at once given to the thana and the usual enquiry was set on foot. The accused Dukari was not to be found at his home. Nor was he found on search by the police. A proclamation was issued and his property was attached on 15th August and on 30th August he surrendered himself in Court. After usual enquiry by the Magistrate he was committed to Sessions on a charge of murder and was tried with the result that I have already noted.

The accused has contended himself with the plea of not guilty. He stated before the Sessions Judge that he was innocent and he used to love his wife deeply and she also loved him in return and, therefore, it was impossible for him to murder her. He does not give any explanation why he was absconding from home up to 30th August. Nor, as far as I can see, has any explanation been attempted to be given by his counsel. On his behalf it seems to have been urged in the Sessions Court that either he was not at the house of his father-in-law or if he was there he did not murder the girl. Suggestion also seems to have been thrown out entirely unsupported by any evidence that the girl was of a bad character and that the young men of the village used to frequent the hut. I may say that there is not a scrap of evidence to support this suggestion and to my mind it is extremely improper to make a serious allegation of this sort against the character of a dead person without any single scrap of evidence of any sort to support it.

The case against the accused Dukari rests on the evidence of persons who saw him in the village on 26th and 27th Jaistha and of his relations who saw him go to the upper room with his wife in the evening and who found her body there early in the morning. If this evidence is believed, and I shall discuss the evidence later on, there can I think be no doubt that it was the accused Dukari who killed the girl Shakti when in addition we find that he was absconding for nearly six weeks immediately after the murder.

On the question of his presence in his father-in-law's house on 26th and 27th Jaistha and of his going to sleep with his wife in the upper room there are the evidence of Manindra, Rohit Kumari, Aghore, Kamini and Nikunja who are his relations and who saw him retire to rest with his wife. The neighbours Suresh, Mohendra and Sashi Bhusan saw him in the village on 26th and 27th Jaistha. I have carefully considered the evidence of the witnesses and I can see no reason whatever to disbelieve them or to think that they are telling a false story. Their evidence is given, as far as can be seen in a simple and straightforward manner and nothing has been brought out in their cross-examination to shake them. Only two points really remain to be considered; one of them arises from the evidence of Rohit Kumari, the aunt of the deceased girl. Rohit Kumari was one of those who saw the girl go up to the room and bolt the door. She would seem to state that the girl did not take any meal that night, while the evidence of the doctor was that the girl's stomach contained undigested meal of rice. None of the other witnesses, however, was examined on the question as to whether or not the girl did eat anything that evening. It is quite possible that she did eat something unknown to Rohit Kumari. The learned advocate who has appeared for the accused has asked us to hold from this fact that Rohit Kumari was not observing what the girl was doing. Even if that were correct there still remains the evidence of the other witnesses who deposed to the events of that night.

The next point which has been urged on behalf of the accused is the evidence of one Radha Gobinda Mandal. This witness was tendered for the prosecution and was cross-examined by the defence. His statement was that on 27th Jaistha at about 1 or 1½ prahar of the night he saw Dukari passing by the side of his house with a shirt on and an umbrella with him. On being questioned by him Dukari replied that he went to Panchpara and was now returning from there. No doubt if the witness was deposing to the truth this would be a fact strongly in favour of the accused person, because Bamnigram is at some distance from Panchpara and

if the accused was at Bamnigram at the time of the occurrence he could not be at Panchpara on that night at about 1 or 1½ prahar. It is, however, very probable that this witness in deposing to this fact was not certain of the time at which he actually saw Dukari or he altered the time in order to give evidence in Dukari's favour. I am not prepared to rely upon this witness in the face of a number of other witnesses who positively state as to the presence of the accused at the house of Manindra on the night of the occurrence.

The evidence, therefore, comes to this: that Dukari went to retire with his wife on the night of 27th Jaistha and shut himself in the upper-room. In the morning the door was found open and the girl was found murdered and Dukari was found absconding, and remained hiding for some six weeks. It is no doubt true that the mere fact of absconding does not necessarily prove the guilt, but it is a factor to be taken into consideration. It can no doubt in some cases be explained. In the present case no explanation whatever has been attempted to be given. I have no hesitation in coming to the finding that it was the present accused Dukari who had killed the girl Shakti Kumari. What was his motive or reason for killing the girl is known to him and him alone. It may be that he was annoyed because she did not come to the house. It is always a matter of speculation as to the motive with which any human being does any particular act but when the facts are clear, the motive is immaterial. The medical evidence shows that the girl had some four wounds, three on the head and one on the shoulder. They were apparently caused by a large sacrificial knife which was found covered with blood close to the body. This knife was used by Manindra and also by the accused himself to perform certain sacrifices. The nature and severity of the wounds can leave no doubt whatever that it was the intention of the assailant to kill the girl. The first wound was an incised gaping horizontal wound on the right side of the head 3" long going right through the sculp and skull and reaching the brain ; the second was an incised gaping wound parallel to the first 4" long and ½" wide below the first going through the sculp and reaching and fracturing the skull; the third wound was an incised gaping wound extending from outer angle of right eye to below the right ear, 5" long and 2" wide reaching bone and going through the bone at outer angle of right eye. Whoever struck these blows must obviously have intended one thing, namely, to kill the victim. I have no hesitation in finding that Dukari the present accused is guilty of murder S. 302, I. P. C. In coming to this finding I have taken into consideration the opinions of the Sessions Judge and also of the jury so far : as regards the opinion of the jury five of them were of opinion that the accused was not guilty and the four found him guilty. Therefore the difference is not very much. The learned Sessions Judge who heard the evidence and had the opportunity of observing the demeanour of the witnesses was of opinion that the accused was guilty.

I now come to the question of sentence. I have given the case my careful consideration and I am of opinion that it was a cruel and brutal murder perpetrated apparently without any adequate motive on a defenceless girl apparently in her sleep. There is no adequate reason given to me why the sentence of death should not be passed on the accused. S. 367, Cl. 5, Criminal P. C. provides that :

"if an accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death the Court shall in its judgment state the reason why sentence of death was not passed."

Where an accused person is found guilty of murder therefore it is clear that the sentence of death has been considered as the normal sentence and the sentence of transportation for life as the abnormal sentence for which reasons are required to be given by the Judge why the sentence of death is not passed. This was not a murder committed in the heat of passion and as far as can be seen was done deliberately. The wounds show that the girl was attacked either in her sleep or certainly without any warning. It is clear that she was attacked while lying down, and there is nothing whatever to show that they were quarrelling at the time. Obviously it is for the accused who alone knew the exact

circumstances under which he killed his wife to show the extenuating circumstances for it is a fact peculiarly within his knowledge. It is not for the Court to presume such circumstances. It may be that the accused was at the time labouring under a grievance, viz., that his wife would not come back or was not allowed to come back to his house. To hold that such a grievance or imaginary grievance is sufficient to justify a Court in passing the lesser sentence is clearly to hold that murdering a wife is not a capital offence. He is a young man of 20 or 21 and obviously not a child who cannot understand what he was doing. Ordinarily I should be reluctant to disagree on a question of sentence. But it seems to me that the present case involves a question of principle. As my learned brother is of opinion for reasons which he would give in his judgment that the lesser penalty is the appropriate one. The case must be laid before a third Judge under S. 429, Criminal P. C.

S. K. Ghose, J.—I agree with my learned brother that the accused should be convicted under S. 302, I. P. C. but with great respect I am unable to agree that it is a fit case for the death penalty.

I shall therefore confine myself to the question of sentence only. The facts which are material to that question are these: The accused Dukari Chandra Karmakar is a young man of 21. His wife Sakti Kumari, the deceased in the case, was aged about 15 at the time of her death. They had been married for about 7 years and there were no children. The parties belong to different villages. Ever since his marriage the accused had been in trouble about getting his wife to live with him. Her relations were putting all sorts of obstacles in his way and the girl herself was not sympathetic. At the time of the marriage there was a talk that Dukari should remain as ghar jamai. This was tried for some time but the accused did not find it suitable. His father-in-law Manindra was living with his family in the house of his niece Rohit Kumari P. W. 2. Rohit Kumari made certain demands from the accused and the accused on his part also demanded that some lands should be given to him, but this was refused. On this the accused refused to stay and Rohit Kumari said that unless the accused gave ornaments to his wife the latter would not be allowed to go to him. Some time later the accused filed a petition under S. 552, Criminal P. C., before the Magistrate alleging that his wife's people had kept her in their house with an evil motive. The matter was made up and the girl was left in her husband's house by Manindra. But this also was for a short time. In Assin the girl came back to her father's house but was again taken away by her husband for a short time. Then followed some visits on the part of ths accused but each time he failed to make his wife go with him. In the month of Jaistha a Bagdi woman was sent by the accused to take his wife to his house, but she was unwilling to go without ornaments. On the following day the accused himself came but he went away the next day without his wife. Ultimately on 26th Jaistha (9th June) the accused came to Manindra's house with the object of taking away his wife with him. But, as Manindra says in the first information, he kept his son-in-law in his house telling him that his daughter would be sent on 5th or 6th Assar. The night of 27th Jaistha (10th June) was going to be the last night which the accused was going to spend on that occasion at his father-in-law's. That night the accused and his wife went to sleep in a bedroom upstairs. The accused had taken his meal as usual. In the bedroom there was a big sacrificial knife belonging to Manindra and the evidence is that it was kept there for safety as there were children in the house. Manindra is a professional sacrificer and had been using this knife for the purpose of sacrifice, but the accused had also acted as his proxy on some occasions. There is no eyewitness as to what happened that night. But early in the morning Rohit Kumari was the first to go upstairs and she discovered that the girl was lying murdered on the bed. The sacrificial knife was lying blood-stained close by. According to the medical evidence there were four gaping incised wounds; two were on the head, the skull being fractured, the third was on the right side of the face, and the fourth was on the right shoulder

The medical evidence also is that very little movement was possible after the head blow which went right through the brain. The conclusion is irresistible that the girl was murdered as she was lying in bed and the weapon used was the sacrificial knife. The accused was not seen after the occurrence. The police could not find him out and processes were issued. P. W. 19 a resident of mouza Itanda which is about 10 to 16 miles from the village of the accused deposes that he saw the accused in the month of Ashar at the house of Sakti Thakur, the spiritual guide of the accused. The accused surrendered in Court on 30th August 1928.

Before going any further into the facts, I would like to make a few remarks on the principle on which the Court has to make its choice of sentence in the case of an offence carrying with it the death penalty. S. 367, Cl. (5), Criminal P. C., provides :

"If the accused is convicted of an offence punishable with death and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed. Provided that in trials by jury the Court need not write a judgment, but the Court of Session shall record the heads of charge to the jury."

It may be said that apparently this provision in the Code of Criminal Procedure contemplates that death sentence is to be passed as a matter of course, unless there is sufficient reason to the contrary. But to proceed upon such a construction would be to make the alternative punishment the exception in murder cases. This, to my mind, is against the accepted view as found in the reported decisions and actual practice. In my judgment such procedure would also not be warranted by the words of the section. It occurs in Chap. 26 which deals with the form of the judgment. The section contains a variety of clauses dealing with the language and the contents of the judgment and so forth. Cl. (5) itself contains a proviso which is applicable to trials by jury. In my opinion it is wrong to construe this section as referring to such a matter as the measure of punishment which goes beyond mere form. For certain offences, like murder and treason, the Penal Code provides the death penalty as also an alternative form of punishment, namely transportation for life.

In such cases, the Court must consider the question of sentence with reference to the circumstances, and if these circumstances justify the passing of a sentence other than the sentence of death, the Court must pass that sentence. All that the first part of Cl. (5), S. 367, lays down is that in such cases reasons must be stated in the judgment. This is a matter of procedure. By way of analogy I may refer to a rule of this Court, namely, R. 72, Chap. 1, p. 27 High Court's General Rules and Circular Orders, Appellate Side, Criminal. It was there provided that in the column of remarks in the form of Sessions Statement which a Sessions Judge has to furnish he must state the grounds on which any person punishable with death has been sentenced to punishment other than death (S. 374, Criminal P.C.) This rule has since been cancelled. In S. 367, Criminal P. C., the legislature has not thought it necessary to provide that reasons must be given in the judgment for passing a sentence of death as well. But these reasons must exist in the mind of the Judge. It is unthinkable that a Judge will pass a sentence of death in preference to the alternative sentence without good and sufficient reasons. Only, as a matter of procedure, such reasons need not be recorded in the case of a death sentence. In the nature of things the judicial mind must be reluctant to pass the extreme penalty and to enact that reasons must be stated in the case if a death sentence might have the undesirable effect of encouraging the Courts to shirk what is after all an unpleasant duty. But the Penal Code simply provides alternative punishments and there is nothing which takes away from the Court the duty to see that in a particular case the punishment fits the crime. That I consider to be the true measure. Once you admit this, the position that by S. 367, Cl. (5), Criminal P. C., death penalty must be the rule becomes untenable. As regards the death sentence, far from making it the ordinary penalty for the relevant offences, the draftsman of the Code stated that it ought to be sparingly inflicted. Experience shows that in practice this has been done, which once more proves that S. 367, Criminal P. C., does

not touch the essence of the matter at all. Therefore, in fixing the measure of punishment one is to be guided, not by S. 367, Criminal P. C., but by various other matters, for instance, the enormity or otherwise of the offence and the particular circumstances under which the accused committed it. They all go back to the facts of the case. But in the case of the death penalty the Courts have gone so far as to consider matters which are not relevant to the crime, e.g. mere delay in passing judgment a circumstance bringing into play humanitarian grounds. I may add that I make these remarks without prejudice, as in the course of a long experience as Sessions Judge it has been my lot, perhaps an ordinary one, to send more than one person to his doom.

Whatever view may be taken of S. 367, Criminal P. C., it presents no difficulty in the present case, for I am satisfied that good and sufficient reasons do exist as to why the death penalty should not be imposed in this case. There is no direct evidence as to what happened immediately before the murder. But it is very probable that the accused having failed again to take his wife, and this being his last night with her, they had a difference before going to sleep. Everything points to the conclusion that the murder was not deliberately planned. I do not overlook the fact that a lethal weapon was used and that more than one blow was struck. But the evidence shows that the weapon was not taken there by the accused. It just happened to be there. I consider that the motive in this case is not an aggravating factor. The motive was a fit of desperate resentment which, in the circumstances, was not unnatural and for which the accused himself was not entirely to be blamed. We cannot overlook the consideration with regard to age. After all the accused is a mere lad. There is positive evidence that he has borne a uniformly good character, that he was a good boy, respectful towards his wife's relations, and not outwardly quarrelsome in relation to his wife, and this in spite of the unsympathetic treatment that he had been getting ever since his marriage. His last visit was one of many that ended in failure. This must have preyed on his mind. In the circumstances, with the utmost respect to my learned brother, I do not think that the case is a fit one for capital sentence. I think a sentence of transportation for life would meet the ends of justice. (On difference between the two Judges the case was referred to a third Judge who delivered the following judgment).

C. C. Ghose, J.—This matter comes before me as third Judge under S. 429, Criminal P. C., owing to a difference of opininon between my learned brothers Cuming, J., and S. K. Ghose, J. Both the learned Judges are agreed that the accused should be convicted under S. 302, I. P. C. Cuming, J., was of opinion that there was no adequate reason why the sentence of death should not be passed on the accused, while S. K. Ghose, J., was of opinion that on the facts appearing in this case and set out in his judgment this was not a fit case for a death penalty. During the week end after this matter had been referred to me as third Judge I had an opportunity of examining the entire record and of perusing the opinions of the differing Judges. It is unnecessary for me to set out the facts once again ; they will be found set out at sufficient length in the judgments of my two learned brothers. Now it was laid in this Court many years ago by Woodroffe, J. that if in any case of murder under S. 302, I. P. C. one finds that two learned Judges of this Court are in disagreement over the question of sentence one favouring the death penalty and the other recommending that the transportation for life would meet the ends of justice, that in itself is a sufficient ground for holding that the death penalty should not be inflicted. Sometime ago I had occasion to refer to this opinion of Woodroffe, J., and I have always acted on that opinion. But it is not to be understood from what I have just said that the rule enunciated by Woodroffe is an inflexible rule or that the third Judge to whom the matter is referred on a difference of opinion on the question of sentence is not required to go into the case for himself and to judge for himself whether the case before him is or is not a fit one for the infiction of the death penalty. I have, therefore, as I have just said gone into the case myself. In my opinion, the circumstances present on the

record are of such a nature that I feel abundantly justified in taking the view that a sentence of transporation for life would meet the ends of justice in this case. I feel no doubt whatsoever that the accused was labouring under a serious grievance which was not unnatural in the circumstances disclosed on the record and that he committed the murder in question in a fit of desperate resentment. It is quite true he is not a child but it is equally true that he is a mere lad of 20. His visits to his father-in-law's place for the purpose of taking his wife to whom he had been married for about 7 years, to his house had always ended in failure and there are substantial reasons for coming to the conclusion that the treatment which he had received since his marriage at the hands of his wife's relations had been consistently unsympathetic. These are circumstances ,which must be taken into consideration. The question of appraising the sentence to be passed on a prisoner is at all times a difficult one. But I think in this case it would not be straining the language of S. 367, Criminal P. C., if I were to hold that the prisoner should be sentenced to transportation for life. I agree with S. K. Ghose, J., and I direct that the prisoner be convicted under S. 302, I. P. C., and be sentenced to transportation for life.

V.S./R.K. *Order accordingly.*

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MITTER AND S. K. GHOSE, JJ.

Emperor

v.

Dinbandhu Ooriya—Accused.

Death Ref. No. 3 and Appeal No. 659 of 1929, Decided on 13th November 1929, against judgment of Additional Sess. Judge, 24-Parganas.

(a) Criminal P. C., S. 423—Finding of Judge or jury as to simple issue of fact cannot be disturbed unless opposed to evidence.

A Court of appeal would not be justified in disturbing the finding of a Judge or of a jury on a simple issue of fact unless the verdict arrived at seems to be opposed to the entire weight of evidence. [P 203 C 1]

(b) Penal Code, S. 302—If husband discovers wife in act of adultery and kills her he is guilty of manslaughter only and not murder—This rule cannot be extended when the relationship is not of husband and wife.

If a husband discovers his wife in the act of adultery and thereupon kills her he is guilty of man-slaughter only and not of murder But that rule has no application where the relationship between the parties is not that of husband and wife : *Rex* v. *Palmer*, (1913) 2 *K. B* 29. [P 204 C 2]

(c) Penal Code, S. 300, Expl. 1—Provocation—Test of sufficiency.

There must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, so as to lead the jury to ascribe the act to the influence of that passion : *Rex* v. *Lesbini* (1914) 3 *K. B.* 1116 ; *Rex* v. *Alexander*, 109 *L. T.* 745 ; *Reg* v. *Malsh*, (1871) 11 *Cox C. C.* 336, *Ref.* [P 205 C 1]

Hiralal Ganguli—for Accused.

D. N. Bhattacharya—for the Crown.

Mitter, J.—This is an appeal by Dinabandhu Uriya who has been convicted of murder under S. 302, I. P. C. by the Additional Sessions Judge of the 24 Parganas in agreement with the unanimous verdict of nine gentlemen of the jury for causing the death of a Brahmin youth named Kartik Chunder Mukerjee, aged about 25/26 years. He has also been convicted under S. 326, I. P. C. of causing grievous hurt by a sharp cutting weapon on one Rajabala a woman of the suburbs of Behala. The learned Additional Sessions Judge has passed the sentence of death on him on the charge under S. 302. He has further sentenced him to rigorous imprisonment for a period of four years under S. 326 which is to be operative until the sentence of death passed by him is confirmed by this Court. The matter has also come before us by way of reference by the Additional Sessions Judge under S. 374, Criminal P. C.

On behalf of the prisoner it does not appear that any very serious criticizm has been made of the summing up by the learned Sessions Judge. The only criticism which is made is that the learned Judge should have put to the jury the fact that during the course of the investigation by one of the police officers it was disclosed that the accused was at the shop of one Sindhu Pashi at Barisa during the day on the date of the occurrence before coming to the place where he was arrested and it is said that the learned Sessions Judge ought to have directed the jury to draw an unfavourable inference against the case for the Crown from this very important circumstance. It seems to me that it was not the duty of the Crown to put .this witness before the Court seeing that the witness could really have proved the alibi of the ac-

cused. It was really for the accused person to call him as a witness for the defence in support of plea of any alibi which he might have taken but has not taken. It seems to me after considering and reading the summing up by the Sessions Judge, that the summing up was a most careful one. Every point was put before the jury with great lucidity and there was really ample evidence upon which the jury could come to the conclusion at which they arrived with reference to the two defences which were suggested during the course of the argument before the lower Court. One theory put forward was that the deceased Kartic Mukherjee himself cut a sindh and effected an entrance into Rajabla'a ghar and eventually engaged himself in a scuffle with her and that these two persons managed to fight with a cutting weapon and cut each other and in the course of the fight Kartic got the worse of it and met with his death. It must be said, in fairness to the learned advocate for the appellant, that he has not put forward or pressed this theory before this Court.

The other theory put forward by the defence in the course of cross-examination of the prosecution witnesses was that there was no light in Rajabala's ghar at or about the time of the occurrence and that it was probable that while Kartic, the deceased, and Rajabala engaged themselves in sexual intercourse the light might have been put out and eventually they might have fallen asleep and that while they were so asleep some unknown enemy might have effected an entrance into the room through the sindh and injured both the man and the woman. It is said that the woman Rajabala having failed to recognise the actual assailant who escaped on her cries took it into her head to mention the name of the accused out of sheer grudge. It is further suggested that the name of Dinabandhu occurred to Rajabala not immediately after the time of the occurrence but after she had held a consultation with the other unfortunate woman living in the same house and other persons friendly to her in the locality. No evidence has been put forward in support of this defence and the learned Judge did mention to the jury this possible defence which was suggested in the cross-examination of the prosecution witnesses and I shall show presently from the examination of the evidence that this defence is baseless.

Although the matter has come before us as an appeal from the unanimous verdict of the jury and from a judgment accepting that verdict, as the sentence in this case is one of death, it has always been the practice in this and in the other High Courts in India to deal with the case as a whole, that is, to look into the evidence and consider whether the verdict has been rightly arrived at. It becomes necessary, therefore, to examine the evidence in this case and to determine whether the verdict of the jury can be sustained on such evidence.

The short story, so far as it is necessary to state, is that the woman Rajabala, who is an unfortunate woman in the suburbs of Behala was in terms on her own showing, of great intimacy with the accused for about a year or a year and a half, and it was this woman, who out of affection for the accused, enabled him to make his living by starting at her own expense a chat shop in the locality. The accused used to live at night with this woman and the evidence discloses that he used to come at about 10 p. m. in the night and after that ordinarily no other visitor was allowed access into the room of this woman. It seems that the chat shop was carried on under circumstances which left very little profit of late to the accused person and the accused accordingly stopped the small sum of Rs. 8 or Rs. 9 which he used to pay for the food which he would take at the place of the woman. This sort of strained relationship continued indeed for a very short time when it appears that on 18th May last the day immediately preceding the date of the occurrence the woman was found with another person in her room at a late hour of the night. At that time the prisoner came. Evidently he resented the intrusion of the stranger. He entered into the room of Rajabala, assaulted the stranger and took away his cloth and the coat which he was wearing. This resulted in a quarrel between Rajabala and the prisoner. Rajabala had to appeal to some of the neighbours to induce the prisoner to give the clothes back to the stranger who had come to pay her a visit. As a

matter of fact, evidence is given by one of the witnesses who happens to be the carter of a neighbour of the name of Mohim Chandra Pramanik that he did actually beat the prisoner in order to induce him to deliver the clothes to the stranger. It is said that while the accused returned the clothes he uttered threats to the effect that if he was a man he would teach a lesson to the woman. The exact statement which was made is differently stated by different witnesses, but this much is clear that the prisoner did hold out a threat of teaching the woman a lesson or of taking his revenge on her. This was on 8th May.

On the 9th, which is the date of the occurrence, at about 10 p. m. the deceased paid a visit to this woman and the evidence is that after the preliminary settlement of the fee she would charge for entertaining this visitor they entered into Rajabala's room and it is said that while this unfortunate young man was in the act of sexual intercourse with the woman the prisoner came from the direction in which Rajabala was lying with her head and inflicted wounds on the deceased while he was in this act. On the first blow being struck it is said that the deceased and Rajabala rose from the floor where they were lying when another blow is said to have been struck which had the effect of causing this young man to fall on a wooden bedstead or takhtaposh which was lying nearby. After this it is said the prisoner inflicted injuries on Rajabala, Rajabala is said to have snatched the weapon which is said either to be a hasua or a katari or dao from the hand of the prisoner but it was again snatched back by the accused and several wounds were inflicted on the woman. The woman managed to open the door of the room in which the murdered man lay and she cried that it was Dinabandhu, the prisoner, who had committed the murder. This apparently attracted the attention of another unfortunate woman Giribala who was living in the next room and was at that time taking her night meal. The occupant of the next room Hari Dasi another unfortunate woman was also roused from sleep and to her also it was stated that it was the prisoner who had committed the murder. The prisoner in the meantime, after the door of the room had been opened, escaped into the land and garden towards the west by an opening or sindh which had been cut in the western matwall. A sketch map of the huts of Rajabala and the other women has been made an exhibit in this case and is to be found at the end of the paper book. From that it appears quite likely that the prisoner made his escape through the sindh in the western wall. A short time after the occurrence, the case for the Crown is, a neighbour who had a tea shop which these women frequented, namely, Atul Krishna Das, was called. He heard a report of the occurrence from Rajabala, Giribala and others and immediately went to the thana to lodge the first information report. That information is to be found at p. 5 of the paper book and it is necessary to reproduce portions of it in order to show that the first information report agrees in its broad details with the case now made for the Crown. Atul Krishna said that at about 10 O'clock in the night of 9th May he, Nani Babu and Bhutnath Shaha were working in his shop at the Gholsapur Bazar when a woman of Gholsapur, whom he would be able to recognize if seen, cried out exclaiming "being killed" at which he responded saying what the matter was and she said that the paramour of Rajabala Peshakar had cut her with a katari and murdered another and that the accused who was said to have cut the woman was an Uriya Baman called Dinabandhu. Then the first information proceeds as follows: :

"Then I ran up to Rajabala Peshakar and found her lying on her verandah and saw serious bleeding cut wounds on her back and hands and her whole body was soiled with blood. Before I came here I did not notice whether she had any other wounds. At that time a person, whose name I do not know, said that a man was lying murdered inside the room. I have heard from wounded Rajabala that the paramour Uriya Baman Dinabandhu entered the room by cutting sindh and wounded her with a katari, and murdered a man who came to her room. Before coming here, I have not enquired to know why he had been murdered, nor have I heard, what persons have seen the occurrence. I did not see accused Dinabandhu Uriya there, nor before coming here have I enquired at what part of the ghar the sindh had been cut. This is my ejahar.

In respect of the actual occurrence the whole case for the prosecution really rests on the testimony of the woman Rajabala because she is the only eye-

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witness to the occurrence. (His Lordship after considering the evidence on merits, concluded). As I have stated at the outset, the case made for the Crown and the evidence given by Rajabala in Court tally in main particulars with that was stated in the first information report.

Some argument has been advanced in this Court that Rajabala's evidence must be discredited because the medical evidence shows that her statement that the deceased fell on receiving the first blow or another blow after that is inconsistent with the medical evidence which shows a number of injuries on the person of the deceased. It is difficult to gather in what condition Rajabala was at the time when she found a man with a sharp weapon inflicting wounds on a person who was visiting her at the time and who was having sexual intercourse with her. The attack indeed was very very sudden so far as they were concerned and no wonder that in that confusion Rajabala would not have a clear impression of what actually happened in the room, namely, as to whether there was one injury or several injuries on the person of the deceased. Having regard to the circumstances in which the injuries were inflicted, not much importance can be attached to the medical evidence as to the number of the injuries.

In connexion with Rajabala's evidence it has to be remembered that both the Judge and the nine gentlemen of the jury had an opportunity of observing the demeanour of that witness. That is an advantage which the Judge and the jury in the Court below had over the Court of appeal and, as has been said on the highest authority, a Court of appeal would not be justified in disturbing the finding of a Judge or of a jury on a simple issue of fact unless the verdict arrived at seems to be opposed to the entire weight of evidence. I think, therefore, that the occurrence took place in the manner alleged by Rajabala and that the wounds which caused the death of Kartic were inflicted by the prisoner in the manner in which she deposes.

It has next been argued that there are discrepancies with regard to the occurrence of 8th May and that if the incidents had not taken place in the manner alleged, there would be no motive in the prisoner in committing the crime on the 9th. We have listened to the learned advocate for the appellant on this part of the case at great length and I do not consider that the discrepancies are such as would entitle us to hold that the incidents of the 8th did not take place in the manner in which most of the witnesses state. The learned Judge did put before the jury the slight discrepancies between the different witnesses. It appears, however, from the evidence of Mohim Chandra Pramanik, one of the principal shop-keepers of the locality who took an active part in the incidents of the 8th, that he called the prisoner and that on his orders his cartman Dabiraddi Sheik (P. W. 12) appeared and slapped Dinabandu and snatched the clothes from him. The cartman corroborates his master in the main details. As I have already stated, the evidence leaves no doubt that a threat was held out by the prisoner to Rajabala that he would teach her a lesson. The question as to whether he actually used the words that if he was to give her up he would cut her to pieces rests on the testimony of the carter Dabiraddi. Be that as it may, the entire evidence supports the threat. There may be some discrepancies with regard to the actual words used.

It has next been argued on behalf of the prisoner that it seems singular that if he was the man who committed this crime there would be no trace of blood on his clothes when he was arrested in the shop at about one O'clock in the morning of the 10th. It seems to me that a possible explanation of this is that as it was a premeditated plan the accused person might have thought beforehand of the means of removing all traces of the crime from his person, he might have thrown the hasua or the katari either in some tank or in some out of the way place, he might have removed either the gurensey or the coat or the jama which he was wearing, and after removing all traces of the crime he might have gone to the shop where he used to work and rested there at that time of the night. It is a very significant circumstance that at 1-30 in the morning when he was arrested by the Sub-Inspector he seemed not to be asleep but was rather awake, and it is quite

possible that he had been to that shop shortly before the time when he was arrested. This interval between the actual commission of the murder and the time when he went to the shop might have been utilized for the purpose of removing all traces of the crime. This of course seems to me to be a possible explanation. It is also said that there was no trace of blood in his hands. Of course the evidence of the Sub-Inspector is that he could not, with his naked eyes, discover any blood, but scrappings of the finger nails were taken several days after the occurrence and the result of the chemical examination shows existence of human blood in the finger nails of the accused. I do not lay much stress on this circumstance. This is after all a very weak evidence.

Considering therefore all the circumstances, I think that the jury arrived at a correct verdict and that their verdict is justified on the evidence.

It remains now to consider the question as to whether the extreme penalty of the law should be inflicted on the prisoner. The rule which is generally followed in this case is that unless there are extenuating circumstances the person who is found to be guilty of murder should receive the extreme penalty of the law. I do not find any extenuating circumstance in this case to induce me to inflict the less severer punishment of transportation for life. The attack seems to be a deliberately planned one. The sindh must have been cut at sometime of the night by the accused who was secretly there, possibly in the closed verandah, watching for an opportunity to wreak his vengeance either on Rajabala or on the person whom she might entertain at that time of the night. There was a considerable amount of premeditation and it cannot be said in this case, as has been sought to be argued by the learned advocate for the appellant, that there was a sufficient provocation which would justify us in not passing the extreme penalty of the law. The learned advocate for the appellant has sought to put this case, if not on the same footing, on a somewhat analogous footing as in the case of a husband murdering his wife caught in the act of adultery or murdering the adulterer. The two cases can bear no possible analogy. It is well established law that if a husband discovers his wife in the act of adultery and thereupon kills her he is guilty of man-slaughter only and not of murder. But that rule has no application where the relationship between the parties is not that of husband aud wife. There can be no question in this case that the relationship between the prisoner and Rajabala was that of husband and wife, nor can it be regarded as a case of two unmarried persons living together as husband and wife. The evidence clearly establishes that Rajabala was a public woman and that all persons willing to visit her at any rate before 10 O'clock at night were entitled to be entertained by her. This rule as has been pointed out in a receut case which applies to the case of a husband discovering his wife in the act of adultery, cannot even be extended to the case of a person who kills one with whom he has been engaged to marry. I may just refer in this connexion to the case of the *Rex* v. *Palmer* (1). where Channel, J., points out:

"It is well established law that if a husband discovers his wife in the act of adultery and thereupon kills her he is guilty of manslaughtar only and not of murder. That has been extended in *Reg.* v. *Rothwell* (2) and *Rex.* v. *Jones* (3) to a sudden confession by a wife of past adultery, an extension which no doubt creates an exception to the general rule that provocation by words is not enough, The reason for that exception is that a sudden confession is treated as equivalent to a discovery of the act itself. But here the relation between the parties was not that of husband and wife, nor was it a case of unmarried persons living together as husband and wife. They were simply persons who were in position of being engaged to be married. Under those circumstances if the effect of the summing up was to leave the jury under the impression that they could not properly find a verdict of man-slaughter we think that it was right."

It has next been sought to be argued on behalf of the prisoner in connexion with the mitigation of sentence that if the prisoner was an illiterate man, a man with a defective mental balance what we have to consider is whether the provocation was not sufficient in the coso of such a person to deprive him of his self control; and, if this was so, it is argued that there is an extenuating

(1) [1913] 2 K. B. 29=82 L. J. K. B. 581=29 T. L. R. 340=23 Cox. C. C. 377=77 J. P. 340=108 L. T. 814.
(2) [1871] 12 Cox. C. C. 145.
(3) [1914] 3 K. B. 1116=84 L. J. K. B. 1102 =112 L. T. 175.

circumstance and the extreme penalty of the law should not be passed upon him. The answer to this argument is furnished in a very instructive judgment of Lord Reading C. J., in the case of the *Rex* v. *Lesbini* (4), where the question arose whether the conviction should be altered from one of murder to one of man-slaughter and the sentence consequentialiy altered. It is useful in the present controversy to quote in extenso what was said by the Lord Chief Justice with regard to an argument of this kind-

"It is now said before us that we as a Court of appeal might come to the conclusion that the tests laid down in the well known authorities as to the provocation necessary to constitute a defence of man-slaughter are too narrow and that we could extend it, and if we come to the conclusion that that it ought to be extended we could enter a verdict of man-slaughter and alter the sentence. It is sufficient to say that we see no reason to dissent from what was said by Darling J, in giving judgment in *Rex. Alexander* (4). A similar argument was placed before the Court in that case. It substantially amounts to this, that the Court ought to take into account different degree of mental ability in the prisoners who come before it, and if one man's mental abllity is less than another's it ought to be taken as a sufficient defence if the provocation given to that person in fact causes him to lose his self-control, although, it would not otherwise be a sufficient defence because it would not be provocation which ought to affect the mind of a reasonable man. We agree with the judgment of Darling. J., in *Rex* v. *Alexander* (4). and with the principles enunciated in *Reg.* v. *Welsh* (5), where it is said that "there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion." "We see no reason, therefore, to dissent in any way from the principle of law on which this case was tried. On the contrary we think it is perfectly right. This Court is certainly not inclined to go in a direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequences of his acts."

Applying this test to the present case it appears to me that the act of the accused was one which is shocking to the ordinary sense of humanity. This Brahmin youth Mookerjee in a moment of weakness was led to the vicious atmosphere of a brothel and while he was in the act of sexual intercourse he was attacked with almost dramatic suddenness by the accused with a weapon which caused his death. In my opinion, this is a case where the extreme penalty of the law should be passed upon him. I would accordingly confirm the sentence of death passed on the prisoner by the Additional Sessions Judge and dismiss the appeal.

(4) [1914] 109 L. T. 745.
(5) [1871] 11 Cox C. C. 336.

S. K. Ghose, J.—The accused was tried on charges under Ss. 302 and 326, I. P. C., before the learned Additional Sessions Judge of Alipore sitting with a jury of nine persons. The jury unanimously found the accused guilty on both the charges. The learned Judge agreeing with the jury has convicted the accused on both the charges. On the charge under S. 302 he has sentenced the accused to death and under S. 374, Criminal P. C., he has referred the case to this Court for confirmation of the death sentence. The prisoner has also appealed to this Court. So the case is open to us both on facts and law. (HisLordship after stating facts and considering the evidence in support of it and objections thereto, concluded). It comes to this then that Rajabala actually recognised the accused as the person who assaulted her and the deceased. At the time of the assault she cried out mentioning the name of the accused and this is deposed to by the neighbours who came immediately afterwards. There is evidence as to circumstances going to show that the accused had a strong motive to commit the assault. In fact, on the previous day he had assaulted another person who was being entertained by Rajabala and he had gone away threatening to do further harm. At the time of the occurrence there was no chance of making a mistake, as there was a lamp burning in the room. The evidence is of witnesses who bear no special grudge against the accused.

The learned Judge in his charge to the jury pointed out that, according to the doctor, the injuries inflicted on Kartik were "not necessarily of immediate dangerousness" and he went on to say:

"The question is whether the jury will find that the act was done with the intention of causing the death of Kartic Mukherji. In this connection jury will notice the nature of the injuries on Rajabala on whom fatal injuries were not inflicted."

It seems to me that in saying this the learned Judge put the matter as much in favour of the accused as was possible.

It has been argued by the learned advocate for the appellant that the learned Judge should not have drawn the atten-

tion of the Jury merely to the first part of S. 304, I. P. C. but that he should have gone on and drawn their attention to the second part of that section. But the jury did not even accept the view that the offence would come under the first part of S. 304, I. P. C.; evidently they took the common sense view that the intention of the accused was to cause death. The learned advocate for the appellant has also argued that there was room for provocation. But this argument is futile in view of the fact that the assailant had already entered the room by cutting a sindh and being armed with a cutting weapon. He was evidently lying in ambush, waiting for an opportunity, and he did enter at the paychological moment when the woman and the other man were engaged in sexual intercourse. It seems to me, therefore, that the plea of provocation cannot possibly be sustained.

The case is a quite simple one and the facts are clear. The learned Judge has delivered an admirable charge in the course of which he has drawn the attention of the jury to all the salient features of the case. The charge is a fair one and the learned Judge has laid due stress on the points that are in favour of the prisoner. The evidence, is, however, sufficient and convincing. Upon this evidence the Judge and the jury could come to no other conclusion than that the accused is guilty order S. 302, I. P. C. in respect of the injuries caused on the deceased and under S. 326, I, P. C. in respect of the injuries caused to Rajabala. In passing sentence the learned Judge has carefully considered the question as to whether there is any extenuating circumstance. He has found none, and I agree with him. The appeal of the prisoner must, therefore, be dismissed and the reference must be accepted. The conviction under S. 302, I. P. C. and the sentence of death passed thereunder must be confirmed. I therefore agree with my learned brother in the order that he has made.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 205

CUMING AND MALLIK, JJ.

Abdul Gani Chaudhuri and *another*—Plaintiffs—Appellants.

v.

Angri Bhiku and *others*—Defendants—Respondents.

Appeal No. 2641 of 1926, Decided on 18th December 1928, from appellate decree of Dist. Judge, Chittagong, D/- 25th May 1926.

(a) Bengal Tenancy Act, S. 74—Abwab—Whether stipulation in lease amount to part of rent or abwab is question of fact.

Whether a stipulation in the lease or kabuliat to pay a sum, goats, molasses or any other thing over and above rent mentioned in the lease is an abwab or forms part of the lease rent is a question of fact to be decided in each particular case. In each case it has to be ascertained whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease : *A. I. R.* 1927 *P. C.* 250, *Rel. on.* [P 206 C 2, P 207 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 52 (3) and (4)—Assessment of rent on additional area is governed by sub-S. 3 and not 4.

The subsection which sets forth the rule to guide Court in determining the additional rent is sub-S. 3 and not 4. The rule prescribed in sub-S. 4 does not apply to cases of assessment of rent on additional area. [P 207 C 1]

(c) Landlord and Tenant — Additional cesses for excess of area can only be claimed if landlord be paying cesses for that excess of area.

Unless the landlord had to pay additional cesses for the additional area for which he claims additional rent from tenant, he is not entitled to recover any cesses from the tenants in respect of the additional rent. [P 207 C 1,2]

Dwarkanath Chakravarti, Nurul Huq Chaudhuri and *Chandrashekhar Sen*—for Appellants.

Dhirendralal Kastgir, Nagendranath Basu and *Sushilchandra Datta*—for Respondents.

Cuming, J.—In the suit, out of which this appeal has arisen, the plaintiffs sued for recovery of arrears of rent and cesses for the years 1283 and 1284 M. E. and first quarter of 1285 M. E. with damages thereon at 25 per cent. They based their claim on a certain unregistered kabuliyat. They also claim additional rent of Rs. 212-14-0 as for the period in suit, on the allegation that there had been an increase in the area of the taluk to the extent of 6 drones 7 kanis 6¼ gandas of land. The defendants contended, among other things, that they were not liable to pay any additional rent for any additional area

The first Court decreed the plaintiffs' suit for 2½ years' rent at the rate of Rs. 713 with cesses and with damages at 12½ per cent, but he disallowed the claim for additional rent for additional area. On appeal, the learned District Judge held that the plaintiffs were entitled to additional rent to additional area and that the area on which they were entitled to additional rent was three drones odd. He assessed the additional rent for this additional area at Rs. 69 per annum.

The plaintiffs have appealed to this Court and their first point is that, on a proper construction of the kabuliyat, it will be found that the excess area is some six drones odd and not only three drones odd. They would seem to contend that, on a proper construction of the kabuliyat, the amount of land settled with the defendants-respondents, was some 21 drones and that, as they are now in possession of 28 drones odd, the plaintiffs are entitled to additional rent on additional area, which is the difference between 21 drones odd and 28 drones odd. This question depends on the construction of the kabuliyat, so far as we are concerned. Mr. Chakravarti, who appears for the appellants, would seem to argue, first of all, that what was settled by the terms of the kabuliyat with the defendants was only the hasila area, which was some 21 drones odd. He contends further that if we find, on construing of the kabuliyat, that what was settled with the defendants was the hasila land 21 drones odd together with khila land, which was some 3 drones, still we ought to hold, on a proper construction of the kabuliyat, that the rent of Rs. 713 was assessed not on the total land mentioned in the kabuliyat, 24 drones odd, but only assessed on cultivable land. I have very carefully considered the terms of the kabuliyat and I have no hesitation in coming to the conclusion that what was settled with the defendants was the area of 24 drones 10 kanis 2 gandas and 1 kara. If the land settled with the defendants was only the cultivable area of 21 drones 10 kanis and 3 karas, it seems to me there would be no point in making any mention of the uncultivated lands. The land, of which the taluk is comprised, is not described as land within certain boundaries. Had the lands been within certain boundaries, then there might have been some point in mentioning the facts that some were waste and some were culturable and it was the culturable lands only within these boundaries that were settled with the tenants. But there being no mention of the boundaries, there was obvicusly no point in making any mention of the unculturable lands, if they were not settled with the defendants. I am clearly, therefore, of opinion that what was settled with the defendants was 24 drones 10 kanis 2 gandas and 1 kara of land. Mr. Chakravarti would then seem to argue that, even if that were so, the rent was assessed only on the cultivated area. There is nothing whatever in the document to show that the rent was assessed only on the cultivated area. If it were, the document would probably have said so and there probably would have been a stipulation in the document that if the khila lands came under cultivation additional rent would be assessed upon them. There is, however, no such stipulation in the document. I am, therefore, of opinion that the learned Judge has rightly held that it is only some 3 drones odd which are now liable to assessment for additional rent. There is a further point to be taken into consideration in connexion with this question namely, if only culturable lands were assessable under the kabuliyat, there is no evidence, as far as I can see, to show how much is culturable land and how much is khila land at the present moment.

Mr. Chakravarti has then argued that the lower Courts were wrong in not allowing them a decree for 16 goats and two large jars of molasses, which, according to him, form part of the rent. The defendants, on the other hand, contend that these are abwabs and the plaintiffs are not entitled to realise them. Whether a stipulation such as this, to pay goats and molasses or other things, is an abwab or forms part of the rent is really a question of fact to be decided in each particular case. In the case of *Chuttra Kumari Devi* v. *W. W. Broucke* (1), their Lordships of the Judicial Committee remark :

" A large number of cases decided by the Calcutta and Patna High Courts were referred

(1) A. I. R. 1927 P. C. 250=7 Pat. 134=54 I. A. 432 (P.C.).

to in the judgments and cited at the Bar. Their Lordships do not consider it necessary to refer to them beyond expressing their agreement in the view that in each case it has to be ascertained whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease."

If we apply this principle to the present case, I have no hesitation in finding that the goats and molasses do not form any part of the rent. It is quite clear, from a perusal of the document, that the total annual rent is settled to be Rs. 713 and, therefore, it is equally clear that these 16 goats and two big kars of molasses do not form any part of the rent. They cannot, therefore, be recovered by the plaintiffs and they were rightly disallowed by the lower Courts.

Mr. Chakravarti then objects to the method, which the learned Judge has adopted, in arriving at what he considered to be fair and equitable rent for this additional land. Mr. Chakravarti would seem to contend that the amount of rent to be assessed on the additional land should bear a proportion to the rent payable on the rest of the land, that is to say, I presume, if the rate of rent of the original land is Rs. 2 per ani, the same rate should be adopted in assessing rent for the additional area. The learned advocate in his argument is clearly thinking of the rule which applies to the case of abatement of rent which is dealt with in S. 52, sub-S, 4, Ben. Ten. Act. But the subsection which sets forth the rule to guide Courts in determining the amount of additional rent is sub-S. 3 and not sub-S. 4. As far as I can see, the learned Judge has followed the rule and principle prescribed in sub-S. 3. The rule contained in sub-S. 4, I need hardly say, does not apply to a case of assessment of rent on additional area.

The last point argued by the learned advocate for the appellants is that the appellants are entitled to cesses on the additional rent. Incidentally I may point out that this point was not argued in the lower Court. Nor, as far as I can see, did they claim cesses on the additional rent. They have not, however, yet, as far as I can ascertain, to pay any additional cesses for this additional area for which the additional rent has been assessed. Clearly, therefore, they are not entitled to recovery any cesses from the tenants in respect of the additional rent.

The result is the appeal must fail and is dismissed with costs. The cross-objection by the respondents is not pressed and is also dismissed with costs.

Mallik, J.—I agree.

V.B./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Calcutta 207

B. B. GHOSE AND PANTON, JJ.

Ram Krishna Kulasi and *another*—Plaintiffs—Appellants.

v.

Heramba Chandra Roy and *others*—Defendants—Respondents.

Appeal No. 55 of 1927, Decided on 8th January 1929, against original decree of Sub-Judge, Second Court, Midnapur, D/- 28th February 1927.

(a) Contract Act, S. 74 — Court cannot make new contract unless debtor shows grounds — Mere ground that interest is excessive or amounts to large sum is insufficient for interference.

Unless the mortgagor can show any good reason why the contract entered into by him under the mortgage bond should not be enforced, the Court cannot make a new contract for him and interfere with the terms of the contract. The Court cannot reduce the rate of interest or interfere with the stipulation for compound interest merely on the ground that the interest stipulated is considered to be excessive or that the interest has amounted to a large sum owing to the defendant not paying it at the stipulated periods of the rests agreed upon in the bond : *A. I. R.* 1918 *P. C.* 48 ; *A. I. R.* 1918 *P.C.* 249 and *A.I.R.* 1921 *P.C.* 60, *Foll.* [P 208 C 1]

*** (b) Usurious Loans Act (10 of 1918), S. 3 — Rate of interest neither unfair nor higher than the one prevalent—Court should not interfere.**

Where interest at 12 per cent per annum with yearly rests was charged it cannot be considered as excessive when the rate of interest prevailing at the time was not lower than that provided in the mortgage bond or there was no circumstance on which it could be held that the transaction as between the parties to it was substantially unfair. [P 208 C 1]

Amarendra Nath Basu and *Arun Chandra Bose*—for Appellants.

Satcowripati Roy and *Apurba Charan Mookerjee* and *Shantimoy Majumdar*—for Respondents.

Judgment.—This is an appeal by the mortgagee against the decree of the Subordinate Judge, Second Court, Midnapur, partially rejecting his claim on a mortgage bond.-The mortgage bond was executed by the father of defendants 1 to 5 for Rs. 8,000 in the year 192[illegible]. The

stipulation was to pay interest at the rate of Re. 1 per month with yearly rests. The plaintiffs brought the suit for the mortgage money including interest in terms of the bond. The Subordinate Judge reduced the interest on the ground that the stipulation to pay compound interest with yearly rests is excessive and unfair. His 'reason for so holding was that the security was ample and the property was valuable, the plaintiff himself having offered to purchase it for Rs. 27,000. It was proved that the defendant had considerable properties, although he had other debts. The Subordinate Judge made a decree for simple interest at the rate of one per cent per month. The plaintiff has appealed against that decree and his contention is that he is entitled to enforce his mortgage according to its terms and that the Subordinate Judge was wrong in allowing only simple interest. It is well settled that unless the defendant can show any good reason why the contract entered into by him under the mortgage bond should not be enforced, the Court cannot make a new contract for him and interfere with the terms of the contract. The Court cannot reduce the rate of interest or interfere with the stipulation for compound interest merely on the ground that the interest stipulated is considered to be excessive or that the interest has amounted to a large sum owing to the defendant not paying it at the stipulated periods of the rests agreed upon in the bond.

The authority for this proposition will be found in the cases of *Aziz Khan* v. *Duni Chand* (1), *Balla Mal* v. *Ahad Shah* (2) and *Raghunath Prosad Sahu* v. *Sarju Prosad Sahu* (3). The decisions of their Lordships of the Judicial Committee in these cases has in effect overruled the earlier cases as to the power of the Court to reduce the interest on the ground that it was excessive. The respondent, however, relies upon the provisions of the Usurious Loans Act (Act 10 of 1918) which applies to this case as the mortgage bond was executed after the Act came into operation. Under S. 3 of that Act the Court can reopen the transaction entered into between the parties if it has reason to believe that (a) the interest is excessive and (b) the transaction was as between the parties thereto substantiaily unfair. In this case, no evidence has been given that the interest charged was excessive, having regard to the rate of interest prevailing in the locality. As a matter of fact, 12 per cent per annum with yearly rests cannot be considered as excessive. Besides, there is no evidence in the case that the rate of interest prevailing at the time was lower than that provided in the mortgage bond. Moreover, there is no circumstance in the present case on which it can be held that this transaction as between the parties to it is substantially unfair. The plaintiff was not in a position to dominate the will of the mortgagor. The result, therefore, is that this appeal is decreed with costs. Plaintiff will be entitled to interest at the stipulated rate, that is to say, one per cent per month with yearly rests. Au account should be made of what is due to the plaintiff for the principal, interest and costs calculated up to 8th April 1929, and the amount so found shall carry interest at the rate of six per cent per annum from that date until realization. A preliminary decree for sale shall be drawn up in terms of Form No. 4 of Appendix D, Sch. 1, Civil P. C.

We are told that the added respondent in this Court who has purchased the mortgaged property depcsited the sum decreed by the lower Court. It is not known whether the plaintiff-appellant has actually withdrawn the amount deposited. If he has done so, it must be taken as in part payment of the decretal amount and from that date interest on the amount withdrawn will cease. If, on the other hand, the appellant has not withdrawn any amount so deposited, an account shall be made as directed above in the Court below. The decree shall be prepared by the lower Court.

Let the records be sent down as soon as the decree in this case is signed.

M.N./R.K. *Appeal allowed.*

(1) A.I.R. 1918 P.C. 48.
(2) A.I.R. 1918 P.C. 249.
(3) A.I.R. 1924 P.C. 60=3 Pat. 279=51 I.A. 101 (P.C.).

* A. I. R. 1930 Calcutta 209

MUKERJI AND JACK, JJ.

Prafulla Kumar Bose—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 216 of 1929, Decided on 3rd September 1929, against order of Sess. Judge, Sylhet, D/- 8th February 1929.

*** (a) Penal Code, S. 366 — 'Forced' includes forced by circumstances.**

The word 'forced' as used in S. 366, is used in its ordinary dictionary sense and would include forced by stress of circumstances.

[P 210 C 1]

(b) Penal Code, S. 366—'Seduced' includes subsequent seduction for further acts of illicit intercourse.

The word 'seduced' as used in S. 366 should not be taken to have that narrow meaning of inducing a girl to part with her virtue for the first time but that even though a girl may have by the first act of seduction surrendered her chastity, subsequent seduction for further acts of illicit intercourse is also meant to be included: *Rex* v. *Moon*, (1911) 1 *K. B.* 818, *Ref.* [P 210 C 1, 2]

(c) Criminal P. C., S. 297—Age of girl in dispute—One count of charge setting out both kidnapping and abduction in alternative or both does not vitiate charge.

An a case under S. 366, Penal Code, if the age of girl is in dispute one count of charge setting out both kidnapping and abduction in alternative or together does not vitiate the charge to jury : *A. I. R.* 1927 *Cal.* 200, *Ref.*

[P 210 C 2, P 211 C 1]

(d) Evidence Act, S. 65—Oral evidence of contents of letter inadmissible under S. 66 cannot become admissible by subsequent dispensing with notice.

Oral evidence of the contents of a letter neither called for nor produced, is inadmissible under S. 66 though no objection may be taken to the giving of that evidence, and no subsequent dispensing with the notice can operate to make it admissible: 20 *Cal.* 53, *Relied on.*

[P 211 C 1]

*** (e) Criminal P. C., S. 342—If accused declines to answer questions Court should not hold inquisitorial proceedings.**

If an accused prefers to be reticent the Court should not hold an inquisitorial proceeding and the fact that the accused declines to make a statement would not necessarily indicate to the Judge that the accused would not like to answer specific questions put to him.

[P 212 C 1, 2]

Narendra Kumar Bose and *Hari Charan Banerji*—for Appellant.

Birbhusan Dutt—for the Crown.

Judgment.—The appellant Profulla Kumar Bose has been convicted by the Sessions Judge of Sylhet under S. 366, I. P. C., and has been sentenced to undergo rigorous imprisonment for 18 months and to pay a fine of Rs. 1,200, or in default to undergo rigorous imprisonment for 18 months more. The fine has been ordered to be paid as compensation to the father of the girl in respect of whom the offence has been found to have been committed. The trial was held with the aid of a jury on charges under Ss. 366, 368 and 376, I. P. C. The jury were unanimous in their verdict. They found the appellant not guilty under S. 376, I. P. C. They held that he was guilty under S. 366, I. P. C., finding that the girl had been kidnapped, the seduction having taken place before the girl left her father's place They held that in the circumstances the offence under S. 368, I. P. C., did not arise.

The story needs no recounting. It is set out in all its harrowing details in the voluminous charge which the learned Judge delivered and which purports to deal with every point in controversy with all the evidence bearing on it and from all conceivable view points. Put in a nutshell, the story is that the appellant who was an Assistant Surgeon at Sunamgunge in the District of Sylhet, taking advantage of his position as the next door neighbour, and abusing the confidence that was reposed on him as the medical attendant of the girl who was placed under his treatment and which enabled him to have almost free access into the house wherein the girl lived, kidnapped or abducted the girl on or about 20th August 1920, and removed her from place to place keeping her concealed to avoid detection till the girl was recovered at a place called Khalsini, near Chandranagore on 23rd March 1923. The story is that in the meantime the girl gave birth to a child, which however died. Information of the girl having left her father's house was given to the police almost simultaneously with her disappearance. The appellant remained at Sunamgunge till April 1921, presumably to keep up appearances. Subsequently, some time in 1922, the father on receipt of some information against the appellant applied for and obtained warrant for his arrest and search warrant for the production of the girl. After the girl was recovered on 23rd March 1923, as already stated, the usual investigation by the police followed, and a charge sheet was submitted against the appellant on 10th

June 1924. The appellant, however, could not be arrested then. He eventually surrendered on 21st December1927.

In this appeal which the appellant has filed to this Court from his conviction and sentence, various grounds have been taken which we propose to deal with one by one.

It has been urged in the first place that the learned Judge has not correctly explained the offence punishable under S. 366, I. P. C. It has been argued that the expression "in order that she may be forced or seduced to illicit intercourse" has been wrongfully explained. The contention is that the learned Judge wrongly explained the two words 'forced' and 'seduced.' As regards the word 'forced' the learned Judge said as follows :

"Force implies not merely physical force but also the force of circumstances. For instance, a girl who has been kidnapped from her father's house may be placed in such circumstances that she has no option but to submit to illicit intercourse. For instance, if she was entirely in the power of her kidnappers or abductors, her consent might be nothing more than a mere submission to their will."

It is contended that this explanation of the word 'forced' goes far beyond the definition given in S. 349, I. P. C. This argument overlooks that the definition that is given is not the meaning of the verb 'force' but of the expression 'to use force.' In our opinion there is no reason to suppose that the word 'forced' as used in S. 366, I.P.C., was not used in its ordinary dictionary sense which would include forced by stress of circumstances. Assuming, however, that the learned Judge was not right in the meaning he gave to the word, the error, even if there was any, did not matter, because the learned Judge made it plain to the jury that the question they had to consider was:

"whether or not the doctor's main motive in kidnapping or abducting the girl was that she should be seduced to illicit intercourse with himself."

It is 'seduction' that the jury had to deal with and not 'force,' and the verdict shows that the jury rightly understood the point. As regards the word 'seduced' the learned Judge told the jury by reference to some decided cases that though the word 'seduction' is sometimes used to mean to induce a girl to part with her virtue for the first time, the word as used in the section should not be taken to have that narrow meaning, but that even though a girl may have by the first act of seduction surrendered her chastity, subsequent seduction for further acts of illicit intercourse was also meant to be included. It has been urged that this view is wrong and as authority in support of this contention *Rex* v. *Moon* (1) has been cited, though that case, amongst others, has been relied upon by the learned Judge and in support of the view he took. We are of opinion that the view taken by the learned Judge is correct. It is the view taken in several reported decisions on the section, and is amply supported by what Channel, J , as well as the Court of appeal says in the case of *Rex* v. *Moon* (1) as regards the meaning of the word. The Court of appeal in that case only held that the wider meaning should not be given to the word 'seduction' as used in the particular section of the Childrens' Act, in view of the words "or prostitution" that stood next to it.

The second ground urged is that the learned Judge mixed up the two offences of kidnapping and abduction and did not keep the elements of those offences separate before the jury. As indicating this confusion, reliance has been placed upon the following passage in the summing up:

"I should also be glad if you would come to a further finding of fact whether you think that the girl had been kidnapped or abducted or kidnapped and abducted."

This contention in our opinion has no substance inasmuch as one of the questions in dispute in the case was that relating to the age of the girl. If the girl was 16 or over, she could only be abducted and not kidnapped, but if she was under 16 she could be kidnapped as well as abducted if the taking was by force or the taking or enticing was by deceitful means.

Thirdly it has been contended that the charge under S. 366, I. P. C., should have been split up into two, one relating to kidnapping and the other to abduction, and it has been said on the authority of the case of *Isu Sheikh* v. *Emperor* (2), that it was illegal to frame one count of charge setting out both the offences in the alternative. We are not prepared to say that a charge of latter

(1) [1910] 1 K. B. 818=79 L. J. K. B. 505= 74 J. P. 231.
(2) A. I. R. 1927 Cal. 200.

character contravenes the requirements of the law, far less that there was the least prejudice caused to the appellant thereby.

The next ground of objection relates to the admission of oral evidence from the girl as regards certain letters which she said she had received from the accused and which she returned either to a man of the accused named Ram Charan, or to the accused himself. This ground has been pressed with considerable force. What happened was that no exception was taken to the reception of this evidence when it was given but several days after the deposition was over, an application was made objecting to it on the ground that the notice contemplated by S. 66, Evidence Act, had not been given. The learned Judge then passed an order that as the accused denied having got the letters in his possession this was a case in which he would dispense with the notice. It has been urged that the fact that objection was not made at the time did not matter and that the subsequent dispensing with of the notice would not make the evidence admissible that was inadmissible at the time it was given. The first of these propositions need not be disputed: *Kameshwar Pershad* v. *Amanutulla* (3), and the second one is obviously just. But there are several answers to the appellant's contention. One is that the learned Judge might have expunged the evidence that had already been given and after dispensing with the notice, allowed the same evidence to be given over again this technical defect of procedure that there was, in not adopting this course can well be condoned. Another is that the case can hardly be regarded as one in which the originals are "shown or appear to be in the possession or power" of the accused,—it not having been stated by the girl that that was so, and it not having been the case of the accused that he had the letters. It was therefore not a case under S. 65, Cl. (a), but rather under Cl. (c) of that section. If so, it was only a question of sufficiency of the search that should have been made for justifying the reception of secondary evidence. In such a case, as the Judicial Committee has pointed out:

"whether or not there was evidence of such an amount of search for the originals as would justify the Court in admitting secondary evidence of it was a point which was proper to be decided by the Judge of first instance, and was to be treated as one depending very much on his discretion, and the conclusion should not be overruled except in a very clear case of miscarriage of justice: *Harripriya Debi* v. *Rukmani* (4)"

Anent this ground it has been also urged that sufficient directions were not given by the learned Judge to point out to the jury the improbability of the girl remembering the contents of the letters for such a length of time, but we do not think that there is anything in this objection.

The fifth ground is a complaint against the procedure adopted by the learned Judge in interposing too frequently in the midst of the examination and the cross-examination of the girl by putting questions to her. We have examined the evidence that was elicited in that way, and we think that the only object of the learned Judge was to clear up matters involved in obscurity, and that except as regards one or two points, what was said in answer to the question put as aforesaid, was in favour of the accused. Of course if the learned Judge hampered the prosecution or the defence by taking the case out of their hands that would be a different matter; but no complaint of that character was made at the time, and there is nothing on which such a complaint can reasonably be made now.

The sixth ground is to the effect that the learned Judge did not give sufficient or proper directions as regards the non-examination of witnesses. What he did was to tell the jury:

"It has also been pointed out that a number of persons whose names transpired in the evidence, have not been examined as witnesses and during the course of the arguments the learned defence pleader produced a list of 26 persons who are according to his contention should have been examined by the prosecution."

Having said this the learned Judge proceeded to deal specially with one of these witnesses, namely the husband of the girl. Then he said generally:

"If such witnesses are not produced and examined, you may draw an inference that their testimony would not have supported the prosecution case."

He then briefly discussed the information on the record regarding the said 26 witnesses in order to explain to the jury to what extent the said witnesses

(3) [1898] 26 Cal. 53=2 C.W.N. 649.

(4) [1892] 19 Cal. 488=19 I. A. 79=6 Sar. 177 (P.C.).

could have given material evidence and placed the whole list before the jury in that way.

We do not think there was anything left unsaid that should have been said on the question of non-examination of material witnesses. Amongst these witnesses were the astrologer and the mother, for whose non-examination a good deal of argument has been advanced before us. Hemangini also is mentioned in that list.

It has been contended as the seventh and eighth grounds that the learned Judge should have told the jury that if the charge of rape failed the evidence of the girl and of the other witnesses should be regarded as very much discredited. The ninth ground is to the effect that on the question of omission on the part of the girl to state before the Committing Magistrate matters that she spoke to in the Court of Sessions the Judge's remarks had the effect of minimizing the importance of the omission. We do not feel pressed by any of these grounds.

The tenth and last ground is a complaint as regards the examination made of the appellant by the learned Judge. The contention is that after the appellant had declined to make a statement the learned Judge should not have put questions to him in the way that he did. Objection is also taken to the form of the questions, their range and their number and it is also said that the questions were of an incriminating character and were in the nature of cross-examination. Now the first question that the learned Judge put and the answer that the appellant gave to it were as follows:

"*Q.* Do you wish to make a statement? You are not bound to do so but if you do so your answers may be taken into consideration at the trial and put in evidence for or against you.

"*A.* I am not guilty. I do not wish to make any statement. What I have got to say my lawyers will say in the argument."

After this the learned Judge put to the appellant a very large number of questions covering almost every single point which formed the main allegations in the case for the prosecution. It is true that if an accused prefers to be reticent the Court should not hold an inquisitorial proceeding, but what was done in this case was something entirely different. The fact that the appellant declined to make a statement would not necessarily indicate to the Judge that the appellant would not like to answer specific questions put to him. The appellant did answer all the questions without demur. The questions were not inquisitorial or of a cross-examining character, and were not intended to fill up the gaps, if any, in the prosecution case. They were clearly put with the object of knowing what portion, if any, of the prosecution case was also the case for the defence, so that the learned Judge might be better able to place the case properly before the jury. They were also put to give the appellant a proper opportunity of explaining, if he he would the circumstances appearing against him in the evidence. No advantage has been taken of any slips that the appellant may have made in his answers. The questions may have been somewhat inconvenient for the appellant, but there is nothing therein of which he can legitimately complain.

We are unable to hold in appellant's favour upon any of the ten points on which the appeal has been pressed.

The appeal is accordingly dismissed.

V.B./R.K. *Appeal dismissed.*

** A. I. R. 1930 Calcutta 212

Full Bench

RANKIN, C. J. AND C. C. GHOSE, SUHRAWARDY, PEARSON AND PAGE, JJ.

Emperor

v.

Ermanali and *others*—Accused.

Full Bench Ref. No. 2 of 1929 in Jury Reference No. 41 of 1929, Decided on 9th Jaunary 1930.

**** (a) Criminal P. C., Ss. 274 and 326 (1)—Number of persons summoned for trial of offence under Penal Code, S. 302—Summoning less than 18 does not vitiate trial**—33 *C. W. N.* 1054, *Overruled.*

In a murder case where the number of jurors summoned is 14, nine of whom appear and are chosen by lot, the trial is not bad by reason of the fact that only 14 jurors have been summoned in contravention of the provisions of Ss. 274 and 326 : *A.I.R.* 1927 *P.C.* 44, *Appr.* 25 *Mad.* 61 (*P.C.*), *Dist.* ; **33 C. W. N. 1054 Overruled; A. I. R. 1930 Cal. 60 (2) and 33 C. W. N. 1053, impliedly overruled**

(b) Criminal P. C., S. 326 (1)—Large area of selection in persons attending is not the underlying intention of S. 326 (1).

Per *Rankin, C. J.*—It is no part of the intention of the legislature to have a large area of selection in the persons attending upon the summons on the theory that the larger the number of effective names in the ballot box,

the greater the chance the persons chosen will make good jurors. [P 215 C 1]

(c) Criminal Trial — Court should look to substance rather than to form — Criminal P. C., S. 537.

Per *Page, J.* — When the decision of a criminal Court in substance appears to be correct an appeal Court should endeavour to uphold the decision even in cases where the rules of procedure by which the trial is to be regulated have been transgressed ; except where the breach of the prescribed rules is of so grave a nature, where the form of trial was substantially different from that provided by law for the offence charged, or where, although the violation of the rules was not so profound as to radically alter the mode of trial, it is proved that thereby in the event a failure of justice has in fact been occasioned. [P 217 C 1]

(d) Criminal Trial — Decision just and reasonable on merits should not be disturbed.

Per *Page, J.*—Rules and Regulations are intended to be the handmaid and not the mistress of the law ; in criminal proceedings it is of the utmost importance that a decision just and reasonable on the merits should not be disturbed because in the course of the proceedings some flaw can be detected that is not fundamental and which is not proved to have worked injustice to the accused, although it may constitute a breach of the rules of criminal procedure : *R.* v. *Justices of the County of London*, (1893) 2 *Q. B.* 491, *Rel. on.* [P 217 C 2]

(e) Criminal P. C., S. 537—Scope.

Per *Page, J.*—Whether a particular breach of the procedure prescribed in the Code vitiates the proceedings or not must depend upon the gravity of the breach and the consequences that are presumed or proved to have flowed from it: *Allen* v. *Flood*, (1901) *A.C.* 506, *Rel. on.* [P 218 C 1]

Suresh Chandra Talukdar, Jatish Chandra Guha, Radhika Ranjan Guha, Sudhansu Sekhar Mukerjee, Surajit Chunder Lahiri, and *Benod Lal Ghose*—for Accused.

Debendra Narain Bhattacharjee and *Bikash Chunder Ghose*—for the Crown.

Rankin, C. J.—In this case there were nine accused persons. One of them was charged with murder under S. 302 and the remaining eight with an offence under S. 302 read with S. 149, I. P. C. They were tried by the Sessions Judge of Bakarganj with a jury of nine persons chosen by lot from among 14 persons who had been summoned to serve as jurors under the provisions of S. 326, Criminal P. C. The learned Judge, disagreeing with the verdict of the jury, referred the case to the High Court under S. 307, Criminal P. C.

At the hearing of the reference it was objected by the learned advocate for the accused that the jury had not been constituted in accordance with law and that accordingly the proceedings before the trial Judge should be set aside altogether. The objection taken is not that the number of persons who served on the jury, namely nine, was not the correct number under S. 274, but that under S. 326 the number of persons to be summoned was not less than 18 whereas summonses were sent to 14 persons and no more.

By S. 326, it is provided :

"326 (1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the Sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said Sessions, the number to be summoned not being less than double the number required for any such trial."

Upon this subsection, the first thing to notice is that it purports to prescribe something that is "ordinarily" to be done by the Sessions Judge. He is to request the District Magistrate to summon as many persons as seem to the Sessions judge to be needed for trials by Jury. The subsection envisages him as having fixed time for holding the Sessions and the number referred to is the number not for any particular trial but for the trials by jury which are to take place at the Sessions. The minimum number to which the subsection refers is not less than double the number required for any such trial, i.e., for any one of the trials to take place at the Sessions.

It has been found convenient in Bengal and is a practice generally adopted, to fix dates for each particular case to be tried before the Sessions Judge and to summon a certain number of persons to attend on the date fixed in order to provide a jury for that particular case. This practice is authorized by S. 327, and in the present case it has been followed.

Under S. 274, Criminal P. C., it is provided that where an accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons, and if practicable of nine persons.

Now, in dealing with these matters this Court has by its decisions from time to time laid down four things. The first is that although a jury is summoned for a particular case, the number to be

summoned should always be double the number required for the trial. If the summoning of persons to act as jurymen for the whole of a Sessions as contemplated by S. 326 is not to be carried out, nevertheless the direction "not less than double the number required for any such trial" can and should be carried out by adopting that minimum in each individual case. The standard set by the subsection should not be lowered by reason that the services of the persons summoned are in practice to be utilized for one case only : *Serajul Islam* v. *Emperor* (1).

The second thing which this Court has laid down is that if by reason of a a failure to observe this standard, it results, whether from non-attendance of jurymen or otherwise, that a jury of nine persons cannot be empanelled for the trial of an accused charged with an offence which is punishable with death, this fact will not entitle the Sessions Judge to proceed to trial in such a case with a jury of seven, in other words that it cannot be said that it was impracticable to have a jury of nine merely because an insufficient nnmber of persons have been summoned from the jury list : *Serajul Islam* v. *Emperor* (1).

The third thing which has become matter of decision is that in applying this standard to such a case it is not correct to regard seven as "the number required for any such trial" in the absence of circumstances which make it impracticable to have nine. Hence 18 persons and not 14 persons only should be summoned : *Dwarika Malo* v. *Emperor* (2) and *Amir Khan* v. *Emperor* (3).

The fourth thing which this Court has determined is that the persons who are actually to serve as jurors must be chosen in strict compliance with the provisions of Ss. 276 to 278, Criminal P. C. and that if these provisions are not strictly observed the proceedings will be treated as altogether bad : *Kedar Nath Mahato* v. *Emperor* (4).

Upon this reference we are asked by the learned advocate for the accused to hold that notwithstanding that the number of persons empanelled on the jury was the correct number, and notwithstanding that they have all been chosen from among persons summoned to act as jurors in strict accordance with the provisions of Ss. 276 and 278, the proceedings have been altogether illegal and must be quashed because summonses were not issued to at least 18 persons. He contends in view of S. 326 that if any less number of persons be summoned, there is a breach of a mandatory provision of the law which affects the constitution of the tribunal and renders void the proceedings. For this contention there is the authority of *Emperor* v. *Tamizuddin* (5), which is directly in point. The learned Judges of the Division Bench who dealt with the present case disagreed with that decision and they have referred to us the following questions :

(1) In a murder case where the number of jurors summoned is fourteen, nine of whom appear and are chosen by lot, is the trial bad by reason of the fact that only fourteen jurors have been summoned in contravention of the provisions of Ss. 274 and 326, Criminal P. C. ?

(2) Was the case of *Emperor* v. *Tamizuddin Ahmed* (5), rightly decided ?

In my opinion these questions should be answered in the negative and the case should be remanded to be dealt with on the merits.

The persons who are summoned to attend are chosen by lot (sub-S. 2, S.326) and in addition, the accused persons have the right of challenge given to them by S. 277. Mr. Taluqdar for the accused contends that the requirement that the number to be summoned shall not be less than double the number required for any trial finds place in the Code not merely for the purpose of ensuring that a sufficient number of persons whose names are on the jury list shall attend at the hearing and be found competent to be jurors and unobjectionable, but in order that an additional element of chance may exist in the interest of the accused person who is, therefore, prejudiced if the area of selection by lot under S. 276 is more limited than S. 326 contemplates. In *Kedar Nath Mahto* v. *Emperor* (4). I find in the order of reference the following observations :

"If the accused cannot successfully challenge him, any one of the persons summoned can be a juror to try the case. On this view the object of a second choice being made by lot is to eliminate arbitrary or biased choice as between one person summoned and another."

(1) A. I. R. 1928 Cal. 645=55 Cal. 794.
(2) A. I. R. 1930 Cal. 60=56 Cal. 1154.
(3) [1929] 33 C. W. N. 1053,
(4) A. I. R. 1928 Cal. 83=55 Cal. 371 (F.B.).
(5) [1929] 33 C. W. N. 1054.

In the judgment of Buckland, J., in which the Full Court agreed, it was said:

"In the course of the argument it was suggested that the ballot required by S. 326 (2) as to the persons to be summoned, and that required by S. 276 were intended to benefit the prisoner by ensuring as far as possible an unbiassed and impartial jury, chosen haphazard and that this furnishes an additional reason for requiring that even when the proviso is to be invoked, there shall nevertheless be a ballot. With this, in some measure, I agree, but inasmuch as the prisoner has a right to challenge conferred by S. 278, I should be disposed to think that the object of the several ballots was as much to ensure a fair and impartial incidence of the duty of service upon juries upon those who are liable to it."

This passage, it is clear, in no way conflicts with the other. The contention before us that if in a murder case 18 persons are summoned, 9 attend upon summons and 9 are chosen to serve without objection, the trial will be good; but that if 17 persons are summoned 17 attend and 9 are chosen without objection, the trial will be bad. In my judgment very clear reason must be shown for any such contention.

In the interests alike of the jury and of the prisoner, it is desirable that the persons who are in fact to serve as jurymen should not be selected by the concious choice of any one, whether it be the District Magistrate, the Judge or any other person. It is necessary in practice to summon a greater number of persons than is required to serve and for this reason some method of elimination is required. This method must be free of the dangers attendant upon a voluntary choice. It is no part, so far as I can see, of the intention of the legislature to have a large area of selection in the persons attending upon summons on the theory that the larger the number of effective names in the ballot box the greater the chance that the persons chosen will make good jurors. This aspect of the matter is dealt with by the ballot under S. 326 (2) which directs that all the names on the jury list (with certain exceptions) are to be entered for that ballot. There is much sense in saying that the jurors are to be chosen haphazard from the whole of the jury list but this having been done there would indeed be little point in another lottery but for the considerations I have mentioned. Since mistake, sickness or accident may diminish the number of persons attending upon summons and challenges may diminish their number still further, it is reasonably clear that the provision as to the number to be summoned is not motived by any idea that a certain superfluity of jurors is required to provide an additional element of chance. It is required to meet these very contingencies and the element of chance is required as a consequence of the superfluity.

It is said that the requirement as to the number to be summoned is "mandatory". This word is used in various senses but I understand it to be used as the equivalent of "imperative" as distinct from "advisory" "directory" or "facultative". Now if we look carefully at the wording of S. 326 we will find it to be expressed somewhat loosely. There are two clauses which may be compared. Immediately after the word "ordinarily" comes the phrase:

"seven days at least before the day which he may from time to time fix for holding the sessions."

This fixes a minimum in spite of the word "ordinarily" but the minimum fixed is governed by the word "ordinarily". The requirement as to the number to be summoned is also a minimum and in strictness of form it too is part of a statement of what the Sessions Judge shall "ordinarily" do. The whole practice of summoning jurors for special cases is a departure from the strict terms of the section and is a departure which can be justified under the word "Ordinarily" and by S. 327. If one is summoning a number of people from whom juries have to be chosen for the trial of several cases, the legislature thinks that the number to be summoned should never fall below double the number required for any single case. The legislature has not dealt expressly with the question whether for the purpose of a single case the minimum might be reduced. But the word "ordinarily" can be explained by S. 327 which refers to "other periods than the period mentioned in S. 226" and unless it is so explained a very important provision which ensures that jurors are to be taken from the jury list by means of a ballot becomes optional as under the word "ordinarily" a Judge could in a particular case ignore the section altogether. This he certainly cannot do *Brojendra Lal Sircar* v. *Emperor* (6); *Rahamat*

(6) [1902] 7 C. W. N. 188.

Sheik v. *Emperor* (7). Hence in such cases as *Serajul Islam* v. *Emperor* (1), this Court has held that the standard set by the section for the case contemplated therein is in all cases to be complied with.

When the circumstances which call for certain action are in character and and number such as can be fully stated or clearly implied the Code constantly uses the word "shall" or other imperative words. The Code is a long list of such imperatives some of which have reference to matters which are in no way vital and many of such are directed to minor incidents of procedure. But for S. 537 there would be grave disadvantages in a Code which makes statutory so many and so various requirements. That section obviates the difficulty which would arise by reason of all irregularities bearing the character of transgressions of a Statute.

The Judicial Committee pointed out in *Subrahmania Iyer* v. *Emperor* (8), that though in a sense the merest irregularity may be illegal, it does not follow that all illegalities are within the scope of S. 537. They did not say or suggest that nothing could be cured under the section if it was illegal and as the Division Bench has pointed out we now have in *Abdul Rahman* v. *Emperor* (9), an express decision to the contrary. Both decisions are really a condemnation of the view that all illegalities are as such in the same category for the present purpose. In the former case it was idle to suggest that there was no prejudice. The accused had suffered in an aggravated form the very prejudice from which the Code intends to save him. In *Abdul Rahman* v. *Emperor* (9), the test applied was whether there was ground for any probable suggestion of any failure of justice. The Judicial Committee in view of difference of opinion in India and of the fact that no case had come before them since *Subramania Iyer* v. *Emperor* (8), carefully explained and applied S. 537 "for the guidance of the Courts" and this decision must now govern the interpretation of the section unless and until the legislature shall see fit to amend the section.

(7) A. I. R. 1927 Cal. 593=54 Cal 1026.
(8) [1902] 25 Mad. 61=28 I.A. 257=11 M.L.J. 233=8 Sar. 160 (P.C.).
(9) A. I. R. 1927 P. C. 44=5 Rang. 53=54 I.A. 96 (P.C.).

In my judgment the test there laid down cannot be evaded by saying that the omission here is an omission to do what is required by a "mandatory" provision of the Code. Nor by saying on the one hand that the summoning of jurors is not even a "proceeding before or during the trial" and on the other hand that it is such a matter that a defect therein will vitiate the trial.

I do not understand what was meant when it was said in *Emperor* v. *Tamizuddin Ahmad* (5):

"By summoning less than 18 you initially reduce the chances of selection by lot and make it more possible to pack the jury."

Nor, save on the footing that one illegality is the same as another, can I agree that the summoning of less than 18 persons is on a par with trying a murder case with a jury of five. The present case has no analogy to the error in the "mode of trial" referred to in *Subramaniya Iyer* v. *Emperor* (8). The fact that the legislature has expressly provided in S. 537 that in the absence of prejudice to the accused an omission even to revise the list of jurors shall not render a trial void an irregularity which would prima facie entitle the accused to "challenge the array" in no way inclines me to think that the present case is beyond the scope of S. 537.

In the course of the argument before us the case was put of some jurors having to be chosen from among "persons present in Court" whose names were not on the jury list and of the need for this course having been occasioned by reason that the number of persons summoned was insufficient. I desire to express no opinion as to the effect upon the validity of a trial of such events as these.

Moreover as I have had occasion to refer to previous decisions upon S 537 and as we are sitting as a Full Bench, I think it well to add that in view of *Abdul Rahman's* case some of the previous decisions of this Court may require to be revised. This case does not require us to consider that aspect of the matter and it should be left for discussion when the need arises, and when specific questions can be considered.

In my opinion, the view taken by the learned Judges who have referred this matter to the Full Bench is correct and

the questions which they have propounded for our decision should be answered in the negative.

The case should be remanded to a Division Bench for disposal on the merits of the other questions which arise.

C. C. Ghose, J.—I agree,

Suhrawardy, J.—I agree.

Pearson, J.—I agree.

Page, J.—I agree and I desire to add some observations on the general question raised, which I regard as of prime importance.

The maintenance of law and order in India, as in other countries, depends mainly upon criminal law and procedure being so plain and sensible that ordinary persons are not mystified by its intricacies, and recognize that thereby substantial justice is done between the Crown and the accused. No one doubts that the utmost precaution should be taken to ensure that an innocent person is not convicted, but the extent to which the administration of the criminal law suffers when an obviously guilty person succeeds in evading conviction is not so fully appreciated. In truth, a miscarriage of justice of either description bewilders the public, and tends to shake the faith that is reposed in the stability and good sense of the Courts that administer justice in criminal cases. For this reason I am strongly of opinion that when the decisions of a criminal Court in substance appear to be correct an appeal Court should endeavour to uphold the decision even in cases where the rules of procedure by which the trial is to be regulated have been transgressed ; except where the breach of the prescribed rules is of so grave a nature that the form of trial was substantially different from that provided by law for the offence charged, or where, although the violation of the rules was not so profound as radically to alter the mode of trial, it is proved that thereby in the event a failure of justice has in fact been occasioned.

The test to be applied, in cases where the prescribed rules of procedure have not been followed, to ascertain whether there has been a mis-trial is always essentially the same, namely, whether there has been a miscarriage of justice for if the appeal Court is satisfied in point of fact that the accused has materially been prejudiced by the breach of procedure clearly a failure of justice has occurred; while if by reason of the breach of procedure there has in effect been substituted another mode of trial for that prescribed by the legislature as affording the best means of obtaining a fair trial, it is presumed that a fair trial has not been accorded the accused, and that in that case also there has been a failure of justice. In either case, therefore, the proceedings pro tanto will be set aside upon the ground that by reason of the breach of the rules of procedure a miscarriage of justice has been occasioned. On the other hand, if the appeal Court is not satisfied that the breach of procedure falls within one or other of those categories, in my opinion it ought not to hold that the proceedings have become vitiated merely because there has been a transgression of the prescribed rules by which such proceedings are to be regulated. It is ever to be borne in mind that rules and regulations are intended to be the handmaid and not the mistress of the law, and that in criminal proceedings it is of the utmost importance that a decision just and reasonable on the merits should not be disturbed because in the course of the proceedings some flaw can be detected that is not fundamental and which is not proved to have worked injustice to the accused, although it may constitute a breach of the rules of criminal procedure. Now, in 1901 *Subramania Ayyar* v. *Emperor* (8), was decided by the Privy Council. It was a plain case in which there had been a flagrant violation of a rule of procedure enacted to prevent the prejudice that an accused person inevitably will suffer if he is called upon to answer in one trial a multiplicity of charges. In that case the failure to confirm to the procedure laid down in the Code of Criminal Procedure clearly went to the root of the trial, and vitiated it. Lord Halsbury (Lord Chancellor) however, in the course of delivering the judgment of the Board took occasion to animadvert upon the view expressed by Maclean, C. J., in *Abdur Rahman* v. *Keramat* (10) :

"that because all irregularities are illegal, as he says in a sense, and this trial was illegal, that therefore all things that may in his view be called illegal are, therefore, by that one adjective applied to them, become equal in im-

(10) [1900] 27 Cal. 839.

portance, and are susceptible of being treated alike *Subramania Ayyar* v. *Emperor* (8)."

That, no doubt, was a sound criticizm of the propsition enunciated by Maclean, C. J., and I apprehend that it would equally be incorrect to assert that every violation of the Code of Criminal Procedure is curable as that every failure to conform to the rules of procedure ipso facto vitiates the proceedings. There is no magic in the use of the imperative in this connexion, and it cannot reasonably be contended that each and every transgression of the mandatory rules of procedure set out in the code are "equal in importance" or "are susceptible of being treated alike." I respectfully agree with the observations of Brown, L. J., in *R* v. *Justice of the County of London* (11):

"that there is no such exact division of sections in Acts of Parliament into those that are directory and those that are imperative as is ordinarily assumed to be a categorical division which exhausts every possible class of section. You must look at each Act of Parliament and each section to see exactly what it means. No other rule of construction of Acts of Parliament that I know of is of much use, except to try and find out as best you can what the Act of Parliament means, and that is not a rule of construction at all."

Whether a particular breach of the procedure prescribed in the Code vitiates the proceedings or not, in my opinion must depend upon the gravity of the breach and the consequences that are presumed or proved to have flowed from it and I am satisfied that Lord Halsbury, whose judgments were permeated with sturdy common sense, and who in *Allen* v. *Flood* (12), laid down :

"that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found"

did not intend to encourage in any way a tendency to exaggerate the importance of breaches of procedure that did not materially affect the due course of justice.

I discern, however, in the numerous decisions which purport to be founded upon *Subramania Ayyar* v. *Emperor*(8) a tendency to regard the judgment in that case as indicating that, in the opinion of the Judicial Committee, where there has been a departure from the strict letter of the Code of Criminal Procedure indeed, according to some of the decisions as I venture to think with all due deference even in matters of mere triviality and where it cannot reasonably be suggested that the accused has suffered any prejudice—the appeal Court ought to hold that a mistrial has taken place. The result has been that the path of a Judge exercising criminal jurisdiction is beset with pitfalls and obstructions, and his attention must needs be diverted unduly from the substance to the form of the proceedings, lest perchance if he fails in any particular to conform to the provisions of the Code the proceedings may be set aside. Of course, a Judge who deliberately or through inadvertence does not follow the procedure laid dow in the Code fails in the performance of his duty, but the effect of non-compliance with the statutory rules of procedure, in my opinion, must vary according to the gravity and effect of the breach, and the test in each case is whether the proceedings have resulted in a miscarriage of justice. In *Allen* v. *Flood* (12) Lord Halsbury added :

"that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all."

and in, my opinion, no sanction or warrant can be found in *Subramania Ayyar's* case (8) for a method of construction that tends to magnify the importance of technical defects to the detriment of the substance and the merits of a case. In my opinion the objection raised to the validity of the trial in the present case is misconceived. The accused was tried by the statutory number of jurors, who were chosen by lot without objection or challenge from the accused. It is not proved that the accused was prejudiced in making his defence or in any other way by reason of the course that the proceedings took. In these circumstances an argument that the trial was a nullity merely because only 14 instead of 18 persons were summoned as jurors is one that with all due deference, in my opinion, ought not to be countenanced, and I agree that a negative answer should be given to the questions that have been propounded. The

(11) [1893] 2 Q. B. 491.
(12) [1901] A. C. 506.

case of *Abdur Rahman* v. *Emperor* (9), decided in 1926 marked the turning of the tide, and the decision of the Full Bench on this reference will, I trust, have the salutary effect in criminal matters of discouraging objections that are merely technical, and broadening the outlook of those whose duty it is to administer justice according to law.

v.s./R.K. *Reference answered.*

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* A. I. R. 1930 Calcutta 219

SUHRAWARDY AND GRAHAM, JJ.

Obedar Rahaman—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1076 of 1928, Decided on 8th February 1929, against order of Sess. Judge, Chittagong, D/- 27th August 1928.

*** Criminal P. C., S. 342—Accused cannot claim to be examined when he enters upon defence after prosecution has closed its case and he has once been examined.**

The word "examination" in S. 342 includes cross-examination and re-examination and "examined" means completely examined.

[P 219 C 2]

When the accused enters upon his defence the stage at which he must be examined under S. 342 passes. After the prosecution has closed its case by examining its witness in chief and submitting them to cross-examination and re-examination, the accused cannot re-open the prosecution case by applying for an indulgence from the Court for further cross-examination and then claim the right that he should be examined over again: *A. I. R.* 1923 *Cal.* 196 and *A. I. R.* 1923 *Cal.* 927, *Ref.* [P 220 C 1]

Anilchandra Ray Chaudhuri—for Petitioner.

Suhrawardy, J.—This rule has been issued upon two grounds. Ground 1 is that the provisions of S. 342, Criminal P. C., were not complied with and, therefore, the conviction is bad in law. The facts, in so far as they are relevant for our present purposes are that, on 16th May 1928, six prosecution witnesses were examined in chief and the accused was also examined. The charge was, thereafter, framed under S. 354, I. P. C., and the prosecution wanted to examine some witnesses. On 31st May 1928, the next hearing day, the prosecution examined one more witness and all the witnesses for the prosecution, eight in number, were cross-examined by the accused. Then the accused was examined, presumably under S. 342 and the Magistrate's order runs thus:

"Defence wants to examine six prosecution witnesses after this. Of them, the Sub-Inspector is to be resummoned. Others to come on personal recognizance. Accused as before. Defence will pay costs of all but the Sub-Inspector. Defence will bring in witnesses on next date."

On the next date, 14th June 1928, seven prosecution witnesses were cross-examined and the accused was again examined. Only one witness (the Sub-Inspector) was not in attendance, and, therefore, could not be cross-examined. He was examined on the next day of hearing, but no further examination of the accused was held. It is argued that the accused should have been examined under S. 342, after the examination of the Sub-Inspector and, as he was not so examined, his conviction must be held to be illegal.

Section 342, Criminal P. C., has been interpreted by this Court in several cases and, in my opinion, has been too liberally construed. I do not think it will be profitable to discuss it any further. S. 342 says that, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may at any stage of any enquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary and shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

As has been held in *Mozahur Ali* v. *Emperor* (1) and *Dibakanta Chatterjee* v. *Gour Gopal Mukherjee* (2), the word "examination" in that section includes cross-examination and re-examination; that is the witnesses have been completely examined. Now in the present case, the witnesses were completely examined on 31st May 1928. The order recorded by the Magistrate on that day does not expressly say so, but it shows that, after the examination of the witnesses was closed and the accused examined, he was asked to examine his witnesses or he was called upon to enter upon his defence. The accused, however, applied to the Court for permission to recall some of the prosecution witnesses for further cross-examination. That was apparently done under S. 257 of the Code, which says that if the

(1) A. I. R. 1923 Cal. 196=50 Cal. 223,
(2) A. I. R. 1923 Cal. 727=50 Cal. 939.

accused, after he has entered upon his defence, applies to the Magistrate, etc, This must be so, as the order recorded by the Magistrate on that date shows that the application to further examine some prosecution witnesses was made after the examination of the accused; and further, that the accused was ordered to pay the costs of the prosecution witnesses for their attendance. This order could only be passed under S. 257. It, therefore, appears that the accused had already entered upon his defence and the stage at which he must be examined uader S. 342 had passed. I do not think it proper to hold that after the prosecution has closed its case by examining its witnesses in chief and submitting them to cross-examination and re-examination, the accused can well re-open the prosecution case by applying for an indulgence from the Court for further cross-examination and then claim the right that he should be examined over again. In my opinion, there has been sufficient compliance with the directory provision of the section and this ground must be overruled.

Ground 2 upon which this rule has been issued is that two of the witnesses, whom the trial Magistrate regarded as corroborating the complainant did not really corroborate her. The Magistrate, in his judgment, says that these two witnesses corroborate the story given by the girl. One of the witnesses says that:

"the girl told him that the accused had thrown away her pitcher and was pulling to take her away and thereby violated her modesty."

The other witness said that:

"she said that Obedar had thrown her pitcher and was pulling her to take her to the school hut."

He also said that he had heard her cries and saw the accused run away from the tank. This evidence corroborates the story of the girl, at any rate under S. 157, Evidence Act. I do not think that there is any substance in this ground.

The rule is, accordingly, discharged.

The accused must surrender to his bail and serve out the remainder of the sentence.

Graham, J.—I agree that the rule should be discharged. With regard to the first point, it seems to me that the entire argument on behalf of the petitioner is one of technicality, rather than of substance. I am further of opinion that, having regard to the facts and circumstances of this particular case, there was a proper compliance with the provisions of S. 342, Criminal P. C. As regards ground 2, on which the rule was granted, it may be observed, in the first place, that on reference to the judgment of the appellate Court it does not appear that the learned Sessions Judge has said anything about the evidence of Khalilur Rahaman and Chand Mia corroborating the story of the girl. This ground, therefore, was not correctly worded. The judgment of the trial Court does, however, refer to there being such corroboration, and when the evidence of these two witnesses is referred to, it is clear that they do in fact corroborate the story told by the girl. There is, therefore, no substance in this ground.

R.M./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 220

RANKIN, C. J. AND C. C. GHOSE, J.

Satya Ranjan Bakhshi and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 714 of 1928, Decided on 5th February 1929, from order of Chief Presy. Magistrate, Calcutta, D/- 3rd September 1928.

Penal Code, S. 124-A—It is not necessary that rebellion of any form should be advocated in article — Government may be brought into hatred and contempt by abuse of officials.

It is not necessary for the purposes of S.124-A that the article should advocate any form of rebellion. So also it is quite possible by abuse of Government officials as officials to make an endeavour to bring into hatred or contempt the Government established by law in British India: 22 *Bom.* 112 and *A. I. R.* 1929 *Cal.* 309, *Ref.* [P 222 C 1]

B. C. Chatterji, Mrityunjoy Chatterji, Suresh Chandra Talukdar, Jyotischandra Guha, Bholanath Ray and *Binodelal Ghosh*—for Appellants.

N. N. Sircar—for the Crown.

Rankin, C. J.—In this case the appellants have been convicted on a charge of sedition under S. 124-A, I. P. C., in connexion with an article which appeared in the issue of 20th May 1928, of a Calcutta daily newspaper published in Bengali and called the "Banglar Katha." The translation of the article is before

us and it is headed "Barbarism in the Garb of Gentlemanliness." We have to read the article solely from the point of view of seeing whether we are satisfied by the internal evidence of the article itself that as a fact the writing or publication of the article was a successful or unsuccessful attempt to bring into hatred or contempt or to excite disaffection towards the Government established by law in British India. It does seem to me that, for the purpose of the present question, from the words used by the writer it is necessary to go into an analysis of the phrase :

"The Government established by law in British India."

Since the case of *Queen Empress* v. *Bal Gangadhar Tilak* (1) was decided, various changes in form and, to some extent, in principle, have been introduced into the constitution which obtains in British India. But we have, in this case, to see whether the article is an endeavour to express disapprobation against certain measures of Government without exciting or attempting to excite hatred, contempt or disaffection or whether in one guise or another an attempt to excite hatred, contempt or disaffection towards the Government established by law in British India is a part of the purpose of the writer. The article begins by a reference to State prisoners and persons who have been in prison under certain legislation without trial by the ordinary tribunals. It makes a reference to "living burials" taking place every month in the plains of Siberia under the Czar of Russia. It goes on to say that incidents of a far-away land are taking place daily at our own doors and that, while there is no Czar in a physical form in our country, the administrative system which is going on in place of the Czar is still more terrible than the Czar. I do not think there can be any doubt that "the administrative system which is going on" is a reference to the Government established by law in British India. It is not a reference specifically to any legislation or to the exercise of any legislative function, but the Government is not the same thing as the legislature and the administrative system in India as obtaining at the present time is clearly the object of animadversion in the article. It goes on to say that barbarity is going on under the name of civilization and all its diabolic cruelty is dancing under the mark of law ; and after that it says that more terrible even than the rule of the Czar of Russia is the administration of the bureaucracy in India :

"This is the acme at once of barbarism and of deceitfulness."

Apart from certain exaggerated expressions about a jail being as hot as fire and a reference to self-interested lying spies, we come to certain sentences which show the standpoint of the article for our present purpose. It says that even if the State prisoners had been convicted after an open trial, the writer would not have approved of the sentences. The reason given is that :

"no country has the right to fetter another country to satisfy the thirst for pillage."

Here we get a reference, a direct reference, to British rule at large :

"If the children of an enchained country do even take up arms for the deliverance of the land of their birth, even then no foreign oppressors can have the right to inflict punishment on them."

It goes further to talk about the inhuman oppression of foreign rule and about people having no power to liberate certain persons from the array of the bayonets of a handful of foreigners, and it speaks of weapons, namely, the weapon of boycott of British goods and that if it would be possible to break the "fangs of Lancashire" by boycotting cloths made in foreign countries :

"the edifice of foreign rule would have in a trice tumbled down to the dust of ruin like a house of cards."

My only purpose in making any citation from this article is to show why I think that the article (which is certainly full of hatred and bitterness) is clearly directed against the Government established by law in British India. It is doing exactly what Strachey, J., in the case cited [*Queen Empress* v. *Bal Gangadhar Tilak* (1)] said must not be done :

"But if he goes on beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers,—as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people,—then he is guilty under the section, and the explanation will not save him."

Mr. Chatterji has pointed out to us that, while the article advocates the

(1) [1897] 22 Bom. 112.

boycott of cloth, it does not in any way advocate any form of rebellion. I quite appreciate that, but that is not the charge. It is quite clear from the section itself that this is not a necessary element in an offence under S. 124-A. It has been pressed upon us that there are expressions which are to be attributed to a spirit of exaggeration and which may be regarded as excrescences upon this article. That, in fact, is true up to a point, but I must point out that there are exaggerations in this article which are of themselves clear evidence of the desire to bring the Government into hatred or contempt.

We have been treated to an argument on the strength of the Government of India Act of 1919 and on the fact that the legislative power in this country is no longer in the hands of Government officials ; and Mr. Chatterji has argued that by the legislation of 1919, the law of sedition underwent a complete transformation. His idea is that "officialdom," to use the word which he tells us, no doubt quite correctly, would be a better translation of the Bengali word than the word "bureaucracy"—that officialdom are the servants of the people and, therefore, abuse of officialdom cannot possibly be an attempt to bring into hatred or contempt the Government established by law in British India. I can only say that in that argument, Mr. Chatterji is gravely wrong. It is quite possible, by the abuse of Government officials as officials, to make an endeavour to bring into hatred or contempt the Government established by law in British India. There is no necessary equivalence between mere legislative power and the :

"Government established by law in British India."

That is a concrete phrsae which applies to such Government, whatever form that Government takes, and is just as much applicable to it after the legislation of 1919 as when it was enacted years ago.

We really, in this case, have to see whether, after making all reasonable allowances, we think it possible to hold that this is an article whose criticism, however unreasonable, is still legitimate ; or whether it is really an attempt to bring into hatred or contempt the Government established by law in British India. Upon that question, I can entertain no doubt whatsoever that this article is not only on the wrong side of the line, but it is a very long way off the line.

In my judgment, the sentences which have been inflicted are very moderate and this appeal should be dismissed.

C. C. Ghose, J.—I agree. On a previous occasion, I attempted to indicate within what limits S. 124-A is to be worked and also endeavoured to make it clear that criticisms of measures of Government, however strongly worded, provided that criticism itself does not come within the mischief of S. 124-A, will leave the critic unscathed. In my opinion, this article taken as a whole, and after making all allowances for the enthusiasm of the writer goes very much beyond the limits indicated in my previous judgment in the case of the *Emperor* v. *Satya Ranjan Bakshi* (2). I am, therefore, of opinion that the learned Chief Presidency Magistrate is right in coming to the conclusion that this case does come within the mischief of S. 124-A and I agree also with the learned Chief Justice that the sentences inflicted are moderate and that this appeal should stand dismissed.

R.M./R.K. *Appeal dismissed.*

(2) A.I.R. 1929 Cal. 309.

A. I. R. 1930 Calcutta 222

RANKIN, C. J., AND PATTERSON, J.

Ram Gopal Goenka—Petitioner.

v.

Corporation of Calcutta — Opposite Party.

Criminal Revn. Nos. 793 and 794 of 1929, Decided on 8th August 1929.

(a) Calcutta Municipal Act (3 of 1923), S. 363 (2)—Onus of proving that work was done more than five years previously is on owner.

Under S. 363 (2) the question before the Magistrate is not whether the Corporation has shown the date of the work being done or that the date was within five years of the institution of the proceedings but whether the owner has established to his satisfaction that the work has been done more than five years previously. (P 223 C 2]

(b) Criminal P. C., S. 200—Complaint for demolition of structure by building-surveyor of Calcutta Corporation is complaint by public servant and he need not be examined.

Under the Calcutta Municipal Act any Municipal officer is a public servant and apart altogether from any express provisions, a complaint for demolition of structure made by a

buildings-surveyor of the Coroporation is a complaint by a public servant in the discharge of his official duty and he need not be examined as to the complaint when lodging it.

[P 223 C 2, P 224 C 1]

(c) Calcutta Municipal Act (3 of 1923), S. 557-A (4)—Effect and Scope enunciated.

The effect of Cl. (4), S. 557-A is this that between August 1926 and August 1927, in a proceeding for demolition of structure under S. 363 even although five years may have expired, a legal proceeding would have been competent because the clause was intended as an extension of limit in view of the fact that legal proceedings had not been possible effectively for some considerable period prior to the amending Act. The clause does not say and it does not mean that no legal proceeding under S. 557-A is ever to be taken after the expiry of one year from August 1926. What it says is that if in the Act or any other law a legal proceeding between August 1926 and August 1927 would have been barred it is not to be barred until August 1927. Such a clause at no time was of any use to anyone except to the Corporation, and that in a case in which it was desired to get in extension of some restrictive period of limitation imposed by some other section of the Act or some other law.

[P 224 C 2]

K. N. Chaudhuri, *Suresh Chandra Taluqdar* and *Kanaidhan Dutt* — for Petitioner.

D. N. Bagchi and *Gopendra Krishna Banerji*—for Opposite Party.

Rankin, C. J.—In my opinion, this R. 793, should be discharged. The order complained of is an order directing demolition of certain structures mentioned in the order under the headings (a), (b), (c) and (d). The contention before us is, first, that so far as (d) is concerned the rule is not pressed. So far as (c) is concerned, it is conceded that there is some evidence before the Magistrate to show that the structures were raised within five years from the date of the present proceedings. So far as (a) and (b) are concerned, the contention of the learned counsel on behalf of the applicant is that there is no specific evidence on the part of the Corporation to show that these structures were erected within five years of the present proceedings and that the Magistrate should have been satisfied with certain evidence called by the owner to the effect that the structures were erected more than five years from the date of the proceedings. Another ground is taken to the effect that the whole proceedings before the Magistrate were bad because they were instituted upon a complaint made by Mr. C. K. Chatterji and that under S. 200, Criminal P. C., it was necessary that Mr. Chatterji should be examined, and on this point reference has been made to a decision of this Court in the case of *Ambica Prosad* v. *Corporation of Calcutta* (1).

As regards the question of the age of the structures the provision of the Calcutta Municipal Act is clear. Sub-S. (2), S. 363 is as follows:

"Notwithstanding anything contained in sub-S. (1), no proceeding shall be instituted thereunder in respect of any work which has been done more than five years before the institution of such proceeedings, provided that the onus of proving that the work was done more than five years previously shall lie on the owner."

Under this provision it is claimed that the question before the Magistrate was not whether the Corporation had shown the date of the work being done or that the date was within five years of the institution of the proceedings but whether the owner had established to his satisfaction that the work had been done more than five years previously. The Magistrate had dealt in a most painstaking fashion with this question and he has given very good reason, as it seems to me, for refusing to be satisfied with the evidence of the owner to the effect that the work was done more than five years from the date of the proceeding. In my judgment, there were materials before him which entirely justified him in finding, as he has in fact found, that the structures in question were newly made in 1923-24 and, therefore, are within the period of five years prescribed by the section which I have just referred to.

On the question whether the proceedings are bad by reason that the complainant was not examined under S. 200, Criminal P. C., the Magistrate contends in his explanation, first, that the Magistrate in a case of this sort is not acting with a complaint under the Criminal Procedure Code at all. Whether that view be right or wrong I do not require now to consider. What the Magistrate says is that even if this be taken to be a complaint under the amended Criminal Procedure Code there is no need any longer to have the complainant examined when a complaint is filed by a public servant acting in the discharge of his official duties. Under the Calcutta Municipal Act any Municipal offi-

(1) A. I. R. 1928 Cal. 493.

cer is a public servant ; but, apart altogether from any express provision, it appears to me plain that if the document referred to is to be treated as a complaint it is a complaint by the Building Surveyor of the Corporation acting as a public servant in the discharge of his official duties.

For these reasons, it appears to me that this rule must be discharged.

This R. 794 has been obtained at the instance of certain occupiers of the premises referred to in the previous rule and the only additional ground which requires to be considered is this : It appears that these occupiers were made parties to the Magistrate's proceedings on 17th January 1928. The contention is that under the amending Act 5 (B. C.) of 1926, Cl. (4), S. 557-A, Municipal Act, puts a limit of one year from the date of the commencement of the Act to the time within which proceedings may be taken in such a case as this against a party. When one comes to examine Cl. (4), S. 557-A, one finds that its real meaning is as follows : When the Calcutta Municipal Act of 1923 was first passed it contained, as afterwards appeared, insufficient provision for a case in which prior thereto an authorized structure had been erected and certain proceedings taken before the General Committee of the Corporation. The new Act applied very well to cases which arose after it was passed but there was no provision which enabled cases which had occurred and been in part dealt with prior to the passing of the new Act to be dealt with under the machinery of the new Act. The object of Act 3 (B. C.) of 1926 was to enable the new machinery to be applied to cases which had arisen prior to the passing of the Act of 1923. But between the date in 1923 when the Calcutta Municipal Act was passed and the date in 1926 which this amendment was made there was no valid or effective process for taking action with reference to cases of work done prior to 1923. The law being out of action for a certain period it was provided by Cl. (4), S. 557-A as follows :

"Notwithstanding anything contained in this Act or in any other law, a suit or legal proceeding under this section may be instituted at any time within one year from the commencement of the Calcutta Municipal (Amendment) Act, 1926."

We are dealing with a limit of five years. The present applicants were made parties to the proceedings on 17th January 1928, and unless they show that these structures were erected before 17th January 1923 they do not show that they are protected by any time limit imposed by the Act. The effect of Cl. (4) to which I have referred is this that between August 1926 and August 1927, in a case such as this, even although five years had expired, a legal proceeding would have been competent because the clause was intended as an extension of limit in view of the fact that legal proceedings had not been possible effectively for some considerable period prior to the Amending Act. The clause does not say and it does not mean that no legal proceeding under S. 557-A is ever to be taken after the expiry of one year from August 1926. What it says is that if in the Act or any other law a legal proceeding between August 1926 and August 1927 would have been barred, it is not to be barred until August 1927. Such a clause at no time was of any use to anyone except to the Corporation, and that in a case in which it was desired to get an extension of some restrictive period of limitation imposed by some other section of the Act or some other law. In this view of the meaning of the section, it is unnecessary for me to examine further into the objection taken in this case.

The Magistrate has in his explanation contended that :

" the Corporation does not proceed against the tenants. It is only the Magistrate who has to hear the tenants under Act 3 (B. C.) of 1923 as well as Act 3 (B. C.) of 1889. The notice on the tenants can be issued at any time before the disposal of the case."

He goes on to cite a ruling of this Court to the effect that the law does not require specifically that a notice should be served on the occupier and that it is for the occupier to move the Magistrate. Whether there is anything in this contention or not, the ground upon which this rule was granted is not made out. The ground was that the order was barred by limitation under S. 557-A. In my opinion, therefore, this rule must be discharged.

Patterson, J.—I agree.

V.B./R.K. *Rules discharged.*

A. I. R. 1930 Calcutta 225

MUKERJI AND MALLIK, JJ.

Nalini Bhusan Roy and *others* — Defendants 2 to 6—Appellants.

v.

Hiralal Roy and *another*—Plaintiffs and Defendants—Respondents.

Appeal No. 452 of 1927, Decided on 12th April 1929, from appellate decree of Addl. Dist. Judge, Tipperah, D/- 15th September 1926.

Bengal Tenancy Act (8 of 1885), Sch. 3, Art. 3—Raiyat out of possession of his holding for two years forfeits his right to sue and title and no subsequent occupation within 12 years can remit him to raiyati status.

On the general principle underlying S. 28, Lim. Act, if a landlord keeps a raiyat out of possession of his holding for the period specified in Sch. 3, Art. 3, the raiyat not only forfeits his right to recover possession but his title as well and no subsequent possession by the raiyat within 12 years of his dispossession can remit him to his status as raiyat : 11 *B. L. R.* 237 ; 21 *All.* 204 and 16 *C. W. N.* 351, *Ref.* [P 227 C 1, 2]

Amarendra Nath Bose, Sarat Chandra Basak and *Bhagirath Chandra Das*—for Appellants.

Gopal Chandra Das and *Biswa Nath Roy*—for Respondents.

Judgment.—The suit out of which this appeal has arisen was one for declaration of title and recovery of possession with mesne profits. The claim for mesne profits was allowed to be withdrawn with liberty to institute a separate suit therefor. The prayers for declaration of title and recovery of possession were granted by the decree of the trial Court which has been upheld on appeal by the District Judge. The defendants have preferred this appeal.

The lands in suit together with other lands constituted the ryoti holding of one Ramratan Sil. Ramratan had a son named Koilas (who died during the lifetime of Ramratan leaving a widow named Nityabasi and a daughter named Brajabasi, who married one Bansi), and a daughter named Tirthabasi (who had two sons, Monmohan and Sanatan). Defendant 1 alleging that she had purchased the suit lands from Koilash's heirs dispossessed Monmohan and Sanatan in 1323 B. S. The plaintiffs purchased the lands from Monmohan and Sanatan and instituted a suit for declaration of title and possession to which defendant 1 was made a party defendant. It was Suit No. 247 of 1918 and it finally ended in plaintiff's favour on 21st July 1920. There were two execution proceedings. The first one proved abortive, the peon having reported that the lands were not in possession of defendant 1 but of defendants 4 to 6 who are the sons and stepson of defendant 1. The second one terminated on 4th November 1922 when delivery of possession was made in favour of the plaintiffs as against defendant 1. Defendants 2 and 3 are the sons of the brother of defendant 1's deceased husband. The plaintiffs' case was that they obtained actual possession through Court on 4th November 1922, and took the paddy crops that were standing on the land at the time, that they thereafter sowed kalai on the lands which were destroyed by the defendant's cattle on 5th February 1923, that they thereafter sowed til seeds on lands on 7th and 8th February 1923 but on the last mentioned date the defendants ploughed up the lands and destroyed the seeds. The plaintiffs instituted a criminal case which resulted in an acquittal of the accused who were made defendants 7 and 8 in the present suit. The suit was instituted on 3rd February 1925.

Defendants 2 to 6 who have preferred this appeal were the contesting defendants. Apart from the defences on the merits they pleaded that they were in possession as landlords since 1323, and so the plaintiffs' claim is barred by the special rule of two years limitation.

The first contention that has been urged on behalf of the appellants is that the findings arrived at by the Courts below in order to save the suit from the bar of two years' rule of limitation are not sufficient. Both the Courts below appear to have found it proved that the plaintiffs obtained actual possession of the lands by the delivery of possession made by the Court on 4th November 1922. The trial Court proceeded to observe that there being no evidence to show that the defendants were in possession between that day and 6th February 1923, i. e., prior to the sowing of til crops by the plaintiffs, the latter must be presumed to have been in possession during this period. Now, there is no such presumption in law in respect of land which is capable of being possessed by exercise of acts of possession ; and to the extent that the trial Court

relied on the presumption it was not correct. The District Judge, however, has found, on a consideration of the probabilities of the case, that the plaintiffs held on the possession that they obtained on 4th November 1922 and the story of their graining kalai and til and of the same being destroyed and of the plaintiffs being dispossessed before 7th and 8th February 1923 was true. This portion of the judgment of the learned District Judge is not very happily worded, but the effect of what he has said is not open to any serious doubt. In our opinion the findings are sufficient.

The next argument that has been advanced on behalf of the appellants is that the question of the plaintiff's title has not been considered by the learned District Judge. On the question of title, the Munsif observed that it was "practically admitted" that Monmohan and Sanatan, the plaintiffs' vendors were the legal heirs of Ramratan, that the sale was binding on both of them, and that the decree in Suit No. 247 of 1918 operated as res judicata as against defendant 1 and Monmohan and Sanatan. The District Judge has recorded some observations which indicate that he was inclined to the view that the interest of defendant 1 is in reality identical with that of defendants 2 to 6, and it is the same battle which was once fought by defendant 1 that is being fought over again by defendants 2 to 6. The circumstances may not be sufficient to conclude defendants 2 to 6 by any principle of estoppel or res judicata, but at the same time, examining the materials on the record one finds it extremely difficult to make out whether defendants 2 to 6 have set up any title in themselves as against or in conflict with the title of defendant 1, and in the circumstances we think that what the plaintiffs have proved is sufficient to establish that they have acquired the interest of Ramratan to the lands in suit by their purchase from Monmohan and Sanatan. The appellants also as we understand them, do not seek to reopen this part of the decision, but the grievance that is made on their behalf is that the plaintiffs as purchasers of a non-transferable occupancy holding acquired no interest as against them, they being cosharer landlords. Now the plaintiffs' case is that the lands formed only a part of the holding and did not constitute an entire holding, and the appellants never put the contention forward before the trial Court in the form of an issue that might be adjudicated upon. There was a ground, being ground 8 in the memo. of appeal, before the lower appellate Court which may be taken to cover this contention; but it does not appear that it was pressed. At this late stage they cannot be permitted to raise a contention which would necessitate an investigation into disputed facts.

The last contention that has been urged on behalf of the appellants is that they having dispossessed the plaintiff's vendors in 1323, and no suit having been brought against them within two years from that dispossession the title of the plaintiffs vendors as also of the plaintiffs was extinguished by virtue of S. 28, Lim. Act. The matter was canvassed in the trial Court which disposed of it in these words :

"Admittedly their possession, if any, began in 1323, so there can be no question of general limitation in this case. As regards special limitation it must be stated here that possession by a landlord for over two years gives him no title though it bars the tenant's right to recover possession and if by chance, the tenant actually gets possession a fresh period of limitation starts from that point unless the tenants' title was completely extinguished by adverse possession for over 12 years prior to dispossession. In this view of the case it is quite immaterial in this suit as to whether defendant 1 possessed the land or defendants 2 to 6 prior to the plaintiffs taking delivery of possession through Court."

In our opinion this is not a correct view of the law. Under the law of limitation as it stood before the statute of 1859 the Privy Council enunciated the principle in the case of *Ganga Gobinda Mondal* v. *Collector of the 24-Parganas* (1), in these words :

"As between private owners contesting inter se the title to the lands, the law has established a limitation of twelve years; after that time, it declares not merely that the remedy is barred, but the title is extinct in favour of the possessor."

The principle of that decision was frequently applied to cases governed by Act 14 of 1859, and Markby, J., in the case of *Brindaban Chunder* v. *Tara Chand* (2), dealing with a case under that Act, observed :

"It also appears to me to be the accepted doctrine in our Courts that, if a party who has been 12 years out of possession, and whose suit

(1) [1867] 7 W. R. 21.
(2) [1873] 11 B. L. R. 237=20 W. R. 114.

is therefore barred, should again get into possession he is not (to use an English phrase) remitted to his old title; our Courts adopting as pointed out by Sir Lawrence Peel in *Shib Chunder* v. *Shib Kissen* (3), at p. 79, the English rule that there is no remitter to a right for which the party had no remedy by action at all."

The principle was first introduced by the Indian Legislature in S. 29, Lim. Act 9 of 1871 which corresponds to S. 28, present Act. There is considerable authority for the view that S 28 of the Act lays down a rule of substantive law: see *Parmanand* v. *Sahebai* (4). It has also been held that even in case to which the Limitation Act by its terms would not apply, the principle of the section would still be applicable. In the case of *Dalip Rai* v. *Deoki Rai* (5) in which a tenant had failed to apply under the North Western Provinces Rent Act 1881 for the recovery of the occupancy of land of which he had been wrongfully dispossessed within the prescribed period it was held that this failure had the effect not only of barring the tenant's remedy but of extinguishing the tenant's right to the occupancy of the land. In this case Stratchey, C. J. observed:

"The cases, however, so far assist us that they establish, first that a provision as to limitation which in terms merely bars the remedy may have the further effect of extinguishing the right, and secondly, that as regards the possession and dispossession of immoveable property or an interest therein, the latter effect generally follows. If this view is correct the presumption appears to be that on the lapse of the six month's period prescribed by S. 96 (c), Rent Act, the defendants' right to the occupancy of the land in suit was extinguished and that the possession which he afterwards forcibly obtained was not that of a tenant who could only be ejected through a revenue Court, but that of a trespasser who might be ejected through a civil Court. If on the other hand, this view is not correct the result would seem to be that there is no limit of time within which the defendant might not forcibly re-occupy the land and assert the continuance of his tenancy. Such a state of things would lead to great insecurity in the occupancy of land by tenants holding under the landholder in good faith and in ignorance of the dispossessed tenant's claim, and to the substitution of irregular and violent methods of recovering possession for the method which the legislature has provided for a dispossessed tenant's benefit."

So far as Art. 3, Sch. 3, Ben. Ten. Act, is concerned there is authority for the view that where a landlord keeps a ryot out of possession of his holding for the period specified in that article the ryot's title in the holding is extinguished by adverse possession on general principles, if not under S. 28, Lim. Act: *Nanda Kumar Duby* v. *Ajodhya Sahu* (6). The view taken by the learned Munsiff therefore is not correct. It follows therefore that matters could not be permitted to be left at the point at which the learned Munsiff purported to leave them. The learned District Judge does not appear to have considered the question at all. Whether he was expressly invited to deal with the matter is not at all clear, but there is a ground in the memorandum of appeal, being ground 6, which directly raises the question.

It would therefore be necessary to consider whether the case should be sent back to the lower appellate Court in order to deal with the question whether defendants 2 to 6 were in possession of the lands in suit after dispossessing the plaintiffs or their vendors, for a period of two years prior to 4th November 1922. It appears that there are certain findings in the judgment of the District Judge which have a good deal of bearing on this question. In the first place there is the fact that of the five defendants 2 to 6, three are the sons and two are the nephews of defendant 1. The District Judge has found that it has not been shown that the interest of these defendants was not identical with that of defendant 1. He appears also to have found that the story of defendants 2 to 6 having been in possession was not credible, because he says thus:

"The failure to prove that the interest of the mother and the rest of the defendants are divergent seems to me to be fatal to the theory of possession set up by the contestants. If anything further were needed it would be found in para. 7 of the written statement Ex. 2 in the previous suit, where Taramoni is made to say that there is litigation between plaintiffs and defendants 2 to 6, that because she had purchased the property, the plaintiffs had taken a kobala from Monmohan and Sanatan. She has missed the opportunity of saying that defendants 2 to 6 were in possession then, and there is no reason why the mother should hide the true state of things as they now allege namely the possesion at that time of her sons who were no parties."

The learned District Judge has also found that the plea of defendants 2 to 6 to have been in possession for 8 or 9 years untenable. In the face of these

(3) [1854] 1 Boul. 70.
(4) [1889] 11 All. 433 (F. B.).
(5) [1899] 21 All. 201=(1899) A. W. N. 36.
(6) [1912] 16 C. W. N. 351=11 I. C. 465=14 C. L. J. 232.

findings we are not satisfied that any useful purpose would be served by making an order for remand, and we think that we may safely take the aforesaid findings as implying that defendants 2 to 6 have failed to show that they had dispossessed the plaintiffs' vendors or were in possession for the requisite period.

We accordingly dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 228

GRAHAM AND LORT-WILLIAMS, JJ.

Tafiz Pramanik and *others*— Petitioners.

v.

Emperor—Opposite Party.

Criminal Appeal No. 141 of 1929, Decided on 9th August 1929.

(a) Evidence Act, S. 32 (1)—Dying declaration can be proved by examining person recording it or person who heard its being made—It must be taken as a whole and portion only cannot be allowed.

The method of proving the dying declaration and the method usually adopted is to examine the person who recorded the statement as to what the deceased said or to examine some person or persons who were present at the time and heard the statement being made; and the statement if admissible must either go in as a whole or not at all and if otherwise no portion of it should be allowed to go in evidence.

[P 229 C 1]

(b) Criminal P. C., S. 299 — Although Judge be of opinion that witness ought not to be believed for giving different version, provided deposition in lower Court is put in under S. 288, jury is at liberty to believe evidence in lower Court.

Where deposition of witness for prosecution in preliminary enquiry under Chap. 18, is put in evidence under S. 288, Criminal P. C., by the defence, it is open to jury to believe the evidence if they so wished although the Judge may be of opinion that the witness having given different version in the lower Court ought not to be believed. [P 230 C 1]

(c) Evidence Act, S. 33—Dying declaration made to Sub-Inspector—Sub-Inspector examined under S. 208, Criminal P. C., but not cross-examined — Sub-Inspector dying before Sessions Trial — Deposition can be admitted in evidence.

Where the deceased makes his dying declaration as to the cause of his death to a Sub-Inspector of Police just before death, and the Sub-Inspector is examined under S. 208 but not cross-examined by defence, if the Sub-Inspector dies before Sessions trial, his deposition is admissible under S. 33 in the Sessions trial.

[P 229 C 1]

K. N. Chaudhury, *Mirtyunjoy Chattopadhya* and *Manindra Nath Banerjee*—for Petitioners.

Debendra Narain Bhattacharya—for the Crown.

Graham, J.—This is an appeal by ten persons who have been convicted under Ss. 147 and 304 read with S. 149, I. P. C. and sentenced to one year's rigorous imprisonment and six years' rigorous imprisonment respectively, the sentences being directed to run concurrently. The appellants Nos. 2, 3, 4, 5 and 9 have also been convicted under S. 323, I. P. C. and sentenced to six months' rigorous imprisonment.

The case for the prosecution was that at about 11 p. m. on the night of 19th April last one Mayan Khan, who died subsequently as the result of certain injuries received, hearing a noise in his cowshed went outside, that he was thereupon seized by a number of people who dragged him along and trampled upon him and beat him severely. His brother Ayen Khan who went to his aid is also alleged to have been beaten. Several of Mayan's ribs were broken and he died on the following day. At about midnight he had been brought to the house of one Jayan Pramanik. Information of the occurrence was lodged at the thana about a mile distant at 5 a. m. next morning. In the course of the investigation which followed a dying declaration was made by Mayan to the Sub-Inspector of Police. The Sub-Inspector was examined in the committing Court to prove this, but he died before the Sessions trial. The prosecution sought to put in the deposition of the Sub-Inspector under S. 33, Evidence Act. The learned Sessions Judge held that it could not be admitted in evidence on the ground that no specific opportunity had been given to cross-examine the witness. While, however, disallowing the prayer to put in the deposition the learned Judge directed that portions of the statement itself as recorded by the Sub-Inspector, in which the names of Mayan Khan's assailants are mentioned, might go in on the ground that some of the witnesses had deposed to those statements as having been made by Mayan Khan in their presence to the Sub-Inspector. These facts are referred to because one of the main points in the appeal is connected with this dying declaration.

The accused all pleaded not guilty to the charges but do not appear to have set up any very definite defence. Some

of them pleaded enmity and the accused Rahimuddi pleaded an alibi.

On behalf of the appellants objections have been taken to the learned Sessions Judge's charge upon several grounds. The ground upon which most stress was laid was that the learned Judge having rejected the dying declaration as inadmissible misdirected the jury by placing before them certain portions thereof relating to the names of the accused. Now the dying declaration could not as such be admitted in evidence. The method of proving such a statement, and the method, which so far as my experience goes as usually adopted, is to examine the person who recorded the statement as to what the deceased said, or to examine some person or persons who were present at the time and heard the statement being made. In this view of the matter the learned Sessions Judge erred in my opinion in admitting portions of the statement in evidence. It appears that those portions were exhibited, as the order of 10th January 1929 shows. In my judgment too the statement itself as recorded must either go in as a whole or not at all. If it is inadmissible, no portion of it should be allowed to go in evidence.

At the same time the learned Judge in my opinion was in error in holding that the deposition of the Police Sub-Inspector, which was recorded in the committing Court, could not be admitted in evidence, the ground given by him for so holding being that specific opportunity had not been given to the defence to cross-examine the witness. S. 33, Evidence Act, provides inter alia that the adverse party must have had the right and opportunity to cross-examine. There can be no doubt that the defence had that right under S. 208 (2), Criminal P. C., and I do not see how it can be said that they had not the opportunity. If they wished to exercise their right, it seems to me that it was incumbent upon them to claim it. The fact that they did not do so can only give rise to the inference that they did not wish to cross-examine in that Court, and that they reserved the cross-examination for the Sessions Court. The adoption of that course necessarily involves some risk, though it is not a risk which would ordinarily be deemed to be a serious one.

In my judgment it is a case for the application of the maxim "*omnia praesumuntur rite esse acta.*" It can fairly be assumed that there was opportunity to cross-examine the witness if the accused had chosen to exercise their right. The assumption it seems to me is that it existed and not the contrary. Now if the deposition had been admitted, as I hold it should have been, it is clear that it would have been to the disadvantage of the accused, because in that case the whole statement would have gone in instead of only a portion. To that extent the advantage is with the accused. But it is objected in this connexion that, if the whole deposition had been admitted, the defence would have been able to cross-examine some of the witnesses, who have deposed concerning it, with a view to showing what really took place and discrediting the statement as recorded, as for example by proving that leading questions were put by the Sub-Inspector. We find, however, that as the result of the admission of a part of the dying declaration some of the witnesses were in fact cross-examined with the above object in view, and, that being so, there does not seem to be much substance in this objection, or in the objections generally with regard to the dying declaration.

The next point which was argued on behalf of the appellants was that the learned Judge misdirected the jury in telling them that they were to discard the evidence of certain prosecution witnesses as their story was inconsistent with the prosecution version, and the Public Prosecutor had thought fit to declare them hostile; whereas he ought to have made it clear to the jury that, although the prosecution was not entitled to rely on any part of the testimony of those witnesses, it was open to the jury to rely on their evidence in so far as it contradicted, or was inconsistent with the prosecution case and supported the defence version. If this ground and especially the first part of it had been substantiated, we should undoubtedly hold that there had been misdirection. The learned Judge does not, however, appear to have given any such direction. He certainly has not put it in the form in which it has been stated in ground 2 of the memorandum of appeal. The only passage in the charge

which appears to support the contention on this point is at p. 10 thereof where this passage occurs:

"This witness (the Judge is here referring to P. W. 2 Kafiluddin) should be wholly disbelieved for in the lower Court he did not give such a version."

That direction was apparently meant to be in favour of the defence, for it seems to amount to this that the Judge told the jury that this witness having given two different versions ought not to be believed. In substance that appears to be a proper direction. It is complained, however, that the Judge omitted to tell the jury that it was open to them to believe the evidence which this witness had given in the committing Court. The deposition of this witness was, however, put in by the defence under S. 288, Criminal P. C., and it was, therefore, evidence in the case and it was open to the jury to believe that evidence if they so wished.

The next ground of objection is that the learned Judge omitted to draw the attention of the jury to the delay in lodging the first information. The facts in this connexion are that the occurrence took place at 11 o' clock at night and the information was lodged at the thana one mile distant at 5 a. m., the following morning. It cannot be said that there was any inordinate delay so as to impose on the Judge the duty of drawing the particular attention of the jury to it.

It was next argued that the Judge should have drawn the attention of the jury to certain facts referred to in ground 4 of the petition of appeal. This relates to details and it is obviously not possible for a Judge to refer to every fact in this charge. We do not think that the omission to refer to the particular matters mentioned in this ground can be held to amount to misdirection.

Grounds 6, 7 and 8 in the memorandum of appeal were not pressed by the learned advocate for the appellants in view of the explanation which has been submitted by the Sessions Judge, and we think that the learned advocate in the circumstances very properly adopted this course. At the same time the legal advisers of the appellants cannot be altogether excused for making these somewhat reckless allegations, in particular the allegation contained in ground 6, which is to the effect that the Judge misdirected the jury in telling them that, if there had been any reasonable doubt about the guilt of the accused, they would not have been committed to the Court of Sessions. It is not in the least likely that the learned Judge would have given any such direction in his charge, and he has categorically denied that he did so, and we accept his statement. The importance of the matter is this that appeals are sometimes admitted on such statements in the grounds of appeal, and grounds of appeal ought to be carefully drawn up and with a due sense of responsibility.

Grounds 19, 21 and 22 were also briefly referred to, but were not seriously pressed, and we do not think that there is anything in them which would amount to misdirection.

In the result all the grounds which have been urged fail, the appeal is dismissed and the convictions and sentences are confirmed.

Lort-Williams, J.—I agree.

V.B./R.K. *Appeal dismissed.*

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*A. I. R. 1930 Calcutta 230

B. B. GHOSE AND PANTON, JJ.

Hindusthan Co-operative Insurance Society, Ltd.—Appellants.

v.

Secy. of State—Respondent.

Appeal No. 30 of 1925, Decided on 21st January 1929, against original decree of President, Calcutta Improvement Tribunal, D/- 10th November 1924.

(a) Land Acquisition Act, S. 23 (as amended by Calcutta Improvement Act, 1911)—Mode of valuation should be left to discretion of Collector and Court.

No general principle as regards the mode of valuation can be laid down for ascertaining the market value of the land to be acquired under the Land Acquisition Act (1894). The mode of valuation must, therefore, be left to the discretion of the Collector and the Court having regard to the nature of the property. 33 *Bom.* 483 ; 24 *C. W. N.* 184, *Ref.* [P 232 C 2]

*** (b) Evidence Act, S. 115—Representation to operate as estoppel must be of existing facts and not of mere intention or future promises.**

In order that representation may operate as an estoppel, it must be representation of an existing fact and not of a mere intention or of future promises. Estoppel does not confer any title but is merely a rule of evidence which prevents one party from denying the existence of a fact which he represented as existing and upon which representation another person has been induced to act to his detriment.

Some plots abutting on certain land were sold which was decribed in the conveyances as

"land kept for the proposed drainage road of the Trust." The purchasers claimed right of way over the land by reason of rule of estoppel.

Held : that the representation was a mere statement of what the Improvement Trust was going to do with regard to the land which was described to be on the boundary of the plots sold and did not confer any title on the purchasers of the plots either by express grant or implication. No right of easement could also be created by such statement. *Espley* v. *Wilkes*, (1872) 7 *Ex.* 298, *Dist.* [P 233 C 2]

(c) Easements Act, S. 13—Land conveyed should be surrounded by land belonging to others with access only through grantor's land.

For claiming easement of necessity it must be shown that the land conveyed is surrounded on all sides by lands belonging to third persons and the only way of access is over the contiguous land of the grantor. [P 233 C 2]

(d) Land Acquisition Act, S. 23 (amended by Calcutta Improvement Act (5 of 1911), Sch. S. 9 (3) (a)—Disposition of land at the time of declaration explained.

A Co-operative Insurance Society purchased a large tract of land and proceeded to develop the same by driving roads through it with a view to sell it in plots.

Originally the society had been devising schemes for the development of the property and were not aware of any scheme of the Calcutta Improvement Trust affecting their property but when they came to know of the scheme by which the Trust proposed to construct a hundred feet wide sewer road affecting their property they decided that their own scheme for the development of their own property should be made to run in co-operation with the scheme of the Trust. Some plots abutting on the land were sold by the society and the land was described as land kept for "proposed drainage road of the Trust." Later on the declaration under S. 6, Land Acquisition Act was published in respect of the scheme of the Trust by which the strip of land left undisposed of by the society together with other lands adjoining it were declared for acquisition.

Held : that the mere fact that the society knew before the date of declaration that the Improvement Trust was going to acquire the land for the purposes of building a road and therefore left it open and did not dispose of it by sale could not be considered as disposition of the land as a road. The real disposition of the land was that it was part of a scheme for the purpose of selling it in small plots to purchasers as building sites by driving roads through the area in order to give access to the plot. [P 234 C 1]

N. N. Sircar, N. C. Sen-Gupta, S. M. Malik and *Hirankumar Ray*—for Appellants.

B. C. Mitter, Surendranath Guha and *Maulvi Nasim Ali*—for Respondent.

B. B. Ghose, J.—This is an appeal by the Hindusthan Co-operative Insurance Society, Limited, which will henceforth be called the society, against the award made by the Tribunal under the Calcutta Improvement Act for acquisition of a plot of land, about 10 bighas 17 cottas in area, on account of the Trust. The society were claimants No. 1 and other persons were also parties as persons interested before the Collector. The declaration was made on 17th November 1920. The society, it appears, had acquired a tract of land about 162 bighas in area by several conveyances between the year 1917 and May 1919. They proposed to sell the land in small plots to different persons as building sites by driving roads through the land and make a profit by their scheme. A map was prepared by the society to show the manner in which the land should be disposed of.

The Collector made an award of Rs. 32,000 odd plus the statutory allowance, and he made an apportionment by giving shares of the compensation to various persons on the ground that they were persons interested having rights of easement over the land acquired. He stated that the land has been valued on the presumption that it was a plot of land over which the owners of the plots adjacent to it had a right of way. The society had, before the declaration was made, sold a number of plots to different purchasers. But sometime before the declaration, they became aware of the fact that the Trust was going to purchase a 100 ft. broad strip of land in order to construct a road, which has been called in the various documents as their proposed Sewer Road. The society asked for a reference to the tribunal under the provision of S. 18, Land Acquisition Act, both on the ground of valuation and also with regard to the question of apportionment. The tribunal took up the case of valuation first, and the matter was decided on 10th November 1924. But the question of apportionment was left undecided on the ground that it was a separate matter, which the President of the tribunal could deal with sitting alone without the aid of assessors. The Tribunal dismissed the claim of the society for increased valuation, and from that judgment appeal has been preferred to this Court with the requisite leave obtained from the president. The appeal came up for hearing on a

previous occasion before a Divisional Bench of this Court, of which I was a member. That Bench considered it necessary that the matter of apportionment of compensation should be heard immediately after the appeal with regard to the question of valuation, because the question of the rights of the other claimants were mixed up with the question of valuation in this particular case. The valuation was made by the tribunal, as it was made by the Collector, on the basis that the other claimants had some right by way of easement on the property acquired. That right was denied by the society. The hearing of this appeal was, therefore, adjourned till the decision of the question of the rights of the other claimants to the property acquired. That matter has now been decided by the tribunal against those claimants, and they have preferred Appeals Nos. 96, 140 and 212 of 1928, which will be dealt with after this appeal.

In determining the amount of compensation to be awarded for the land acquired, reference must be made to the addition made to S. 23, Land Acquisition Act by the Calcutta Improvement Act of 1911. The relevant portion of the amendment is that the market value of the land shall be deemed to be the market value according to the disposition of the land at the date of the publication of the declaration relating thereto under S. 6. The learned president held in his judgment that the disposition of the land by the society at the material time was that they had decided that there should be a road running through their property and between their two schemes and that the width of the road should be hundred feet. Further on, the learned president stated that :

"if the matter had rested there, it might have been contended on behalf of the society that the mere laying out by them of their own land in a particular manner would not fix the disposition of any part of that land. But that could no longer be said if at the material time the society had, by their dealings with the plots into which they had divided their property, created in favour of third parties, rights over different parts of the land on the basis of that lay out."

The learned president thereafter found that the description of a boundary in five plots of land, which they had sold, i. e., plots 2, 26, 27, 28 and 30, was either as "land kept for proposed 100 feet wide drainage road of the Calcutta Improvement Trust" or as "the proposed drainage road of the Trust" and by reason of that, a right of way over the acquired land had been granted to the various purchasers of those plots by the operation of the rule of estoppel as against the society. The learned president, therefore, held that the land was rightly valued by the Collector as a road-way, and as it could not have been turned to any profitable use by the society such would justify a higher valuation than what has been put on it by the Collector, he dismissed the claim of the society.

Against that judgment it is contended on behalf of the society by the learned Advocate General that the initial defect in finding the market value of the land was that the Collector as well as the tribunal proceeded to value the rights of the society to the land separately on the supposition that it was burdened with encumbrances, that it was not the right way of finding the market value of the land, and that the Collector ought to have valued the land with all the bundle of rights and left the parties interested to claim apportionment of the compensation awarded according to their rights. It cannot, however, be laid down that that should be the uniform rule for arriving at the market value of a piece of land acquired under the Act. It was observed in the case of *Trustees for the Improvement of the City of Bombay* v. *Jalbhoy Ardeshir Sett* (1) cited on behalf of the appellants, that no general principle as regards the mode of valuation can be laid down in finding the market value. The same principle was laid down in the case of *Girish Chandra Roy Choudhury* v. *Secy. of State* (2), to which my learned brother was a party, and in which all the previous cases have been referred to. Instances may be cited where it would be inequitable not to take into account the value of the different rights which the several claimants may have in the land acquired. The mode of valuation must, therefore, be left to the discretion of the Collector and the Court, having re-

(1) [1909] 33 Bom. 483=3 I. C. 757=11 Bom. L. R. 674.
(2) [1920] 24 C. W. N. 184=55 I. C. 150=31 C. L. J. 63.

gard to the nature of the property. But the appellants have a grievance in this case as regards the apportionment made by the Collector. Their case is that, after having valued only what may be called the "subsidiary interest' of the society in the land acquired, the Collector proceeded again to give the other persons who were supposed to have rights of easements over the land a part of the compensation or, in other words, the Collector has valued the land neither by taking into consideration the whole bundle of rights free from all encumbrances nor by valuing the rights of different claimants to the property.

But the question in this case does not depend upon the mode of the valuation by the Collector. The principal question in this case is whether the purchasers of the plots, I have mentioned above, had a right of way over the land, by reason of any rule of estoppel as found by the learned president and as contended for on behalf of the Secretary of State as well as by the counsel for the different claimants in the other appeals. The main and the most important case that was dealt with by the learned president in finding that the purchasers had a right of way over the land acquired is the case of *Espley* v. *Wilkes* (3). It is not necessary to state the facts of the case, in detail, as they have been fully dealt with by the learned president. It is only necessary to say that in that case the lessor by the grant expressly described the land demised as abutting upon strips of land of his own to the north and the east and which were distinctly delineated upon the plan and therein called "new streets." The lessor was, therefore, held to be estopped from denying that there were streets running along the north and the east fronts of the houses to be built on the demised lands according to the terms of the lease: see p. 303 of the report. It seems to me that the facts of that case are quite different from those of the present. I need not deal with the other cases referred to by the learned President in this connexion, because, in my judgment, it is a well established rule shat, in order that representation may operate as an estoppel, it must be representation of an existing fact and of not mere intention or future promises. The question has been fully discussed in Pollock's Principles of Contract (Appendix, Note 1) and summarised in Everest and Strode's Law of Estoppel, 3rd Edn., p. 279. Estoppel does not confer any title, but is merely a rule of evidence which prevents one party from denying the existence of a fact, which he represented as existing and upon which representation, another person has been induced to act to his detriment.

Now, what was the representation which was made in describing the boundaries of the plots which had been conveyed to the different claimants? As the learned President points out, and that is borne out by the documents (Ex. J for plot 2, Ex. 3 for plot 26, Ex. 5 for plot 27, Ex. 11 for plot 28 and Ex. 94 for plot 30): that the description of the plots conveyed as in the boundaries, was either "the proposed drainage road of the trust" or "the proposed 100 feet wide drainage road of the Calcutta Improvement Trust." It seems to me to be quite clear that there was no representation of an existing fact like that on which the decision of *Espley* v. *Wilkes* (3) proceeded. It is a statement of what the improvement trust was going to do with regard to the land which was described to be on the boundary of the plots sold. It did not confer any title on the purchasers of the land sold either by express grant or by implication. It has been argued on behalf of the other claimants in the other appeals and I think this argument may also be considered here, that with regard to some of the plots they might claim an easement of necessity as a right of way over this land. But that is quite a different question from the fact that a right had been conferred by grant. For claiming an easement of necessity, it must be shown that the land conveyed is surrounded on all sides by lands belonging to third persons, and the only way of acccess is over the contiguous land of the grantor. That does not appear to have been the fact with regard to any of the purchasers of the different plots. The only effect of the statement made in the boundary seems to me to be this that, if the improvement trust had not made a 100 feet broad road on the land contiguous to the plots sold,

(3) [1872] 7 Ex. 298=41 L. J. Ex. 241 = 26 L. T. 918.

the purchasers might possibly have a claim for damages on the ground that they were induced to pay higher price for the plots purchased on that representation than what they would have paid, if it was not stated to them that the improvement trust was going to build a wide road there. But, as a matter of fact, the improvement trust has built a road, and we need not consider that situation. The only question is whether by that description in the boundaries of the lands sold a right of easement was conferred. and I have already said that no right of easement was conferred by that statement.

That being so, the only question that remains for consideration is as to what was the disposition of the land at the date of the publication of the declaration. It has been contended by Sir Benode Mitter, on behalf of the Secretary of State, that we are bound by the findings of fact of the learned President that the disposition of the land at the material time was that this land acquired should be a road 100 feet broad and that according to the provisions of S. 3, sub-S. (2), Calcutta Improvement (Appeals) Act, we are bound by the finding of the learned Judge which is a finding of fact. Now, the first answer to it is that there is no evidence on the record that the disposition of the land at the date of the declaration was such as the learned president has found. Secondly, it seems that the learned president has misapprehended the expression, "according to the disposition of the land at the date of the publication of the declaration." The mere fact that the society knew before the date of declaration that the improvement trut was going to acquire this land for the purpose of building a road and, therefore, left it vacant, and did not dispose of it by sale, cannot be considered as disposition of the land as a road. The real disposition of the land was that it was a part of scheme for the purpose of selling it in small plots to purchasers as building sites and, in pursuance of that scheme, they intended to drive roads through the land, in order to give access to the various plots they wanted to sell.

In my opinion, therefore, we must consider what was the intention of the society at the requisite time with regard to these lands, if they had not the information that the improvement trust was going to acquire a portion of the land 100 feet in with. That would appear from one of the documents which has been referred to more than once by both sides and the oral evidence given on behalf of the society. The document, I refer to, is Ex. F, dated 10th August 1918, which contains the proceedings of a meeting of the directors of the soceity. From that document it appears that they became aware of the scheme of the improvement trust for building a road which was to run partly through the society's property and the construction of which was to be taken up as an urgent matter. Then it proceeds thus:

"This might have operated as a bar to the immediate sale of a considerable number of the society's proposed plots. It was, however, found possible to avoid this contingency by making this society's proposed development road in Scheme No. 2 follow the slightly different line of a road projected by the trust (thus avoiding all cross roads in this scheme) and leaving out of the scheme a strip of along side the improvement trust drainage road alignment to which the chairman of the trust agreed."

From this document, as well as the evidence of the Secretary of the Society, Mr. S. N. Tagore, and that of Mr. C. K. Sarkar, an engineer examined on behalf of the soceity, it is apparent that it was their intention to drive a 40 feet broad road at or about the place which they knew was going to be acquired by the trust. The disposition of the property should, therefore, be held to be building sites with a road 40 feet wide for allowing access to the sites that were going to be sold. The knowledge of the fact that the improvement trust was going to build a hundred feet road by acquiring a part of their property induced the society to keep vacant a 100 feet broad plot of land. But that, as I have already said, cannot be taken as the present disposition of the land.

The question now is what should be the valuation of the land acquired. Sir Benode Mitter, on behalf of the Secretary of State, argued that the matter should be sent back to the tribunal for working out the valuation. We are unable to agree with that suggestion in the particular case. The learned Advocate-General, on behalf of the appellant, pointed out that the valuer on behalf of the Secretary of State has work-

ed out the market value of the land according to the scheme as given by Mr. C. K. Sarkar on behalf of the society, and we are of opinion that, if that be taken as the proper valuation of the land acquired, the respondent has no right to complain. The valuation cannot, in any case, be lower than what was stated by the respondent's valuer, Satyaprakosh Sarkar. After deducting the value of land for a 40 feet road and the cost of making the roadway, he has put the value of the land at Rs. 94,330, and it seems to me that that is the most equitable way of valuing the land acquired. It was contended, on behalf of the appellant, that this valuation was increased by that witness during his cross-examination to one lakh odd. We have gone through his cross-examination, and it seems that that increase was made on a hypothetical basis and cannot be taken as a proper valuation.

The appeal is, accordingly, allowed in part, the award of the Collector and the tribunal is varied and the society is allowed Rs. 94,000 as the market value according to the disposition of the land at the time of the declaration plus the statutory allowance and damages at the rate allowed by the Collector. Having regard to the fact that there has been a partial success on both sides, there will be no order as to costs in either of the Courts.

Panton, J.—I agree.

R.M./R.K. *Order accordingly.*

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* A. I. R. 1930 Calcutta 235

RANKIN, C. J. AND MUKERJI, J.

Promotha Nath Mozumdar — Defendant—Appellant.

v.

Nagendra Nath Mozumdar—Plaintiff—Respondent.

Appeal No. 1396 of 1927, Decided on 7th June 1929, from appellate decree of Addl. Sub-Judge, Rajshahi, D/- 2nd March 1927.

*** (a) Civil P. C., O. 21, R. 94—Mortgagee purchasing under mortgage decree suing for possession—Reference to mortgage deed to identify property in sale certificate with that in plaint is competent.**

Where a person brings a suit for possession of a land bought by him at the auction sale under the mortgage decree in his favour, although no reference can be made to the mortgage decree in order to construe the sale certificate or explain any ambiguity therein, such reference in order to identify property in the sale certificate with that claimed in the plaint is competent : *A. I. R.* 1922 *P. C.* 252, *Dist.* [P 236 C 1, 2]

(b) Civil P. C., S. 100—Question whether description is sufficient to identify property is question of fact and cannot be raised in second appeal for the first time.

The question under Registration Act, S. 22 is a question whether the description given of a property is sufficient to identify that property. And the question whether the description, which includes misdescription as well as cases of non-description or insufficient description, is or is not sufficient to identify the property is to be regarded as a question in the first instance of fact. And it is improper to raise an objection regarding such matter in the third Court for the first time. [P 237 C 2]

(c) Registration Act (16 of 1908), S. 22—Misstatement of sub-registry in which property situate—Description does not invalidate document.

Where there is a misstatement or misdescription of the sub-registry in which the property is situate, the description is not co ipso insufficient and of such character as to make the registration of the document invalid : 2 *I. A.* 210, *Ref.* [P 237 C 2]

(d) Civil P. C., O. 41, R. 23—Full evidence before trial Court and finding by trial Court on points involved — Remand cannot be ordered.

Where evidence is fully placed before the trial Court and the trial Court has determined the several questions one way or the other, it is the duty of the appellate Court Judge if he is dissatisfied with the view taken by the trial Judge to come to a proper conclusion on the evidence, for himself, after arriving at the necessary finding of facts and of law, instead of entailing on the parties unnecessary trouble and expense of a de novo trial. [P 237 C 2; P 238 C 1]

Bejoy Kumar Bhattacharya for *Bireswar Bagchi*—for Appellant.

Nirod Bandhu Roy and *Jojneswar Mozumdar*—for Respondent.

Rankin, C. J.—In my opinion, this appeal must fail. There are three points that are taken in this appeal. The defendant-appellant is a purchaser of the land in suit in the year 1912 at an auction sale held in pursuance of a money decree. The plaintiff is a person whose mother got a decree in 1912 upon a mortgage of 1909 and in 1914 bought the said land at an auction-sale under the mortgage decree. The mortgage bond comprised several items of property. It was executed by one Ambica Kanta Mazumdar for Rs. 500 and it comprised three lots of property specified in different schedules. The plaintiff when he brought his suit claimed certain land describing it in a particular way and there can be no doubt, if one looks simply to the description in the plaint,

that the defendant is in possession of the land which the plaintiff is claiming.

The first question which we have to consider is whether it is properly shown by the plaintiff's title deed that the land which he has become entitled to is the land of the plaintiff or is some other land—may be, not identifiable by the evidence in the case. The plaintiff's title deed is, of course, his sale certificate and the plaintiff obtained by that sale certificate a title to the property sold to him such as the mortgagor had at the date of the mortgage of 1909. Now, the sale certificate describes the property as Mahal Chak Malanchi bearing No. 403 in the Touzi of the Rajshahi Collectorate. It goes on to say that it is situated within police station and Sub-Registry, Lalpur within the Natore Sub-Division of the Rajshahi District. It further says that the share which the judgment-debtor holds is, 1-anna and 10-gandas and that the share of the sadar jama is Rs. 3 per annum.

It is said on behalf of the appellant that the land in question as claimed in the plaint is not known as Chak Malanchi. The land in question is part of the property comprised in No. 403 but it is said that what the plaintiff has to make out in order to succeed is really this that the mortgagor's share in Mouza Harirampur within Pergana Malanchi has passed to him. The learned lower appellate Court seeing that the certificate was of a sale in a mortgage decree has referred back to the mortgage bond and referring back to the mortgage bond, it finds that in the sale certificate the description is copied verbatim from Sch. 1 which describes the property mortgaged. There can be no doubt, therefore, according to the lower appellate Court, that the description in the mortgage deed is evidence which shows that what was meant by the document of title, namely, the sale certificate. If there was any question of using the mortgage deed in order to construe the sale certificate and explain any ambiguity in the sale certificate or anything of that sort, no doubt to have recourse to it for that purpose would be erroneous. But what we are concerned with is not the construction of the sale certificate. We are concerned to find whether we can identify the property described—it may be not very well, it may be inaccurate - the language used in the sale certificate. For that purpose, I have no doubt at all that extrinsic evidence is competent. In support of the appellant's contention, the only case that has been cited to us by his learned advocate is the case of *Ramabhadra Naidu* v. *Kadiriyasami Naickar* (1) where the Privy Council has pointed out that certificates of sales are documents of title which ought not to be lightly regarded or loosely construed. But this was said in a case where the Privy Council reversed a decision which had cut down the language of a sale certificate by reference to the mortgage deed and, in that way, had acted contrary to law. The finding of fact of the lower appellate Court in the present case is that a reference to the mortgage deed clearly shows that a certain share in Mouza Harirampur, within Pergana Malanchi is the first of the mortgaged subjects. That being so, the lower appellate Court was entitled to come to the conclusion that the plaintiff had succeeded in identifying the property comprised in the sale certificate with the property claimed in the plaint. Now, it is conceded that the defendant is in possession of the property claimed in the plaint. That being so, we are not further concerned with the defendant's title deed except in so far as the defendant might be able to say that his title deed had priority over the plaintiff's. Prima facie, there is no question of that kind because the defendant's predecessor purchased in 1912 in execution of a money decree and got only the right, title and interest of the judgment-debtor which he then had, whereas the plaintiff's predecessor purchased the right, title and interest which the mortgagor had in 1909. That being so, the first point seems to me to fail.

The second question is one as regards Lot No. 3. The case made as regards Lot No. 3 is that Lot No. 3 was a fictitious property which had no existence at all, never belonged to the mortgagor and was put in the mortgage deed entirely collusively for the purpose of enabling registration to be made within the particular Sub-Registry of Mirpur in order that the registration might not operate to give publicity to the transaction. On that point, the lower appel-

(1) A. I. R, 1922 P. C. 252=44 Mad. 483=48 I. A. 155 (P.C.).

late Court found in favour of the defendant. The evidence of the defendant was given by producing a register and saying that no revenue free estate of the kind mentioned in Sch. 3 appeared from that register and, therefore, there was no such revenue free property as was included in Sch. 3 and the item was entirely fictitious. The lower appellate Court found that this B register did not contain an estate the area of which was less than 5 bighas and, as the area in this case was not as much as 5 bighas, it entirely refused to find from this register that the property was fictitious. Further, it found that it was proved that certain items in Lot No. 3 did really and in truth lie within the jurisdiction of Mirpur Thana and Sub-Registry and that there was nothing to show them within the Natore Thana and Sub-Registery. In these circumstances, the learned Judge said that it was difficult to hold that any fraud was practised on the Sub-Registrar. In my opinion, on the evidence which the defendant has adduced in this case, there is no substantial ground at all for holding that Lot No. 3 was fictitious and that there was a collusive entry for the purpose of enabling registration to be effected in Mirpur Thana. That appears to me to be the inevitable result of the view taken by the lower appellate Court.

The third point taken was a point which was not taken in the first Court or in the lower appellate Court at all. It is said now that, if one looks to the facts as they existed on the date of the mortgage deed, Lot No. 1 was, in fact, within the Sub-District of Natore and it is said that, as it was described in the mortgage as being in another Sub-District altogether, namely, Lyalpur, although it was described as being within the Sub-Division of Natore the description was not sufficient to enable the property to be identified. In particular, it is said that the description was misleading in that the Sub-Registrar would not send notice of this transaction to the proper place: he would send it to Lyalpur instead of sending it to Natore and, in that way, it is said, on the authority of the decision of a Full Bench of this Court in the case of *Baij Nath Tewari* v. *Sheo Sahay* (2), that the registration was bad and the transaction was invalid. As to this, it appears to me that it is too late now to put to us as a pure point of law any such contention. The question under S. 22, Registration Act, is a question whether the description given of a property is sufficient to identify that property. It may well be that if this matter had been taken at the proper time and evidence had been laid us to the point, it would have been possible for the plaintiff to show that although the Sub-Registry was misdescribed, the description of the property was sufficient for the purpose of identification. It has to be remembered, as it has been pointed out by the Privy Council in the case of *Sah Mukhum Lall Panday* v. *Sah Kondun Lal* (3) at p. 216 that:

"it is scarcely reasonable to suppose that it was the intention of the legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of Ss. 19, 21, or S. 36, or other similar provisions. It is rather to be inferred that the legislature intended that such errors or defects should be classed under the general words "defect in procedure" in S. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through any error or inadvertence of a public officer on whom they would naturally place reliance."

I entirely decline to hold that, in any and every case, as a matter of law, where there is a misdescription or misstatement of the Sub-Registry in which the property is situated, the description is *eo ip so* insufficient and is of such a character as to make the registration of the document invalid. It appears to me that the question whether the description is sufficient to identify the property —and I speak now of cases of misdescription as well as of cases of non-description or insufficient description —is to be regarded as a question, in the first instance, of fact. It does not appear to me to be right that, for the first time in the third Court, an objection of this character should be listened to when the Courts below have not had evidence taken in respect of it.

This brings me to observe that I entirely fail to understand the procedure of the learned Subordinate Judge in directing a de novo trial by the first Court. Having several difficult questions before him which had been determined by the trial Court in one way, it was the duty of the Subordinate Judge, if he was

(2) [1891] 18 Cal. 556 (F.B.).

(3) [1874] 2 I. A. 210=15 B. L. R. 228=24 W. R. 75=3 Sar. 509 (P.C.).

dissatisfied with the view taken by the first Court, to come to a conclusion on the evidence for himself after arriving at the necessary findings of fact and of law. I must strongly deprecate delivering a lecture on points of law to the trial Court and sending a case back for de novo trial to the Court when there is no reason whatever to think that either party had not an opportunity of producing all the evidence that it desired to produce in the first instance. That appears to me to amount merely to throwing the work of the Court on somebody else. It multiplies proceedings. I need not say that ordinarily, if an appellate Court disagrees with the lower Court and is not satisfied with that Court's opinion, its duty is to come to a proper conclusion for itself. Prior to the recent amendment of the Civil P.C., this Court in second appeal being unable at times to come to findings of fact was in the unfortunate position of having to order a remand after an endeavour to explain the law applicable to the case. That is not now the law even in this Court. The learned Subordinate Judge in the present case ought to have come to proper findings for himself instead of entailing on the parties unnecessary trouble and expenses of a de novo trial.

In my judgment, the present appeal should be dismissed and the cross-objection should be allowed—the result being that the plaintiff's suit is decreed with costs in all the Courts. There will be an order that the plaintiff will recover khas possession of the suit land from the defendant and mesne profits for three years prior to the suit, and until delivery of possession. Such mesne profits will be assessed by the trial Court. The defendant will not be entitled to redeem the property.

Mukerji, J.—I agree.

V.P./R.K. *Appeal dismissed.*

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RANKIN, C. J., AND MUKERJI, J.

Bir Bikram Kishore Manikya Bahadur—Plaintiff—Appellant.

v.

Rajjab Ali and *others*—Defendants—Respondents.

Letters Patent Appeal No. 12 of 1929, Decided on 6th June 1929, from decree of Mitter, J. in S. A. No. 127 of 1928, Reported in *A. I. R.* 1929 *Cal.* 201.

(a) Bengal Tenancy Act (8 of 1885), S. 3 (9)—Parcel of land comprising undivided share is not holding.

Where the parcel of land let to a tenant comprises an undivided share in certain land, the letting is not letting of a holding within the meaning of the definition. [P 238 C 2]

(b) Civil P. C., S. 11—Decision of Settlement Officer under S. 104, Ben. Ten. Act—No question about undivided portion of land—Subsequent suit for recovery of rent with claim for enhancement under S. 30 (b) is not barred—Bengal Tenancy Act as amended by (Act 1 of 1907), Ss. 104 and 30 (b).

Decision of the Settlement Officer under S. 104, Ben. Ten. Act (8 of 1885), enhancing rent under S. 30 (b), when no question was raised as to portion of land being an undivided share, is not res judicata in a subsequent suit for recovery of rent with a claim for enhancement under S. 30 (b). 29 *Cal.* 707 (*P. C.*) and 30 *Cal.* 339 *Ref.* [P 239 C 1, 2]

(c) Bengal Tenancy Act (as amended by Act 4 of 1928), S. 3 (9)—Definition has not retrospective in operation.

Definition of "holding" as amended by Act 4 of 1928 is not retrospective in operation and Court cannot disturb a decision between parties correctly arrived at between them according to law on the date of decision. [P 239 C 1]

Ramesh Chunder Sen, Birendra Chunder Das and *Santimoy Majumdar*—for Appellant.

Rankin, C. J.—This is a Letters Patent Appeal from the judgment of my learned brother Mitter, J. sitting on second appeal. This appeal is brought by the plaintiff. The suit was brought in the Court of the Munsiff at Comilla for recovery of arrears of rent due in respect of the years 1332 to 1332 T, E. with cesses and damages. There was a claim for enhancement of rent on the ground of the rise in the price of staple food crops.

It appears that the defendants were holding certain agricultural land under the plaintiff and were also holding an undivided share of the homestead land. According to various decisions of this Court, it is now well settled that, where the land let to a tenant comprises an undivided share in certain land, the letting is not the letting of a holding within the meaning of of the definition in the Bengal Tenancy Act. On that ground, the Courts below have unanimously refused to give effect to the prayer for enhancement of rent under S. 30 (b) Ben. Ten. Act.

The plaintiff in this appeal makes two points. One is that the recent Act amending the Bengal Tenancy Act has, altered the definition of the word "hold-

ing so that, after that Act has come into force, it can no longer be said that such a tenancy as the present is not a holding within the meaning of the definition. Mr. Ramesh Chunder Sen who appears for the plaintiff-appellant contended before us that, though the amending Act came into force after this suit was decided, nevertheless it was open to us and we were obliged to give effect to the new definition. In my opinion, there are no words in the amending Act which show or even tend to show that the amendment of the definition is to be applied with retrospective effect; still less is there anything to show that on the ground of the amendment, the Court is to disturb a decision between the parties correctly arrived at according to law on the date of the decision. That point, therefore, in my opinion, fails.

The second point which was maintained before us was this that, before Chap. 10, Ben. Ten. Act, was amended, namely in 1898, there was a suit under the old S. 104. Ben. Ten. Act for the settlement of fair rent in respect of this tenancy. The suit was dealt with by a judgment which also dealt with various other suits of a like character. The particular question or objection arising out of the fact that a portion of the land in this case is only an undivided share does not appear to have been mentioned to the Settlement Officer at all. But, dealing with the various cases before him, the Settlement Officer did consider the question whether there was anything which protected any of the tenancies which he was considering from enhancement of rent. He was not put in sight of anything which would prevent any enhancement of rent in any of these cases and he did, in fact enhance the rent of this particular holding purporting to act by virtue of the old S. 104 under S. 30 (b), Ben. Ten. Act. The question is whether in view of that decision the plaintiff in this case is able to say to the defendants that they are precluded from raising the objection that the tenancy is not a holding and the rent is not enhancible under S. 30 (b). The decision of the Settlement Officer is given the force of a decree of the civil Court and there can be no doubt, therefore, that when the Settlement Officer enhanced the rent, as he did, from Rs. 5-9-0 to Rs. 8-9-0 that decision must take effect and that the legal rent thereof payable and due was Rs. 8-9-0. If, however, it is to be contended that it has been decided against the defendants for all purposes and for the purpose of the present case that the rent is enhancible, that must be by reason of the principle of res judicata. It is not any part of the immediate effect of the decision of the Settlement Officer. Mr. Ramesh Chunder Sen appreciated in his argument before us that there would be some difficulty in applying the principle that is some times spoken of as constructive res judicata, that is to say, in applying Expl. 4 to S. 11, Civil P. C. But, on examining the matter, it appears to me that there can be no question of res judicata in this case at all because, as has been pointed out more than once, particularly by the judgment of Lord Davey in the case of *Gokul Mandar* v. *Pudmanan Singh* (1), the requirement of S. 11, Civil P C. is that the officer who decided the issue in the previous case must have jurisdiction to decide this suit. Now, this is a suit for recovery of arrears of rent and in no way could that matter be within the jurisdiction of the Settlement Officer; and consequently it seems to me that there is no question of res judicata in any sense of the word. It has been pointed out by a Special Bench of this Court in the case of *Dharani Kanta Lahiri* v. *Gabar Ali Khan* (2) at p. 365 that, while the Bengal Tenancy Act says that the decision of a Settlement Officer is to have the force of a decree of a civil Court, it says nothing to give the decision of the Settlement Officer any force beyond what S. 11, Civil P. C. properly applied to it would give. Consequently, it is not possible in this case in any way to say that the defendants are precluded from raising their objection to the enhancemnet of the rent of their tenancy by reason of the decision under S. 104, old Ben. Ten. Act.

In these circumstances, it appears to me that the conclusion arrived at by the learned Judge on second appeal was correct and that this appeal fails and must be dismissed. As the respondents

(1) [1902] 29 Cal. 707=29 I. A. 196= 8 Sar. 323 (P. C.).
(2) [1903] 30 Cal. 339=7 C. W. N. 33.

do not appear, there will be no order as to costs.

Mukerji, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 240

RANKIN, C. J., AND C. C. GHOSE, J.

Kamal Krishna Sanyal and *others*—Defendants—Appellants.

v.

Madhusudan Choudhury—Plaintiff—Respondent.

Letters Patent Appeal No. 84 of 1928, Decided on 28th March 1929, from decree of Mitter, J., D/- 1st June 1928, in Second Appeals Nos 1004 and 1005 of 1927.

(a) Provincial Small Cause Courts Act, Art. 35—Tenant's suit for compensation against landlord for trespass and mischief to holding is not cognizable by Small Cause Court.

Suit by a tenant against landlord for recovering damages by way of compensation for acts of trespass and mischief are exempt from the jurisdiction of the Court of Small Causes. [P 241 C 1]

(b) Landlord and Tenant—Trees— Tenant has right to enjoyment and benefit of growing timber during occupancy—Landlord is not entitled to enter upon and cut down trees without tenant's consent—Bengal Tenancy Act (8 of 1805), S. 23.

A tenant has a right to enjoy all the benefits of the growing timber on the land during his occupancy and in the absence of a custom or of a contract to the contrary the landlord has no right to interfere with the enjoyment of his tenant of the trees upon his holding as long as the relation of landlord and tenant subsists. If thus the landlord desire to have the privilege during tenancy of entering upon the tenant's holding and cutting down and removing timber he must procure the consent of the tenant in that behalf : (1864) *W. R.Gap*, 367 and 30 *All.* 134, *Ref.* 22 *Cal.* 742 and 11 *M. I. A.* 295 (*P. C.*), *Dist.* [P 244 C 1]

Jatindra Mohan Chowdhury—for Appellants.

Krishna Kamal Moitra—for Respondents.

Mitter, J.—This is an appeal by the plaintiff and arises out of an action brought by him for damages for misappropriation of a mohua tree which stood on the land of defendant 2 and which the plaintiff had felled for his own use. The defence of defendant 2 was that the mohua stood on his mokarari mourasi jote under the plaintiff's zamindari and he was entitled to the timber of the tree both under law and under a local custom. The Munsiff held that defendant 1 was an occupancy raiyat and was not entitled to appropriate trees without the landlord's permission and that there was no custom overriding the general law in favour of Madhusudan and he decreed the plaintiff landlord's suit. Against this decision an appeal was taken to the Court of the Subordinate Judge Rajshahi with the result that the appeal was allowed and plaintiffs' suit was dismissed. A second appeal has been taken to this Court by the plaintiffs.

A preliminary objection has been taken by the learned vakil for the respondent to the hearing of this appeal. It has been argued that the suit being of a Small Cause Court nature and having been valued at less than Rs. 500 is barred by S. 102, Civil P. C. It seems to me that the preliminary objection must prevail and second appeal No. 1004 is dismissed. The plaintiff, however, has put in an application for revision in the alternative. It is said that as the suit was of a Small Cause Court nature and although it was tried by a Munsiff under the ordinary procedure as there was a Small Cause Court in the district which could try suits up to the value of Rs. 50 no appeal lay to the Subordinate Judge and in support of this petition for revision the following case was relied on : viz., *Mohini Mahan Roy* v. *Ramdas Paramhansa* (1). In my opinion this decision supports the contention of the plaintiff applicant before me. The Subordinate Judge had no jurisdiction to entertain the appeal. Prima facie when a Court is faced with a decree which is made without jurisdictiou it is a very strong thing not to interfere in revision because otherwise all sorts of trouble may arise. On the merits I think this is a case in which I ought to interfere. It is now well settled that the right to the timber is in the landlord and the defendant had no right to misappropriate the tree. The decree of the Subordinate Judge is set aside and that of the Munsiff restored with costs which I assess at one gold mohur. *Appeal No.* 1005.The suit inwhich this appeal arises was brought by the plaintiff, now respondent, for recovery of Rs. 200 as damages from the defendants,now appellants. The case stated in the plaint

(1) A. I. R. 1924 Cal. 487.

is that the defendants landlords had entered unlawfully on the land of the plaintiff and had unlawfully felled the mahua tree which stood in his mourasi mokarari jote. The allegation in the plaint clearly amounts to criminal trespass and mischief within the meaning of Chap. 17, I. P. C. The defence of the appellants raised two grounds (i) Madhu the plaintiff had no mourasi mokarari jote rignt in the lands; (ii) and no right whatever in the tree. The Munsiff upheld the first ground of defence but negatived the second and decreed the respondent's suit for Rs. 40 only. On appeal the Subordinate Judge affirmed the Munsiff's dscision.

A second appeal has been taken to this Court by the defendants. A preliminary objection has been taken to the hearing of this appeal on the ground that the suit was one of a Small Cause Court nature and the second appeal was consequently barred by S. 102, Civil P. C. It seems to me that the preliminary objection is not well founded. The allegations in plaint make the acts of the defendant one of trespass and mischief and this suit being for compensation for acts which fall within Chap. 17, I. P. C., are clearly exempt from the jurisdiction of the Court of Small Causes : see Art. 35 of Sch. to the Provincial Small Causes Court Act (9 of 1887). It has been argued by the learned vakil for the respondent that the defence of the defendant shows that the act of the defendants were done bonafide in the assertion of a claim and the allegations in the plaint taken with the defence take the acts out of the definition of trespass and mischief as defined in the Penal Code, but the answer to this contention is that the nature of the suit does not depend on the defence but has to be judged from the allegations in the plaint. That being so, the suit as laid in the plaint was not a suit of a Small Cause Court nature. The preliminary objection must therefore be overruled.

Mr. Brojolal Chakravarti who appears for the appellant in this case contends that both the Courts below are clearly in error in holding that the landlord had no right to cut down the trees. His argument is that under the general law right to the trees is vested in the landlord, and the right to cut down and sell the trees are ordinary incidents of the ownership in the trees. In support of this contention reliance has been placed on the decision of the Judicial Committee of the Privy Council in the case of *Ruttonji Edulji* v. *Collector of Thana* (2). The learned vakil for the respondent concedes that the property in the trees is under the general law vested in the landlords (the defendants-appellants) in the present case but contends that the right has been cut down by S. 23, Ben. Ten. Act.

Let us examine the section to see if this contention is right. S. 23 in the concluding part runs as follows :

"But shall not be entitled to cut down trees in contravention of any local custom."

Ali that this section lays down is that the occupancy raiyat shall be entitled to cut down trees unless the landlord can establish that there is a custom prohibiting the raiyat from cutting down the trees : see *Nafar Chandra* v. *Ramlal* (3). But there is nothing in the section to show expressly that the landlords' right to cut down trees on the occupancy holding has been taken away. It is argued that the same right can not coexist in the landlord and the tenant. It is said that :

"as the tenant has the right tc cut down the trees the landlord cannot cut it."

It is said on the other hand that the lands which are let for agricultural purposes form the subject of the occupancy right and in order that the growth of trees may not prejudicially affect the growing of crops the tenant is given the right to cut down trees. It is said for the appellant that the interest of the landlord to allow the trees to grow in order that he may make profit from the same when in course of time these trees become fit for valuable timber and it is certainly optional with the landlord to cut down the trees, the property which undoubtedly belongs to him under the general law and it is further said for appellant that to read S. 23 as depriving the zamindar of his right as proprietor to cut down the trees would be to read into it something which it does not say and which can not reasonably be implied from its language.

(2) [1866] 11 M. I. A. 295=10 W.R.13=2 Sar. 292 (P.C.).
(3) [1895] 22 Cal. 742.

The trees in this case are not shown to have been planted by the plaintiff tenant nor are they shown to be fruit bearing trees. The trees are mahua trees from the fruits of which a certain kind of country liquor is made and a profit is made by the tenant.

In the case of *Nafar Chandra* v. *Ram Lal* (3) the following observations occur:

"So in the case of *Ruttonjee Edulji* v. *Collector of Thana* trees are said by the Privy Council, to be part of the land on which they stand and the right to cut them down and sell them is said to be incident to the preprietorship of the land."

In the same case it was said :

"So that, it may, we think be taken, that, however, the right of an occupancy tenant to cut down trees on his holding may have been affected by legislation, the property in the trees is still by the general law vested in the zamindar. His proprietary rights in this respect are subject to modification or it may be to complete extinction by custom, but failing the proof of such a custom his right as it formerly existed, seems to us to subsist unimpaired."

These observations do not lay down anything contrary to the contention of the respondent that the proprietary rights of the zamindar in the trees has been cut down by S. 23 to this extent that he has no right to cut down the trees so long as the lands are in the occupancy of the tenant. It has been argued by the appellant that if ownership of the trees is in the landlord it is an ordinary incident of that ownership that he has a right to cut it down and sell it. If the contention of the respondent, it is said, is right then the landlord can never be able to cut down valuable timber on the occupancy holding in cases the occupancy holding continues to exist for generations as it does in most cases and rarely reverts to the landlord. An examination of *Nafar Chandra's* case (3), however, shows that the observations refer to the right of landlord to felled timber. Under Act 10 of 1859 the raiyat had not the right to cut down trees except those planted by himself : see *Abdul Rahman* v. *Dataram* (4), *Goluk* v. *Nabo* (5). The Bengal Tenancy Act has in this respect improved the status of occupancy raiyats by laying down :

"He shall not be entitled to cut down trees in contravention of any local custom.

By implication it seems to me that S. 23 supports to take away the proprietary right of the landlord to cut down the trees and sell them when he liked during the existence of the tenancy. The right of occupancy is granted with respect to the lands, and the right to cut nown trees is given to the tenant also in the absence of a prohibitory custom and this does impair the right of the landlord to cut down trees which is an incident of his ownership in the trees, until the tenancy reverts to to him. The trees when felled whether by the landlord or the tenant belong to the landlord. On this point there is no controversy. In support of the respondent's contention the case in *Ganga Dei* v. *Badam* (6) has been cited. I think the Allahabad case supports the contention of the respondent. It is said in that case :

"But it appears to us to be clear that in the absence of a custom or of a contract to the coutrary a zemindar has no right to interfere with the enjoyment by his tenant of the trees upon his holding as long as the relation of landlord and tenant subsists. A tenant has a right to enjoy all the benefits of the growing timber on his land during his occupancy. If the zemindar desires to have the privilege during a tenancy of entering upon his tenant's holding and cutting down and removing timber he must procure a special stipulation from his tenant in that behalf. In the case of *Shaikh Abdul Rahman* v. *Dataram Bashee* (1), the learned Judges laid down that while a zemindar has a right in the trees which the Court should maintain, the tenant has a right to enjoy all the benefits that growing timber may afford him during his occupancy but has no power to cut down the timber and convert it to his own use."

The Allahabad decision follows an early Bengal case where it was laid down that while a zamindar has a right in the trees which the Court should maintain the tenant has a right to enjoy all the benefits that the growing timber may afford him during his occupancy: see *Abdul Rahman* v. *Dataram* (4).

An examination of the decision of the Judicial Committee in *Ruttonji* v. *Collector of Thana* (2) referred to by the appellant will show that in that case the trees did not from the subject of the demise and consequently the proprietary right in the trees remained in the zamindar and the landlord had a right to cut down the trees and sell. Where trees are exempted from the demise there the landlord is entitled to enter at all reasonable times on the tenant's holding

(4) [1865] W. R. Gap. 367.
(5) [1874] 21 W. R. 344.
(6) [1908] 30 All. 134=5 A. L. J. 93=(1908) A. W. N. 51.

and cut them: see Foa on Landlord and Tenant, 6th Edn. p. 109.

I think the decisions of the Courts below are right and must be affirmed and the appeal dismissed with costs.

The application in revision in the alternative will be dismissed.

(Letters Patent appeal having been preferred their Lordships delivered the judgment as follows):

Rankin, C. J. — This is a Letters Patent appeal from the concurrent decision of three Courts in a suit by the tenant who is an occupancy holder against the landlords for damages for the landlords' wrongful act in coming upon the holding and cutting down a certain tree. The tree appears to be a mahua tree from which a certain form of crude alcohol can be made. Now, the tree when cut down was appropriated by the tenant and the present appellants the landlords have succeeded in a suit in which they have recovered Rs. 40 as damages against the tenant for wrongful conversion of the timber. The present appeal is an appeal by the landlords in which they seek to have it established that they were entitled to enter upon the holding of the tenant and cut down this tree without the tenant's consent. As I have said, the Munsiff, the Subordinate Judge and the learned Judge of this Court in second appeal have unanimously negatived that contention. In my opinion, on a review of the authorities and on principle, they are clearly right.

The first principle in these matters in that prima facie the right in the land and in trees which are let along with the land is in the zemindar and the second principle is that, when the zemindar settles a tenant on the land, that tenant gets certain rights not only in the land but also in the trees which go with the land. If one looks to S. 23, Ben. Ten. Act, one will find that, by virtue of special legislation applicable to agrarian holdings in this province, the enjoyment of this tenancy includes, in the case of a raiyat who has a right of occupancy, a right to use the land in any manner which does not materially impair the value of the land or render it unfit for the purposes of the tenancy—subject to this restriction that the tenant shall not be entitled to cut down trees in contravention of any local custom. From that section, it would appear that the right of enjoyment which a tenant of the present character, that is the respondent now before us, has in his land is a right to have a certain limited use of the trees including the right under certain restrictions to cut them down. Whether or not there ever was a time at which it could be said that a tenant of this sort had no right to cut down trees at all, it is clear from S. 23 that the position has now changed. We are not, however, concerned in this case with the tenant's right to cut down trees: we are concerned with the landlords' right to enter upon the holding and cut down trees without the consent of the tenant. As regards that matter, the eldest authority which need be consulted is I think the case of *Abdool Rohoman* v. *Datarom Bashee* (4). The law, as declared in that case, is reasonably clear. It is said there that the tenant has a right to enjoy all the benefits that the growing timber may afford him during his occupancy; but it goes on to say—and it was no doubt true in that case that he has no power to cut the trees down and to convert the timber to his own use. The latter part of that clause is broadly speaking still true, though it may be modified by local custom.

Apart, however, from the judgment as regards the right of the zemindar to the trees, it was held that the tenant has a right to enjoy all the benefits that the growing timber may afford him during his occupancy; and, in that case, the claim of the landlord was to have his title in the growing trees declared and to obtain a declaration that the pretentions of the raiyat were not legal. There was no claim, therefore, of the landlord to enter upon the holding and to cut the trees down. It is quite clear that any such claim would be inconsistent with the principle upon which the judgment was based. In the case of *Ganga Dei* v. *Badam* (6) this very question arose. In that case, it appears that the landlady instituted a suit for declaration of her title to the trees. She also prayed for a perpetual injunction restraining the tenants from offering any obstruction to the cutting down and removal by her of the trees on the holding. As regards the claim for injunction, it will be seen that it

raised the same point as in the present case. The plaintiff landlord wanted the tenants to be restrained from resisting her when she came upon the tenant's land to cut down trees. Curiously enough, the first Court accepted that contention. But when the case went to the Allahabad High Court, Richards, J., dissolved that injunction. The learned Judges of the Division Bench upheld that decision saying that :

"the presumption of law and the general rule in the absence of custom is that the property in timber on a tenant's holding vests in the zemindar and that the tenant has no right to cut and remove such timber. But it appears to us to be clear that, in the absence of a custom or of a contract to the contrary, a zemindar has no right to interfere with the enjoyment by his tenant of the trees upon his holding as long as the relation of landlord and tenant subsists. A tenant has a right to enjoy all the benefits of the growing timber on his land during his occupancy. If the zemindar desire to have the privilege during a tenancy of entering upon his tenant's holding and cutting down and removing timber, he must procure a special stipulation from his tenant in that behalf."

It seems to me that, in the other cases which have been cited to us, there is no law laid down to the contrary. We have been referred to the case of *Nafar Chandra* v. *Ramlal* (3) where the real question was as to the person entitled to the felled timber and the same is true of the case of *Prodyot Kumar Tagore* v. *Gopi Chandra* (7). There is only one case in all the long line of cases which seems to me even to suggest that, because the landlord has general proprietary right in the timber, he is entitled to exercise his right by cutting it down after the land has been settled with the tenant. That case, however, in no way bears out the contention. I propose to refer to it. It is the case of *Ruttonjee Eduljee* v. *Collector of Thana* (2). In that case, the Court was construing a farming lease of certain jungle lands which had been granted by the Government. The question arose as to whether on certain part of the land the rights granted to the lessee included the the right to fell and take away timber. Dealing, therefore, with this question which was as to the tenant's right to cut trees, the argument of their Lordships was as follows : They pointed out that before the lease was granted, the whole right was in the Government. They went on to say that, if the tenant claimed to have the right to fell trees, he must do it either by showing that that right was a necessary incident of the lease by reason of the objects of the lease or that he had got it under some positive law or under some custom to be incorporated in the lease or under the express terms of the lease. Now, it is the passage upon which their Lordships' reasoning is founded which has given rise, it would seem, to some misapprehension. The passage is this :

"At the time then that this lease was made, the whole of the land and all the rights connected with the land, subject to such claims as third parties might have upon it, belonged to the Government. The trees upon the land were part of the land and the right to cut down and sell those trees was incident to the proprietorship of the land."

So it was, "at the time that the lease was made." This proposition is no authority for the view that a landlord after he has leased out the land can come upon the holding of his tenant and cut down trees without the consent of the tenant. In my judgment, the learned Judge has very correctly appreciated the state of the law. In that view, the appeal fails and must be dismissed with costs.

C. C. Ghose, J.—I agree.

V.B./R.K. *Appeal dismissed.*

(7) [1910] 37 Cal. 322=11 C. L. J. 209=5 I. C. 243=14 C. W. N. 487.

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* A. I. R. 1930 Calcutta 244
Full Bench

RANKIN, C. J. AND SUHRAWARDY AND PEARSON, JJ.

In the matter of Sojoni Kanta Das.

and

In the matter of "India in Bondage : Her Right to Freedom."

Application under S. 99-B of Criminal Procedure Code, Decided on 3rd January 1930.

*** Penal Code S. 124-A—It is no defence to say that only form and not fact of the Government is attacked—Any advocacy for change in Government that brings present Government into hatred etc. comes within S. 124-A.**

The words used by the legislature in S. 124-A are the "Government established by law in British India." The section does not contemplate the probability of attempts being made to excite hatred and contempt against abstractions, but uses a clear phrase for a definite thing and, therefore, it is no defence to say that

the attempt to excite hatred and contempt was directed solely against the particular form of Government now obtaining in India and not against the fact of the Government. Any advocacy regarding change in the form of Government as bringing into hatred or contempt or exciting disaffection towards the present Government comes within the mischief of S. 124-A. [P 217 C 2]

B. C. Chatterjee—for Applicant.

The Advocate General—for the Crown.

Rankin, C. J.—This is an application by Sojini Kanta Das under S. 99-B, Criminal P. C. in respect of a book entitled "India in Bondage: Her right to Freedom" of which he is the printer and publisher. On 13th August 1929, the Government of Bengal declared every copy of this book to be forfeited to His Majesty under S. 99-A of the Code. The present application is to set aside that order on the ground that the book did not contain any seditious matter or any matter the publication of which is punishable under S. 124-A, I. P. C. Our duty is to come to a finding under S. 99-D, Criminal P. C., namely, if we are not satisfied that the book contains seditious or other matter of such a nature as is referred to in sub-S. 1, S. 99-A, our duty is to set aside the order of forfeiture.

The book would appear to have been first published in December 1928 and again in May 1929. The name of the author is given as Jabez T. Sunderland. From certain passages in the book it would appear that it is addressed to an American audience and the author writes as an American. The book, however, was printed in India and it is only with its publication in India that this Court can be concerned. The general thesis or argument of the book is that Great Britain has no right to rule in India; that British rule in India is unjust, tyrannical and highly evil in its effects—is a crime against humanity and a menace to the world's freedom and peace. The main purpose of the book is to remove the impression, said to be widespread in America, that British rule in India has been and is a great and almost unqualified good. The author claims to be well qualified to deal with this matter by reason in particular of the fact that he has paid no less than two visits to India—one in the years 1895-96 and again in 1913-14. He claims to have read the Indian periodical press extensively during his visits and to have been a regular subscriber since 1896 to no fewer than 7 Indian newspapers. Accordingly the reader is informed with great thoroughness and persistency that any signs of prosperity to be noticed in India are not signs of the prosperity of the Indian people but only of the English; that the all-overshadowing fact connected with the history of India in recent years has been the succession of famines and the consequent plague epidemics. That in fact there is always famine, in the sense of starvation on a wide scale somewhere in the land. That the people of India are growing speedily poorer. The causes of India's impoverishment are set forth as being heavy taxation, the destruction of her manufactures as a result of British rule, the enormous and wholly unnecessary cost of her Government and in particular the heavy military expense of Government. These things are set forth as being the evils of foreign rule and the only remedy for them is said to be self-rule. It further appears, according to the author, that England's position in India works much injustice to the United States of America:

"When our Government desires to communicate upon any matter officially with India, it must be done round about by way of the British Ambassador, the official not of India, but of the nation that is holding India in bondage."

A chapter is devoted to the "Arrogance of the British India"; another is devoted to the denunciation of the legal system in India, the information of the author being that its "law system" was framed for India by Macaulay. This it appears (the reference would seem to be to the Indian Penal Code) is of a nature degrading to the Indian people. Its main features are said to be that the Judge and the prosecutor is the same man, that so many of the Judges are foreigners, generally Englishmen, who have little acquaintance with the Indian people; that Englishmen are often appointed Judges who have no knowledge of law; that the legal system is very costly. But the gravest charge of all against the British legal system in India is given as partiality and favouritism towards Europeans. So too, the kind of peace which British rule has brought to India is explained to have been worse than war. "The British

have made a graveyard and they call it peace." Again, the British Government is responsible for India's "opium curse":

"The British have fostered the opium evil and organized it for purposes of revenue. It has done this hypocritically, pretending that it is fulfilling the wishes of the Indian people."

The like is said, at length, of India' "drink curse." Of caste in India, it is said:

The truth is the caste which is the most galling of any to the Indian people, and which they most desire to see reformed or removed, is that of their arrogant foreign lords and masters, who with some honourable exceptions, treat them as serfs."

Of Hindu-Mahomedan riots it is explained that the responsibility for them is primarily on the British who

"have employed the policy of fostering divisions among the people, knowing well that divisions always weaken a nation and render it easier to hold in subjection."

Again, as to the military protection which the British give to India a chapter is devoted to showing that

"The only protection the British give India in return for the crushing military burden that she is compelled to bear is the infinite injustice and wrong of subjection, bondage, exploitation, loss of freedom, deprivation of the place which she has a right to occupy among the great nations of mankind."

Another chapter describes the British rule in India as worse than that of the Moghul Emperors because it is a government of "foreigners and transients," India being a

"plundered nation in the hands of constant plunder with the plunderer carried away clean out of the land"

It does not seem to me to be necessary in this judgment to illustrate further the character and contents of the book, nor do I propose to select for quotation the more extreme or rhetorical passages, or the passages which display at its worst the author's animus against the Government at present established by law in British India.

The question being whether we are satisfied or not satisfied that the book contains seditious matter the publication of which is punishable under S. 124-A, I. P. C., the only reasonable answer in my opinion is that there is in this book ample to satisfy any Court of justice that the terms of that section have again and again been contravened. The book appears to me to be a sustained attempt to bring into hatred or contempt and to excite disaffection towards the Government established by law in British India. The disapprobation expressed of the measures of Government or of the administrative or other actions of Government is motived throughout by a desire to excite hatred, contempt and disaffection.

The Advocate General has referred us to the statement by Strachey, J., in *Queen Empress* v. *Bal Gangadhar* (1) at p. 137 of the meaning of S. 124-A, I. P. C., as it then stood :

"A man may criticize or comment upon any measure or act of Government, whether legislative or executive, and freely express his opinion upon it. . . . He may express the strongest condemnation of such measures and he may do so severely and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that and, whether in course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his reader as for instance by attributing to it every sort of evil or misfortune suffered by the people or dwelling adversely on its foreign origin and character or imputing to it base motives or accusing it of hostility or indifference to the welfare of the people—then he is guilty under the section and the explanation will not save him."

Of this book it can hardly be doubted that its leading features are accurately described in the latter portion of the passage just cited. It proceeds indeed upon well worn lines every evil and misfortune, be it the "drink curse" the "opium curse," famine or anything else, is attributed to the English Government whose foreign origin and character is insisted on upon every page. The baseness of its motives is the ever ready explanation of its policy.

In these circumstances Mr. B. C. Chatterjee, counsel for the applicant, contended before us that the criticism of Government was both elaborate and severe but that nevertheless the book does not offend against saction 124-A by reason of the fact that it appears from certain passages therein that it is no part of the author's purpose to advocate that India should become entirely independent of the British Empire. Thus in one passage the author says :

"Here lies India's only hope. She must become an absolutely independent nation with no connexion with Great Britain, or else, remaining in the Empire, she must be given the place of a real partner not that of a subordinate

(1) [1897] 22 Bom. 112.

under a partner's name,) a place of as true freedom and of an perfect equality with the other partners in the Empire as that of Australia, or New Zealand or South Africa or Canada"

In other passages, moreover, the book contains criticism of the present form of Government as being contrary to England's own interests and its continuance as the kind of policy which cost her the American colonies and which, if persisted in must cost her India also. In the preface or "foreword," there is a passage in which the author disclaims enmity to Great Britain and states that what he advocates for India he believes to be for England's good as well as that of India. It appears that this position is maintained, so far as the author is concerned, by asserting that there are two Englands one which he likes to think of as the true one and the other which he describes as "this evil and as I believe dangerous England" and "this imperialistic, might-makes-right England" which :

"unless held in check will make India a smouldering volcano of unrest."

On the whole it seems to me to be quite true to say that it is no part of the purpose of the book to argue that all connexion with Great Britain should be abrogated. So long as the author is engaged in denunciation, he has little interest, so far as I can discover, in any particular proposals for reform and the book does not seem to be an argument in favour of any special type of constitution. This circumstance, nowever, has little bearing upon the question whether the book infringes S. 124-A. It is not necessary for our present purposes to consider whether the advocacy of any particular policy or any particular kind of constitution would necessarily, and of itself, be within the terms of the section. Though there may be policies or doctrines the advocacy of which is otherwise illegal no such question need be considered in this case. The words of the section are:

"brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards His Majesty or the Government established by law in British India."

No interpretation can be given to these words which would render it possible to hold that the book does not offend against the section.

Mr. Chatterjee suggested that there was room for a distinction between the fact and the form of British Government of India and contended that the attempt, if any, to excite hatred and contempt was in this book directed solely against the particular form of Government now obtaining and was thus innocent under the section. The words used by the legislature are "the Government established by law in British India." The section does not contemplate the probability of attempts being made to excite hatred and contempt against abstractions, but uses a clear phrase for a definite thing, and it would be altogether misinterpreted if effect were given to Mr. Chatterjee's argument. The book itself, moreover, fails altogether to fall into line with the distinction suggested. People who are so unfortunate as to be unable to advocate change in the form of Government without attempting to bring into hatred or contempt or to excite disaffection towards the Government established by law have not been specially favoured by the legislature either by the terms of the section itself or by the explanations. They may take their grievance, if any, to the legislature, but the section while it stands must be interpreted according to the plain and natural meaning of its words. In my opinion this application must be dismissed.

Suhrawardy, J.—I agree.

Pearson, J.—I agree.

V.S./R.K. *Application dismissed.*

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GRAHAM AND MITTER, JJ.

Rakhal Das Nepal Pramanik—Plaintiff—Appellant.

v.

Khirode Bandhu Nandi and *others*—Defendants—Respondents.

Appeal No. 1765 of 1927, Decided on 25th June 1929, from appellate decree of Sub-Judge, Dacca, D/- 29th March 1927.

Bengal Tenancy Act, Sch. 3, Art. 3—Art. 3 is applicable only in case of dispossession by landlord and not in mere discontinuance of possession.

Article 3 can be made applicable only where the dispossession has been effected by the landlord or by his agent. Dispossession implies the coming in of a person and the driving out of another from possession, while discontinuance implies going out of the person in possession and his being followed into possession by another. [P 248 C 2]

Where on discontinuance of possession by a tenant of a non-transferable occupancy holding some of the cosharer landlords take khas possession of the holding, there is no dispossession by them so as to attract the operation of Art. 3 : 22 *C. L. J.* 283 and 32 *C. L. J.* 9, *Rel. on.* [P 248 C 2]

Bimal Chandra Das Gupta for *Debendra Narain Bhattacharjee* and *Tarapada Banerji*—for Appellant.

Girija Prasanna Sanyal and *Sourindra Narain Ghose*—for Respondent.

Mitter, J.—The question raised by this appeal is one of some nicety and is one of special limitation under Art. 3 Sch. 3, Ben. Ten. Act.

The relevant facts are these : Plaintiff who is a minor is the tenant of the non-transferable occupancy holding which is the subject matter of the present suit. His mother, who is an illiterate pardanashin woman sold the lands to defendant 2. The deed of sale was executed by plaintiff's mother in her personal capacity and has been held by both Courts not to be binding on plaintiff. After the sale, the plaintiff with her mother abandoned the holding in Aghrayan 1328, i. e. in November or December 1921 and thereupon two of the cosharer landlords took khas possession. Hence plaintiff has brought this suit. The suit was instituted admittedly beyond two years of the landlord's taking khas possession. The Court of first instance found in favour of the plaintiff both on the question of title and special limitation. On appeal the lower appellate Court while not disturbing the finding of the Munsiff on the question of title has reversed the decision of the Munsiff on the question of special limitation and has dismissed plaintiff's suit.

Against this decision of the Subordinate Judge the present appeal has been brought. It is argued for the appellant that Art. 3, Sch. 3, Ben. Ten. Act has no application to the present case as the plaintiff was not dispossessed by the cosharer landlords but the plaintiff having abandoned possession of the disputed lands the landlords have entered into possession. It is said that plaintiff discontinued possession and thereupon the landlord entered into possession. This, it is said, is not dispossession by the landlord, for dispossession must mean eviction by the landlord and his entry on such eviction. Here the tenant was already out of possession and no question of eviction arises. Attention is drawn to the distinction made between "discontinuance of possession" and "dispossession" in Art. 142 of the Schedule to the Limitation Act. The question we have to consider is whether this view is well founded.

Article 3, Sch. 3, Ben. Ten. Act, prescribes that the period of limitation is two years for a suit to recover possession of land claimed by the plaintiff as a raiyat or an underraiyat. The time from which the said period begins to run is two years from the date of dispossession. And although this article does not specify the person by whom the dispossession had been made as this provision is found in the statute which amends and consolidates enactments relating to the law of landlord and tenant the article can be made applicable only where the dispossession has been effected by the landlord or by his agent see : *Haran Chandre* v. *Madan Mohan* (1). "Dispossession" implies the coming in of a person and the driving out of another from possession while "discontinuance" implies the going out of the person in possession and his being followed into possession by another : *Panchoo* v. *Jajneswar* (2) and *Brojjendra Kishore* v. *Bharat Chandra* (3). The facts found in this case amount to discontinuance of possession by the plaintiff and his being followed into possession by some of the cosharer landlords. We think that there was no dispossession such as would attract the operation of Art. 3, Sch. 3, Ben. Ten. Act. In this view we think the lower appellate Court was clearly in error in dismissing plaintiff's suit by applying the shorter period of limitation provided for in the Bengal Tenancy Act. As plaintiff's title has been found by both the Courts the decree of the lower appellate Court dismissing plaintiff's suit is set aside and that of the first Court restored with costs in this Court and in the lower appellate Court.

Graham, J.—I agree.

R.M./R.K. *Appeal allowed.*

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(1) A. I. R. 1921 Cal 249.
(2) [1920] 32 C. L. J. 9=58 I. C. 844.
(3) [1915] 22 C. L. J. 283=31 I. C. 242=2C C. W. N. 481.

* A. I. R. 1930 Calcutta 249

B. B. GHOSE AND BOSE, JJ.

Rangini Sundari Dasya—Judgment-debtor—Appellant.

v.

Hiralal Biswas and *another*—Decree-holders—Respondents.

Appeal No. 496 of 1928 and Civil Revn. No. 17 of 1929, Decided on 23rd May 1929, from appellate order of Sub-Judge, Jessore, D/- 23rd August 1928.

(a) Civil P. C., O. 21, Rr, 92 and 89—Order under R. 92—No second appeal lies.

There is no second appeal against an order under R. 92 with respect to an application under R. 89 : 13 *C. L. J.* 467, *Doubted.*

[P 250 C 1]

*** (b) Civil P. C , S. 47—Provision for appeal as from order under S. 2—Matter cannot be brought under S. 47.**

Where there is an appeal as from an order under S. 2, Civil P. C., it would be difficult to bring that matter under S. 47 so as to allow of a second appeal. [P 250 C 1]

*** (c) Civil P. C., O. 21, R. 89—Application by judgment-debtor for information as to amount to be deposited—Act of clerk of Court misleading judgment-debtor causing insufficient deposit—Subsequent payment of deficiency—Lower Court setting aside sale—Decision reversed in appeal—High Court held competent to interfere in revision to set aside sale.**

A judgment-debtor made an oral application enquiring as to what sum he should deposit in order to have a sale set aside. The clerk made mistake in calculation and informed a lesser sum with the result that the judgment-debtor made insufficient deposit. under O. 21, R. 89. 30 days after the deposit it was discovered that the amount was insufficient and on judgment-debtor thereafter paying the deficiency the sale was set aside. The opposite party preferred an appeal and the order was reversed. A second appeal with alternative revision was preferred to High Court.

Held : that the judgment-debtor was prejudiced by the act of the Court and the High Court could interfere in revision in view of the fact that the lower appellate Court had acted with material irregularity : 26 *Cal.* 449 (*F.B.*), *Foll.* [P 250 C 2]

Profulla Kamal Das—for Appellant.

Apurba Charan Mukerji—for Respondents.

B. B. Ghose, J.—In my judgment, there is no second appeal in this case.

The appeal arises out of an application made by the judgment-debtor under O. 21, R. 89, Civil P. C., for making a deposit of the amount necessary for setting aside the sale. She made a deposit of a certain sum of money which fell short by a few rupees of the requisite amount. It appears that the judgment-debtor's agent, the judgment-debtor being a pardanashin lady, asked the execution clerk, who as a matter of practice in the lower Courts, makes calculations in these matters, as to what sum she should deposit in order to have the sale set aside under that rule. The clerk gives evidence that under the directions of the sheristadar or the chief ministerial officer he made a calculation on the back of the execution petition filed by the decree-holder as to the amount requisite for making the deposit for setting aside the sale. The judgment-debtor's agent then by a challan made the deposit. Under R. 20, Chap. 9 of the Courts' General Rules and Circular Orders, Civil, it is the duty of the chief ministerial officer to see that the amount due from the person submitting the challan to the person to whom the amount is payable is correct. The chief ministerial officer passed the challan and it must be taken that he found that the amount entered therein as payable by the judgment-debtor for setting aside the sale under O. 21, R. 89, Civil P. C., was correct. It is distinctly stated in the challan that the amount was being deposited under that rule of the Civil Procedure Code for setting aside the sale. This money was deposited two days before the expiry of 30 days as required by the law. No mistake was pointed out till the expiry of 30 days.

After the expiry of that date, the decree-holders' pleader informed the Sheristadar that the amount fell short of the required amount. The judgment-debtor deposited Rs. 787-13 as calculated by the execution mohurrir and passed by the sheristadar. On this objection being pointed out to the sheristadar, he made another calculation which appears in red ink at the back of the execution petition on which the previous calculation was made in black ink. After making this fresh calculation, he found that Rs. 23-6 more was required to make up the sufficient amount for deposit under O. 21, R. 89, Civil P. C. The judgment-debtor thereupon deposited the said amount but that was after the requisite period of 30 days. According to the strict provisions of the rule, the judgment-debtor cannot ask the Court for setting aside the sale as the full amount had not been deposited within

the prescribed period of 30 days. The learned Munsiff set aside the sale under that rule. He stated all the facts and referred to Coke upon Littleton for the exercise of what he called the equitable powers of the Court. There was an appeal by the decree-holder and the learned Subordinate Judge has set aside the order of the Munsiff. Against that order this second appeal has been preferred.

On behalf of the appellant reliance has been placed on the case of *Mahomed Akbar* v. *Sukhdeo Pande* (1), where at p. 469 the learned Judges have held that under certain circumstances the order made under R. 89, O. 21, Civil P. C., falls within S. 47 of the Code and under such circumstances there would be a second appeal. The learned Judges carefully refrained from stating under what circumstances the order made under R. 89, O. 21, Civil P. C., would fall under S. 47 of the Code. There being no sure guide under that case as to the circumstances referred to by the learned Judges, I am unable to accept the contention of the appellant that there is a second appeal in this case. In my judgment, where there is an appeal as from an order under S. 2, Civil P. C., it would be difficult to bring that matter under S. 47 of the Code. In that view, this second appeal must be dismissed. The respondent will get the costs of all the Courts from the judgment-debtor appellant. We assess the hearing fee in this Court at five gold mohurs.

There is a separate revision application in this case and it seems to me that we may reasonably exercise our revisional jurisdiction in such a case inorder to give relief to the petitioner. Here the petitioner no doubt made an application to the Court official for giving him information as to what amount he had to deposit in order to have the sale set aside. That is stated by the execution clerk himself and it appears from the fact that the calculation was made on the back of the application for execution which was on the record of the Court. It is true that the application was not made formally, that is, by a written application. But it is well known that, as a matter of practice the rule as regards making written applications for such a purpose as this is not rigidly enforced. That it was not a hole-and-corner business is apparent from the fact that the sheristadar made another calculation on the back of the execution petition and he took no exception to the propriety of the conduct of the execution clerk in making the calculation on the previous occasion. The fact that the judgment-debtor made the application to the proper official and that official gave him the information as to the amount to be deposited which the judgment-debtor entered in his challan as I have stated, distinctly mentioning that it was for setting aside the sale under O. 21, R. 89, Civil P. C., and this challan having been passed by the sheristadar whose duty it was to see as to the correctness of the amount under R. 20, Ch. 9 of the Court's General Rules and Circular Orders, Civil, it can be said that the exact amount required to be deposited was not put in on account of the wrong information given by the Court official; and as has been observed by Jenkins, J., (as he then was) in the Full Bench case of *Chundi Charan Mandal* v. *Banke Behary Lal* (2), at p. 459, that it was essential for the success of the judgment-debtor in that case that it should be established that he was prejudiced by the act of the Court and that the mistake that was made was attributable to that act and Jenkins, J., was careful to point out that what constituted the act of the Court must depend upon the circumstances of each case. In the present case, it was not the casual act of an officer of the Court but it was the deliberate calculation made by a responsible officer. In my judgment, therefore, the learned Subordinate Judge has exercised his jurisdiction with material irregularity in holding in this case that it was not the Court official's Act which misled the judgment-debtor. I would therefore, set aside his judgment and order and restore that of the Munsiff. There will be no order for costs in the revision application.

Bose, J.—I agree.

V.B./R.K. *Revision allowed.*

(1) [1911] 13 C. L. J. 467=10 I. C. 51.

(2) [1899] 26 Cal. 449=3 C.W.N. 283 (F.B.).

A. I. R. 1930 Calcutta 251 (1)

B. B. GHOSE AND PANTON, JJ.

Rajabala Dasi—Appellant.

v.

Jai Chand Lal Babu and *others*—Respondents.

Appeal No. 346 of 1927, Decided on 18th February 1929, against original order of Sub-Judge, Burdwan, D/ 25th July 1927.

Civil P. C., O. 17, R. 3—Decree—Ex parte decree—Legality of—Defendant's prayer for adjournment refused but time given to produce witnesses — Plaintiff's evidence recorded and without waiting upto day fixed for defendant's witnesses ex parte decree passed—Decree held to be illegal.

On the date fixed for the hearing of the case the plaintiff was ready but the defendant prayed for time and produced a medical certificate in support of the allegation that he was ill. The Subordinate Judge was of opinion that the defendant was guilty of repeated laches on various grounds and rejected the defendant's petition but at the same time allowed five days' time to the defendant to produce his witnesses. The plaintiff's evidence was taken on that very day. Instead, however, of waiting for five days in order to enable the defendant to produce his witnesses as directed by him, the Subordinate Judge made an ex parte decree on that very day. Defendant appealed.

Held: that the trial Court was not justified in passing an ex parte decree. [P 251 C 1]

Panchanan Choudhury — for Appellant.

Gopendra Nath Das—for Respondents.

B. B. Ghose, J.—This is an appeal on behalf of the defendant against an order of the learned Subordinate Judge refusing to set aside an ex parte decree. On the date fixed for the hearing of the case the plaintiff was ready. The defendant prayed for time and produced a medical certificate in support of the allegation that he was ill. The Subordinate Judge was of opinion that the defendant was guilty of repeated laches on various grounds and rejected the defendant's petition but at the same time allowed five days' time to the defendant to produce his witnesses. The plaintiff's evidence was taken on that very day. Instead, however, of waiting for five days in order to enable the defendant to produce his witnesses as directed by him, the Subordinate Judge made an ex parte decree on that very day. This appears to be wrong in form. As to the illness of the defendant on the day when he made his application, there is no doubt, as the Subordinate Judge himself says that he accepts the evidence of the doctors who have been examined. It is true that the defendant was suffering from illness for a long time and that probably he would not have been able personally to attend the Court. The learned Judge, however, says that the defendant had a relative who looked after his case. That relative, it appears, met with an accident as he was run over by a motor car. The principal question, however, is the fact that the Subordinate Judge did not wait for the five days allowed by him to the defendants. We are, however, of opinion that the original defendant who is now dead had been guilty of gross laches, as the learned Subordinate Judge has said. We, therefore, set aside the order of the learned Subordinate Judge and direct that on the appellants' paying to the respondents three gold mohurs as the costs of the hearing of this appeal irrespective of the result of the suit, the suit be restored to its original file and heard on the merits.

It should be clearly understood that the defendant, that is, the substituted defendant, must be ready to go on with the case on the date fixed, and that no further indulgence should be shown to her. We make this order without any reference to the question whether the plaintiffs are governed by the Mitakshara or Dayabhag school of Hindu Law which, we are told, was the subject matter of controversy in the Court below. If the costs are not paid by the appellant in the Court below within a month from this day, this appeal will stand dismissed and the order of the Court below refusing to set aside the ex parte order will stand. This order is peremptory. Let the record be sent down without delay.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 251 (2)

RANKIN, C. J., AND C. C. GHOSE AND B. B. GHOSE, JJ.

On difference between

CUMING AND PAGE, JJ.

Raimoni Dasi and *others*—Appellants.

v.

Upendra Nandan Das Mahapatra and *others*—Respondents.

Letters Patent Appeals Nos. 24 to 37 of 1929, Decided on 16th July 1929.

Bengal Tenancy Act (8 of 1885), S. 153—Question of custom of remission of rent for failure of crop is not question of rent annually payable.

The question regarding the existence of a custom that on failure of crops in any particular year the tenants would get remission of their rents for that year is not a question regarding the amount of rent annually payable by tenants. [P 252 C 1]

Bhupendra Kumar Ghose—for Appellants.

Gunada Charan Sen and *Gopendra Nath Das*—for Respondents.

Judgment.—In these cases, it appears that under S. 153, Ben. Ten. Act, no second appeal lay to this Court. We regret that this point was not noticed at the earlier stage of the second appeals; but there seems to be no doubt about it. We have satisfied ourselves that an appeal did lie to the lower appellate Court. But it appears that in all these cases the claim for arrears of rent was under Rs. 100 and the question is merely whether or not by reason of the flood in 1329 the tenants were exempted from paying rent for that particular year in pursuance of a custom to obtain remission of rent by reason of destruction of crops through inundation. That question does not appear to us to come within any branch of the proviso to S. 153, Ben. Ten. Act and, in that view, these second appeals were incompetent.

We think, therefore, that the second appeals must be dismissed as well as these Letters Patent appeals: we do not think that any order for costs should be made as regards the second appeals or any subsequent proceedings in this Court

V.B./R.K. *Appeals dismissed.*

A. I. R. 1930 Calcutta 252

B. B. GHOSE AND PANTON, JJ.

Secy. of State—Opposite Party—Appellant.

v.

Mary Murray— Applicant —Respondent.

Appeal No. 102 of 1928, Decided on 8th February 1929 from original order of Dist. Judge, 24-Parganas, D/- 2nd December 1927.

(a) Provident Fund Act (19 of 1925), S. 3 (2)—Railway Company cannot insist upon nominee taking out letters of administration.

Where a nominee is duly declared by the deceased employee in the railway service to be his nominee with regard to provident fund, the employer company cannot insist upon his taking out letters of administration. The only thing they can insist upon is the proof of identity. [P 252 C 2]

(b) Court-fees Act, Art. 11—Nominee of provident fund applying for letters of administration—Amount of provident fund is not asset liable to probate duty.

Where a nominee of the provident fund of the deceased applies for letters of administration to the estate of the deceased, the amount of provident fund is not an asset liable to probate duty. [P 253 C 1]

Surendra Nath Guha and *Syed Nasim Ali*—for Appellant.

Bijan Kumar Mukerji for *Chippendale* and *Hari Prosanno Mukerji*—for Respondent.

Judgment.—In this case, the widow of a deceased employee under the Eastern Bengal Railway applied for letters of administration of the estate of her husband. In her application in para. 3 she stated that there was some provident fund money on account of the service of her husband under the railway company and the widow was the nominee with regard to this money in a declaration duly executed by her husband. The reason for her asking for letters of administration seems to be that the railway company refused to pay her the money without the letters of administration. If so it is wrong. The only thing that can be said with regard to this is that the authorities concerned must observe the provisions of the law as to the payment of the money due on account of the provident fund. Under S. 3, Cl. (2), Provident Funds Act (Act 19 of 1925), the money vests in the dependant of the subscriber or depositor and where the dependant is the widow or child of the subscriber or depositor, without being subject to any rights of an assignee under an assignment made before the commencement of the Act. There can, therefore, be no doubt that the widow of the subscriber in the present case was entitled without any deduction to the amount under the provident fund. The only thing which the railway authorities might insist on is the proof of identity and they might have satisfied themselves about the identity of the person claiming otherwise than by insisting upon letters of administration of the estate of the deceased husband. As a matter of fact, it may be that some person other

than the widow or child may be entitled to probate of the will or letters of administration of the estate of the deceased with the will annexed and the widow may be entitled to the provident fund money under the provisions of S. 3, Cl. (2) of the Act. However, the widow was compelled to apply for letters of administration of the estate of her deceased husband and in Sch. A she put down the amount of the provident fund. At the same time in her affidavit she stated that the assets of the estate left by her husband, exclusive of the items mentioned in Sch. B in which the provident fund money was included, were under the value of Rs. 995. In Sch. B the widow again stated that the provident fund money was made over to the applicant as widow and nominee. It cannot, therefore, be said that this provident fund money was included in the petition as assets left by the deceased, so as to fall within Art. 11, Court-fees Act and be liable to probate duty. It was distinctly stated in the petition and the affidavit of the applicant that the money belonged to her. The law also provides that the money would vest in her. Under these circumstances, the learned Judge was quite right in holding that this amount is not liable to probate duty. The appeal, accordingly, stands dismissed with costs three gold mohurs.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 253

RANKIN, C. J., AND C. C. GHOSE, J.

Hari Mohan Mondal—Defendant—Appellant.

v.

Gour Mohan Sarkar—Plaintiff—Respondent.

Letters Patent Appeal No. 55 of 1928, Decided on 12th February 1929, against decree of Mitter, J., D/- 22nd May 1928, in Appeal No. 897 of 1927.

(a) Bengal Tenancy Act, S. 5—Area held by a tenant means holding or letting in controversy.

The term area held by a tenant means the holding or letting, over which a certain controversy has arisen, and not the whole land in tenant's possession. [P 255 C 1]

(b) Bengal Tenancy Act, S. 5, Cl. 5—Presumption of tenure-holder applies only when the land exceeds 100 bighas—Challenging party should prove the contrary.

The presumption of tenure-holder applies only when the land exceeds 100 bighas and it is not right, for the purpose of ascertaining whether the presumption applies, to institute an enquiry as to whether the person who holds the land in question also holds other lands from the same landlord or otherwise in other parts of the province or in the same neighbourhood. That may perhaps be useful for other purposes, e. g., when considering whether the presumption is rebutted, or in a case in which there is no presumption. When once the presumption arises the challenging party should prove the contrary. [P 255 C 1]

Jatindra Mohan Choudhuri—for Appellant.

Bijan Kumar Mukherjee and *Hari Prasanna Mukherjee*—for Respondents.

Rankin, C. J.—In this case the plaintiff sued for ejectment on the footing that the plaintiff had raiyati right in some 88 bighas and that the defendant was an under-raiyat under him who had been served with notice under S. 49, Bengal Tenancy Act, and had not given up possession when the notice took effect. The defence of the defendant is that he is not an under-raiyat because the plaintiff is a tenure-holder and is not a raiyat. Accordingly it has to be decided whether the plaintiff's holding of 88 bighas is or is not a tenure. If it is, then the defendant is clearly a raiyat and these proceedings in ejectment are not effective as against him.

The Court of the Munsiff took the view that the plaintiff's case was made out. It held that the plaintiff was shown to be a raiyat and that consequently the defendant was an under-raiyat. The Additional Subordinate Judge of Rajshaye, on appeal, took another view holding in particular that there was a presumption against the plaintiff under the Bengal Tenancy Act to the effect that he was a tenure-holder.

It appears that the defendant's case was to the effect that the plaintiff in addition to the 88 bighas held further land which would bring the amount of the land held by him up to and over 100 bighas. The case that these two lettings were originally one and were subsequently divided was not proved. I cannot say that I see a clear finding anywhere to the effect that under the same landlord the plaintiff now holds over 100 bighas, but I shall assume for the present purpose that that might be true. The main ground on which the Court of the Munsiff and the Court of the Subordinate Judge disagree is that the

Munsif has taken the view that the holding of the plaintiff under which the defendant claims is not itself as large as 100 bighas: consequently he thinks that there is no presumption to assist the defendant to make out the plaintiff to be a tenure-holder.

In this Court on second appeal Mitter, J., held as follows:

"It is argued on behalf of the appellant that the presumption under S. 5 (5) would only apply where the area held by the tenant under a single grant is in excess of 100 bighas. It seems to me that is the correct interpretation which ought to be put on the provisions of S. 5 (5), Bengal Tenancy Act. But even assuming that the presumption applies to a case where the tenant is shown to be in possession of the land in excess of 100 standard bighas, that presumption is rebutted by showing that in respect of the tenancy in question the tenant was holding the land not in excess of 100 bighas but a smaller area and the tenancy in question along with other lands constituted the 100 bighas in possession of the tenant."

It appears to me that the second or hypothetical part of the opinion there expressed by the learned Judge is subject to grave difficulties and I am not prepared to assent to it.

The first question is whether for the purposes of Cl. (5), S. 5, Bengal Tenancy Act one is to look to the holding or the letting in question or one is to look to all the lands that the person in question may be proved to possess either under the same landlord or otherwise. In my judgment, the main feature of S. 5, Bengal Tenancy Act, is to discriminate between "tenure-holders" and "raiyats" by dividing the purpose for which the person in question has his right to hold the land. "Tenure-holder" means primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it. "Raiyat" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners. It is true that regard has to be had to "local custom" as Cl. 4 says, but the important matter apart from local custom is:

"the purpose for which the right of tenancy was originally acquired."

Clause 5 is expressed as follows:

"Where the area held by a tenant exceeds one hundred standard bighas, the tenant shall be presumed to be a tenure-holder until the contrary is shown."

The question is: does that mean that the Court is to start an investigation as to all the lands under however many different titles the tenant holds, or is the clause to be understood as referring to the particular holding or letting or tenancy that comes into question in the case. It will be observed that the Act leaves the Court free to discover by ordinary means the purpose for which the right of tenancy was originally acquired. It may discover it, for example, by the construction of a kabuliat or a patta. In the absence of evidence of that kind it may discover it by an investigation of all the relevant circumstances. But the purpose which is the subject matter of the enquiry is the purpose of the lessor and the lessee, to use the English phrase, in the letting in question. One has to see whether their common purpose in respect of this land was that the land should be held for collecting rents and so forth or for cultivation by the tenant himself. While the Act leaves this question to be decided by proper evidence in the ordinary way, it does give one piece of assistance to the Court in its endeavour to find out the purpose; that is to say, where the area is over 100 bighas there is a presumption that the purpose is for collecting rents and so on. As the Privy Council has explained, the idea is that in the case of a holding as large as 100 bighas it is not probable that the intention is that the raiyat should cultivate it by himself or by members of his family. There is no presumption under the Act that where a holding is less than 100 bighas the holding is to be a raiyati. The only provision of the Act is that where a holding is over 100 bighas the presumption is that it is to be a tenure. It is quite possible, as indeed everybody knows, that a person may hold land in one place for one purpose and land in another place for another purpose. I do not think it is safe or right to take it that the legislature means more than this that the Court in each case has to discover the purpose but that where in a particular case it is found that the letting or holding has reference to an area in excess of 100 bighas then there is a presumption that the purpose was not that the person holding should culti-

vate himself but was a purpose which is characteristic of a tenure. I think therefore, having regard to the language of the clause and to the scheme of the section, that the correct construction is, in applying Cl. (5) to apply it to the particular letting or holding with which we are concerned and that it is not right for the purpose of ascertaining whether the presumption applies to institute an enquiry as to whether the person who holds the land in question also holds other lands from the same landlord or otherwise in other parts of the province or in the same neighbourhood. That may perhaps be useful for other purposes, e. g., when considering whether the presumption is rebutted, or in a case in which there is no presumption. The language of Cl. 5 is I think directed to the particular holding upon which the question arises. Therefore I agree with the view expressed by Mitter, J., in deciding this case. I do not know whether it will be for every possible case a satisfactory expression to say that the question is whether

"the area held by a tenant under a single grant is in excess of 100 bighas,"

but the learned Judge appears to me to mean what I have endeavoured to express. If this is in any way contrary to the decisions referred to in the High Court at Patna I can only say that I disagree with those decisions and I know of no authority binding upon me which is contrary to my reading of the clause. If the view which I have taken is not correct, I have already said that I am not prepared to assent to what Mitter, J., thinks would be the consequences of a contrary view. That is a purely hypothetical question which it is not necessary to enter into.

I am satisfied that the learned Judge decided correctly the second appeal before him and I think this Letters Patent Appeal should be dismissed with costs.

C. C. Ghose, J.—I agree.

P.R./R.K. *Appeal dismissed.*

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

* A. I. R. 1930 Calcutta 255

B. B. GHOSE AND BOSE, JJ.

Ananta Lal Pakrasi—Defendant—Appellant.

v.

Jnanada Sundari Debya and *others*—Plaintiffs—Respondents.

Appeal No. 152 of 1927, Decided on 26th June 1929, from original decree of Second Sub-Judge, Pabna D/- 6th April 1927.

*** (a) Civil P. C., Sch. 2, Para. 14—Parties may agree that incomplete award would be binding upon them.**

If an award is incomplete, the parties may affirm and may agree that the incomplete award would be binding upon them. Even if the parties had appointed a different set of arbitrators agreeing to abide by the previous award and asking them to complete the work done by previous arbitrators, the previous award should be considered as affirmed by the parties and they would not be allowed to attack the award on the ground that it was incomplete: 21 *Cal.* 590 (*P.C.*) and *A. I. R.* 1928 *Pat.* 7, *Rel. on.* [P 257 C 1]

(b) Evidence Act S. 115—Award—Election by party to award by taking benefits under it—Party cannot turn round and say that award is invalid—Contract Act, S. 70.

Where a party actually affirms the award by taking benefits under it and also giving up certain properties according to it, he cannot turn round and say that the award is invalid, unless he can prove that he was acting under some misapprehension. No person can affirm in part an award and then repudiate it in part: *A.I.R.* 1929 *Cal.* 796, *Ref.* [P 257 C 2]

Hira Lal Chuckerbutty, *Satindra Nath Khasnavis* and *Jitendra Mohan Banerji*—for Appellant.

Romesh Chandra Sen, *Poresh Chandra Sen* and *Amiya Kumar Shome*—for Respondents.

B. B. Ghose, J.—This is an appeal by the defendant against an order of the Subordinate Judge of Pabna filing two awards dated 9th March 1926 and 3rd July 1926 on the application of the respondents. It appears that seven persons were entitled to properties moveable and immovable, of considerable value. Apparently they were not all on very good terms. On 12th February 1926 an achalnama was executed by all the seven persons appointing five gentlemen as arbitrators for settling their disputes, the subject matter of which was entered in a schedule attached to the said achalnama. It was provided that even if all the arbitrators did not join, the decision which a majority of them would jointly come to would prevail. One of

the arbitrators named did not act but four of them made an award dated 7th March 1926. Under that award all the matters in dispute referred to the arbitrators were not decided. But the arbitrators did a good deal of work with reference to the arbitration as appears from that award which is a very lengthy document dealing minutely with various properties of the parties. On 1st July 1926 these seven persons addressed a petition to three of the gentlemen who acted as arbitrators, in which it was recited that the previous award only settled some of the matters in dispute and these three gentlemen were prepared to deliver an award with reference to the matters left undecided. The petition goes on thus :

"We have no objection to your declaring your decisions regarding the undecided matters, and we do request you to deliver your award by putting your decisions in writing. None of us shall be entitled to make any objection with regard to the award you will deliver, either on the ground of the expiry of the time fixed, or on the ground of your having no authority. The award (to be) delivered by you shall be treated as a part of the first award. You shall deliver this award within 3rd July next."

Acting on the strength of this petition those three gentlemen prepared an award which bears the date of 3rd July 1926 and these are the two awards which the respondents asked for filing in Court. The objections that were raised by the appellant in the Court below were confined to two issues viz., the second and the third. Issue 2 refers to the award being bad as falling within the mischief of para. 14, Sch. 2, Civil P. C., and Issue 3 refers to the fact of the making of the award by the arbitrators on 3rd July 1926. The learned Subordinate Judge held in effect that the second award is only a continuation of the award of 9th March 1926 which has been completed by the latter award and he held that para. 14 of Sch. 2 of the Code is no bar to the filing of the two awards as one. With regard to Issue 3 the learned Subordinate Judge held that the second award was made on the petition filed by all the parties including the objector before him and it was a valid award. The Subordinate Judge also found that the appellant who was described as a defendant in the Court below had actually received a certain sum of money from the plaintiffs according to the directions given in the first award of the arbitrators and the defendant in his petition did not allege that the second award left any of the moveables properties undivided but he attempted to show that some properties were left undivided in his evidence. The learned Subordinate Judge held that the evidence amounted to this, that the moveable of very trifling value which taken together would amount to only Rs. 300 to 400 were not partitioned, but the defendant has not suffered any loss on that account because he was only entitled to a sixth share of the money and had in his possession a gun the value of which was more than the sixth share of the value of the other moveables and, therefore, he had no reason to complain. Thereupon the learned Subordinate Judge made an order that the two awards be filed and the appeal is against that order.

Mr. Hira Lal Chuckerbutty for the appellant has taken several grounds against the decision of the Court below and it must be admitted that he has gone very carefully through the two awards in order to find discrepancies and flaws which would if substantiated vitiate the award as either incomplete or illegal. The first objection that he takes is that the award is illegal on the face of it ; because although five arbitrators were appointed in the achalnama, only four of them acted and he argues very forcibly that that makes the award invalid. His argument is that, true according to the majority clause a decision arrived at by the majority of the arbitrators appointed would be a good award but the arbitrators who did not join in the award prepared by the majority must act in the matter of arbitration. The proposition thus stated may be accepted as correct, but in the present case I do not think that it has any substance. The provision as regards the arbitrators acting together has already been recited by me. That may very well be construed as a provision for the event of all the arbitrators not acting in the matter of arbitration. At best the expression may be taken as ambiguous. But the meaning is quite clear from the fact that all the parties took that to be a valid award : the only exception that they might possibly have taken was that it was not a complete award. That appears from Ex. 4, the petition to

the three arbitrators date 1st July 1926. By that document they not only asked three of the arbitrators to complete the work that had been done by four of them but they accepted the previous award as a valid award binding upon them. Under that circumstance, it cannot be said that the award of 9th March is illegal on the ground that only four arbitrators acted out of the five named. The answer to the question raised that the first award is invalid because it was not a complete award is also contained in the petition of the parties referred to above. If an award is incomplete, the parties may affirm and may agree that that incomplete award would be binding upon them. The authority for this proposition may be found in the case of *Makund Ram Sukul* v. *Saliq Ram Sukal* (1) and the latest case to which our attention was drawn by the learned advocate for the respondent is that of *Jnanendra Nath Bagchi* v. *Sures Chandra Roy* (2). The learned advocate for the appellant, however, contends that in the case of *Jnanendra* v. *Sures* (2) the parties referred the matter to all the original arbitrators for completion of the work required to be done by the original reference and that differentiates that case from the present one. In my judgment, that is no distinction at all. Even if the parties had appointed quite a different set of arbitrators agreeing to abide by the previous award and asking them to complete the work done by the previous arbitrators, the previous award should be considered as affirmed by the parties and they would not be allowed to attack the award on the ground that it was incomplete. This disposes of the main contentions on behalf of the appellant. But certain other objections were taken which were not finally pressed on its being pointed out to the learned advocate for the appellant that those questions are really of fact which might have been raised before the lower Court if there was any serious difficulty about giving effect to the award. The only point that appears to be of substance was that in the first award it was directed that properties standing in the name of the parties themselves or their wives should be regarded as their personal properties. In the second award it was pointed out that one bit of property 3 bighas 1¼ cottas of land standing in the name of a lady named Sreemati Soudamini Debi was held to be ejmali property and it was argued that this really contradicts the previous award. As I have already said, proper explanation might have been obtained about this apparent contradiction if this question had been put to the arbitrators when they were examined in Court and if this matter had been raised before the lower Court. But Mr. Sen on behalf of the respondents points out that these two items refer to properties of two different characters; the statement in the first award relates to ejmali properties and in that award certain provisions have been made with regard to khamar lands and the second award with reference to the land standing in the name of Soudamini Debi relates to the partition of khamar lands, and it is possible that that is an explanation as to why this land was held to be ejmali. However, that may be, I do not think that the award can be attacked here for the first time on account of the slight apparent discrepancies. The most serious thing against the defendant is that the defendant had actually affirmed the award by taking benefits under it and also giving up certain properties according to it. Having acted in accordance with the award he cannot now turn round and say that the award is invalid, unless he can prove that he was acting under some misapprehension. But there is no such evidence. No person can affirm in part an award and then repudiate it in part. He must either accept the whole or repudiate the whole. Under that circumstance, even if there had been any illegality in the award, that has been waived by the conduct of the defendant. This proposition has recently been dealt with in the case of *Hurrybux Deora* v. *Johurmull Bhatorai* (3) referred to by the learned advocate for the respondents.

The result, accordingly, is that this appeal must stand dismissed with costs. Hearing fee, fifteen gold mohurs.

Bose, J.—I agree.

V.S./R.K. *Appeal dismissed.*

(1) [1894] 21 Cal. 590 = 21 I. A. 47=6 Sar. 428 (P.C.).

(2) A. I. R. 1928 Pat. 7=6 Pat. 556.

(3) A. I. R. 1929 Cal. 796.

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PAGE, J.

Provas Chandra Sinha—Plaintiff.

v.

Ashutosh Mukherji and *others*—Executors--Defendants.

Original Civil Suit No. 759 of 1928, Decided on 29th April 1929.

(a) Jurisdiction — Bar of—Failure to obtain leave necessary under Letters Patent goes to root of jurisdiction—Want of jurisdiction cannot be waived by parties.

Failure to obtain leave in a suit where leave is necessary under the Letters Patent goes to the root of the jurisdiction and the want of jurisdiction in the Court to entertain the suit cannot be overcome or waived by the consent or submission of the parties: 13 *B. L. R.* 191; 11. *Mad.* 26; 15 *Bom.* 93; 34 *Cal.* 619; 35 *Cal.* 61; 11 *C. W. N.* 663; *A. I. R.* 1921 *Bom.* 267; *Green* v. *Rutherforth*, 1 *Ves. J.* 462; *Queen* v. *Justices of Essex*, 1 *Q. B.* 38, *Rel. on.*; 35 *Cal.* 394 and 44 *Cal.* 10, *Expl.* [P 259 C 2]

(b) Letters Patent (Calcutta), Cl. 12—Proceeding commenced by taking out originating summons is suit

A proceeding which is commenced by taking out an originating summons supported by an affidavit is a suit within the meaning of that term in Cl. 12. The term "suit" in Cl. 12 is not to be construed in a restricted sense. An originating summons is therefore to be deemed a suit. If the law were otherwise a ready method would lie at hand for evading the limits set to the jurisdiction of the Court under Cl. 12: 22 *Mad.* 256; 29 *Bom.* 249; *A. I. R.* 1927 *Cal.* 281; *A. I. R.* 1929 *Cal.* 227 and *In re, Fawsitt*, 30 *Ch. D.* 231, *Rel. on.* [P 260 C 2]

(c) Letters Patent (Calcutta), Cl. 12—Suit for land—Test laid down—Where originating summons is taken out to obtain decision that plaintiff is entitled to residuary estate, proceedings is "suit for land."

The expression "suit for land and other immovable property" in Cl. 12 means suits in which having regard to the issues raised in the pleadings the decree or order will affect directly the proprietary or possessory title to land or other immovable property. [P 261 C 1]

Where the substantial objects for which the originating summons is taken out are claims inter alia that plaintiff is entitled to whole of residuary estate of the testator and that certain dedications of properties made debutter under a will is void and construction of a will is sought merely in furtherance thereof, the proceeding is "a suit for land," for if the Court determines these issues the orders made thereon will necessarily affect title to immovable property situate outside jurisdiction: 29 *Bom.* 249; *A. I. R.* 1927 *Cal.* 768, *Ref.* [P 261 C 1]

(d) Letters Patent (Calcutta), Cl. 34—Court acting under S. 302, Succession Act, 1925 does not act in ordinary original civil jurisdiction.

Court exercising jurisdiction under S.302 acts in pursuance of testamentary and intestate jurisdiction with which it is vested under Cl. 34, Letters Patent and not of its ordinary original civil jurisdiction. The Court is moreover, not competent on an application under S. 302 to determine any disputed question of title, the jurisdiction of the Court under that section being confined to the issue of directions to the executor relating to management of estate: 12 *Bom.* 638, *Rel. on.* [P 261 C 2]

S. C. Bose & *S.B. Sinha*—for Plaintiff.

N. N. Sircar and *S. M. Bose*—for Executors.

B. K. Ghose, *A. K. Roy*, *N. C. Bose*, *S. C. Roy*, *J. C. Sett*, *N. N. Bose*, *S. K. Dutt* and *A. C. Batra*—for Defendants.

Page, J.—This is an originating summons by the plaintiff, taken out by his mother as next friend, in which the plaintiff

"claims to be interested in the relief sought as the sole residuary legatee"

under the will and codicils of his grandfather Gopal Chandra Sinha, for the purpose of determining the title to the property moveable and immovable of the testator. The originating summons is in the following form:

"Let the defendants Ashutosh Mukherjee, Sadasiva Mitter and Khitindra Kumar Mitter, the executors of the said Gopal Chandra Sinha deceased, all of No. 9, Chaulpati Lane, and the defendants Sashi Bhusan Sinha of No. 13-A, Teliparha Road, Khitish Chandra Sinha, since adjudged a lunatic, and Purna Chandra Sinha, the three sons of the said deceased, and the defendant Khoka Sinha, a minor grandson by son of the said deceased, and as such claiming or having an interest in the latter's estate as a residuary legatee under his will and codicils, dated respectively 2nd March 1919, 2nd November 1920, and 3rd Chaitra 1330, B. S., corresponding to 16th March 1924, the last three of No. 26-A, Padmapukur Road, and the defendant deities Sree Sree Raj Rajeswar, Sree Sree Lakshmi Janardan Thakur Shalgram and Sree Iswar Shiva Thakur claiming to be entitled to properties purported to be dedicated to their sheba by the said wills and codicils by their shebait, the defendant Sashi Bhusan Sinha of No. 13-A, Teliparha Road, aforesaid within eight days after the service of this summons on them, respectively, inclusive of the day of such service, cause an appearance to be entered for them respectively to this summons, which is issued upon the application of the plaintiff Provas Chandra Sinha, a minor by Sreemati Radharani Dasi his next friend, which plaintiff claims to be interested in the relief sought as the sole residuary legatee under the said will and codicils of the said Gopal Chandra Sinha deceased, that the following questions arising in respect of the estate of the said deceased may be determined under R. 1, sub-Cls. (a) and (g), R. 2, sub-Cl. (a), and R. 9, Ch. 13 of the rules of this Court 1914, and relief given in respect thereof, that is to say:

I. (1) Whether the purported dedication of the properties mentioned in Cls. 3 and 4 of the said will, as modified by Cls. 2 and 4 of the said codicil of 16th March 1924, is postponed to a period beyond the time allowed for the vesting of legacies, and or whether the same is void for remoteness or otherwise?

(2) Whether the purported gift, under Cl. 3 of the said will of property, bearing income sufficient to meet the expenditure of taxes, repairs and thorough repairs in respect of the debuttar, purported to be created as aforesaid, is void for uncertainty and remoteness ?

(3) Whether the direction for accumulation contained in para. 16 of the said will is void and bad in law ?

(4) Whether the vesting of the several purported bequests under Cl. 16 of the said will is postponed till the period of distribution mentioned therein ?

(5) Whether the purported bequests of one-third share respectively in the remainder of the said deceased's estate or any one or more of them is void for remoteness as offending against the rule against perpetuities and or for any other reason ?

(6) If the said bequests in favour of the sons and grandsons of the defendants Khitish Chandra Sinha and Purna Chandra Sinha, respectively, under the said Cl. 16 are void, then, whether the limitations or gifts over in favour of charities, in default of such sons or grandsons being in existence as the period of distribution, are also void ?

(7) If the purported dedication under Cls. 3 and 4 and or other bequests under Cl. 16 of the said will or any of them fail by reason of their being void as aforesaid, then do such bequests as are avoided sink into and form part of the said deceased's residuary estate ?

(8) Whether the bequest of the residuary estate to the said deceased's grandsons by son under Cl. 12 of the said codicil of 16th March 1924, immediately vests the said residuary estate in the plaitiff at the death of the said deceased to the exclusion of the latter's after-born grandson by son ?

(9) Whether the bequest of the said residuary estate under the said Cl. 12 of the said last codicil immediately vests the said residuary estate in the plaintiff at the death of the said deceased, but so as to open and let in the said deceased's after-born grandsons by son ?

II. How the costs of this application are to be borne, and, if necessary, the estate of the said Gopal Chandra Sinha may be administered ?"

A preliminary issue has been raised by the defendants that the proceeding is a "suit for land." and, inasmuch as the immovable property left by the testator is all situate outside the jurisdiction, or in the alternative is partly so situate, and no leave has been obtained under Cl. 12, Letters Patent, the Court has no jurisdiction to entertain the suit. It is conceeded by the plaintiff that the only immovable property of the testator which it can be pretended, is within the jurisdiction of the Courts is 103, Darmahato Street, Calcutta, of which the testator was the mortgagee under a mortgage in English form executed on 20th October 1917.

In answer to the preliminary objection of the defendant it was contended that the defendants or some of them, by taking steps in the proceeding, had submitted to the jurisdiction, and thereby had waived any objection to the jurisdiction of the Court to hear the summons. In support of this contention learned counsel on behalf of the plaintiff referred two decisions of Fletcher, J. *King* v. *Secy. of State* (1) and *Shama Kanta & Co.* v. *Kusum Kumari* (2), in which it was held that, where leave was necessary under Cl. 12, the obtaining of such leave was not a condition precedent to the Court becoming vested with jurisdiction to entertain the suit; and, therefore, when leave had not not been obtained, the defendant by taking steps in the suit could waive the objection of want of jurisdiction.

In the course of the hearing the plaintiff abandoned this contention, and learned counsel on his behalf frankly conceded—as in my opinion, having regard to the authorities, he was bound to do—that failure to obtain leave in a suit, where leave was necessary under the Letters Patent, went to the root of the jurisdiction, and the want of jurisdiction in the Court to entertain the suit could not be overcome or waived by the consent or submission of the parties. *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub* (3), *Ledgard* v. *Bull* (4), *Minakshi Naidu* v. *Subramanya Sastri* (5), *Rampurtab Samruthroy* v. *Premsukh Chandamal* (6), *Laliteshwar Singh* v. *Rameshwar Singh* (7), *Ashutosh Sikdar* v. *Behari Lal* (8), *Brij Coomaree* v. *Alma Chand* (9), *Narandas Raghunathdas* v. *Shantilal Bholabhi* (10), *Green* v. *Rutherforth* (11), *The Queen* v. *Justices of Essex* (12). The view to the contrary

(1) [1903] 35 Cal. 304=7 C. L. J. 441=12 C. W. N. 705.
(2) [1916] 44 Cal. 10=38 I. C. 571.
(3) [1874] 13 B. L. R. 91=21 W. R. 303.
(4) [1886] 9 All. 191=13 I. A. 134=4 Sar. 741 (P. C.).
(5) [1887] 11 Mad. 26=14 I. A. 160=5 Sar. 54 (P. C.).
(6) [1890] 15 Bom. 93.
(7) [1907] 34 Cal. 615=3 C. L. J. 405=11 C. W. N. 649.
(8) [1907] 35 Cal. 61=6 C. L. J. 320=11 C. W. N. 1011 (F. B.).
(9) [1907] 11 C. W. N. 663.
(10) A. I. R. 1921 Bom. 267=45 Bom. 377.
(11) [1750] 1 Ves. J. 462.
(12) [1895] 1 Q. B. 33.

that was expressed by Fletcher, J. in *King* v. *Secretary of State for India* (1) and *Shama Kanta Chatierji & Co.* v. *Kusum Kumari* (2), with all respect, appears to me to be founded upon a misconception of the ratio decidendi of *Moore* v. *Gamjee* (13). The decision in that case turned upon S. 74, County Courts Act, 1888 (51 & 52 Vic.) and Cave, J. observed:

"Part 3 of the County Courts Act, 1888, is headed "Jurisdiction and Law," and Part 4, which includes S. 74, is headed "Procedure and Trial." It seems, therefore, that cases which are within S. 74 would come under the head of procedure rather than under the head of jurisdiction, although no doubt this Court would have power to issue a prohibition in a proper case. I think, therefore, that the objection to the jurisdiction of the Court may be waived by taking any step in the proceeding before applying to dismiss the action."

In *Moore* v. *Gamjee* (13), as I understand the decision, the Court did not hold that the parties could waive an objection to the jurisdiction in a proceeding which the Court had no jurisdiction to entertain. Different considerations, of course, arise where a party, by submitting to the jurisdiction in a proceeding which the Court is not incompetent to entertain, purports to waive an objection to the jurisdiction purely personal to himself. The true rule was laid down by Lord Watson in *Ledgard* v. *Bull* (4), where His Lordship observed:

"When the Judge has no inherent jurisdiction over the subject matter of suit the parties cannot by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbiter, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismiseal of the suit."

In the present case, if the originating summons is a "suit for land" and leave has not been obtained under Cl. 12, Letters Patent, there is an inherent incompetency in the Court to entertain the suit, and no consent or submission by the parties could confer on the Court a jurisdiction which it never possessed. The plaintiff, however, contended that the present proceeding is not a "suit," and, therefore, is outside the ambit of Cl. 12, Letters Patent. In my opinion the proceeding in the present case, which has been commenced by taking out an originating summons supported by an affidavit, is a suit within the meaning of that term in Cl. 12, Letters Patent. It is a suit commenced by an originating summons and not by a plaint, as in the case of "ordinary suits." See Civil Procedure Code (Act 5 of 1903), S. 26; High Court Rules, Ch. 7, R. 1, Ch. 13, Rr. 1 and 14; and it is none the less a suit because the procedure to be followed in respect of it is more summary than that prescribed for "ordinary suits." Indeed, in para. 12 of his affidavit, filed in support of the originating summons, the plaintiff himself has referred to the present proceeding as a suit. The term "suit" in Cl. 12 is not to be construed in a restricted sense, *Venkata Chandrappa* v, *Venkatarama Reddi* (14). *Vaghoji Kuverji* v. *Camaji Bomanji* (15), and if the order made on the originating summons will have the same effect upon the title to the immovable property as a decree passed in an "ordinary suit" for the same relief, it cannot be doubted, I think, that the originating summons is, and is to be deemed to be, a "suit" within Cl. 12, Letters Patent. If the law were otherwise, a ready method would lie at hand for evading the limits set to the jurisdiction of the Court under Cl. 12, *Pran Kumar Pal* v. *Darpahari Pal* (16), *Pashupati Ghose* v. *Debendra Nath* (17), *Galstaun* v. *Diana Sarkies* (18) and *In re, Fawsitt* (19). The plaintiff further contends that if this proceeding is a suit it is not "a suit for land" within Cl. 12, Letters Patent, What then is a suit for land? In *Goculdas* v. *Chaganlal* (20), I had occasion to consider this question, and I venture to repeat the definition of the term set out in that case. The correctness of the construction that was put upon the term "suits for land" in that case was not challenged when the case came be-

(13) [1890] 25 Q. B. D. 244=59 L. J. Q. B. 505=38 W. R. 669.

(14) [1898] 22 Mad. 256.
(15) [1904] 29 Bom. 249=6 Bom. L. R. 958.
(16) A. I. R. 1927 Cal. 281=54 Cal. 126.
(17) No. 267-A. of 1929 (unreported).
(18) A. I, R. 1929 Cal. 227=56 Cal. 224.
(19) [1885] 30 Ch. D. 231.
(20) A. I. R. 1927 Cal. 768=54 Cal. 655.

fore the Court on appeal, and in the present case all the parties accept that definition as being the true construction of the term according to law:

"In my opinion, the term "suits for land or other immovable property" in Cl. 12, Letters Patent means suits in which, having regard to the issues raised in the pleadings, the decree or order will affect directly the proprietary or possessory title to land or other immovable property."

What then are the substantial issues raised in the originating summons in this case and in the affidavit filed in support of it? It is urged by learned counsel on behalf of the plaintiff that the only relief sought in these proceedings is that the executors should be ordered to administer the estate according to law; and there is authority for the view (in which I respectfully concur) that if the plaintiff is merely applying that the executor or trustees be ordered duly to carry out the terms of a will or trust, the proceeding is not a suit for land within Cl. 12, notwithstanding that the order made on such an application in the event may indirectly affect the title to land situate outside the jurisdiction. *Nistarini Dassi* v. *Nundo Lal Bose* (21), *Abdul Hussein* v. *Mahomedally Adamji* (22). But, in my opinion, the object of these proceedings, and the effect of the order sought on the issues raised therein, are very different from those for which the plaintiff contends that this originating summons has been taken out.

The plaintiff specifically claims inter alia that "he is entitled to the whole of the residuary estate" of the said testator" to the exclusion of the other grandsons of the testator, and that "the purported "dedication" of the properties made debuttar under the will is void. The plaintiff further seeks relief in respect of the above claims under Chap. 13, R. 1 (a). In my opinion these are the substantial objects for which the originating summons was taken out, and the construction of the will is sought merely in furtherance thereof. It follows, in my opinion, that this proceeding is a "suit for land," for if the Court determines the above issues the orders made thereon necessarily will affect directly the title to immovable property situate outside the jurisdiction. *Vaghoji Kuverji* v. *Camaji Bomanji* (15) *Goculdas* v. *Chaganlal* (20).

It is admitted by the plaintiff that at the commencement of the suit the defendants did not "dwell, or carry on business, or personally work for gain "within" the limits of the Court's jurisdiction; that the plaintiff's cause of action, in part at any rate arose outside such limits, and that leave was not obtained under Cl. 12, Letters Patent. I am of opinion, in these circumstances, that this Court has no jurisdiction to entertain this proceeding, and the summons must be dismissed.

Lastly, the plaintiff contended that the Court had jurisdiction to grant the relief sought in this proceeding under S. 302, Succession Act (39 of 1925). I am unable to accept this contention. S. 302 is found in Chap. 4, Part 9 of the Act under the heading:

"Of the practice in granting and revoking probates and letters of administration,"

and the Court, in exercising jurisdiction under that section, is acting in pursuance of the testamentary and intestate jurisdiction with which it is vested under Cl. 34, Letters Patent, and not of its ordinary original civil jurisdiction, which is the jurisdiction invoked by the plaintiff in the present proceeding. Further, I am inclined to think that the Court would not be competent, on an application under S. 302, to determine any disputed question of title, the jurisdiction of the Court under that section being confined to the issue of directions to the executor or administrator relating to the management and administration of the estate. See by way of analogy, *In re, Lakshmibai* (23).

The executors' costs as between attorney and client will be paid out of the estate. Each of those defendants who have separetely appeared is entitled to his costs out of the estate. The costs of the plaintiff will also come out of the estate. The costs of the guardian ad litem will be paid, as between attorney and client, by the plaintiff. The costs are to be taxed as of a hearing.

R.M./R.K. *Order accordingly.*

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(21) [1902] 30 Cal. 369=7 C. W. N. 358.

(22) A. I. R. 1922 Bom. 443=46 Bom. 772 *on appeal* A.I.R. 1924 Bom. 313=48 Bom. 331.

(23) [1888] 12 Bom. 638.

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RANKIN, C. J. AND C. C. GHOSE, J.

Gopal Chandra Rudra and *another*—Plaintiffs—Appellants.

v.

Khater Karikar and *others*—Defendants—Respondents.

Letters Patent Appeal No. 11 of 1929, Decided on 5th July 1929, from decree of Mitter, J., D/- 7th December 1928, in Second Appeal No. 1911 of 1927.

(a) Landlord and Tenant — Holding over on expiry of lease does not necessarily create tenancy of any kind—Each case depends upon facts and intention of parties—English law principles are not wholly applicable to cases under Bengal Tenancy Act.

The act of holding after the expiration of the term does not necessarily create a tenancy of any kind, it being in each case a question of fact, what the intention of parties was. At the common law, if the tenant continues in possession by consent of his landlord, he is deemed prima facie a mere tenant at will. In England in the absence of rebutting evidence the inference arising from payment and acceptance of rent is that the tenancy is tenancy from year to year and prima facie the renewed tenancy is subject to all the terms of the expired tenancy which can be applied to a tenancy from year to year. But these doctrines of English law are not applicable to the whole extent under the Bengal Tenancy Act.

[P 263 C 1]

(b) Bengal Tenancy Act (8 of 1885), S. 85—Landlord purchasing occupancy holding under execution sale—Under tenant holding over—Suit for ejectment—Holding over amamounted to sub-letting otherwise than by registered instrument and was rendered invalid against landlord if not consented to.

A landlord after the purchase of an occupancy holding at a sale held in execution of his rent decree sued for the ejectment of an under-raiyat who was holding over after the expiry of the registered under raiyat lease for a period of nine years.

Held: that the under raiyat after the expiry of original terms was holding under a new subletting otherwise than by a registered instrument, and as such the tenancy was invalid as against the landlord in the absence of the proof of landlord's consent, bringing the case within the purview of S. 85. [P 263 C 1]

Hemendra Chandra Sen and *Satyendra Chandra Sen*—for Appellants.

Rankin, C. J.—The plaintiffs' suit is for recovery of possession of certain land. Mitter, J. agreeing with the Courts below, has dismissed the suit. On this Letters Patent appeal, the learned advocate for the plaintiff contends that in view of S. 85, Ben. Ten. Act defendant 4, who alone contests the suit and contests it in respect of four plots only out of the suit lands is a mere trespasser so far as the plaintiffs are concerned. The plaintiffs are the landlords and defendants 15 to 18 hold the disputed lands as raiyats under the plaintiffs. The tenant defendants defaulted in payment of rent and the plaintiffs, having obtained a decree against them, purchased the disputed land on 23rd March 1922. The case for defendant 4 is that he took settlement of the four plots of land of which he is in possession from one Rupchand, predecessor-in-interest of defendants 15 to 18 by means of a registered patta in the year 1310 B. S., i. e, 1903. No notice has been served on him under S. 167 or S. 49, Ben. Ten. Act.

The patta relied upon by the defendant was not produced or proved at the trial though it appears to have been present in Court. The Record-of-Rights, however, described defendant 4 as a korfa tenant on the basis of a registered patta.

At the hearing of this appeal no one appeared to argue the case for the defendants. Mr. Sen for the plaintiffs contends in view of S. 85, Ben. Ten. Act that if the patta of 1903 was for a longer period than nine years, it is altogether invalid as against the landlord, and that if it was for a period of nine years or less, then it expired in or before 1912 and cannot be set up against the landlords' purchase of 1922. The learned Judge has held that even if the term of the patta from 1310 has expired, the under-tenant must be taken to be holding over and that his interest is an incumbrance which the landlords were bound to annul on notice under S. 167 before they could recover possession.

It is certainly suspicious that the registered patta was not properly proved or produced but the assumption may be made in favour of its validity that it did not purport to create a term exceeding nine years. As regards the period from 1912 to 1922, the question is whether sub-S. 1, S. 85 applies to the case:

"If the raiyat sublets otherwise than by a registered instrument, the sublease shall not be valid against his landlord unless made with the landlord consent."

On the whole, having regard to the language and the policy of S. 85, I think that it is not open to the tenant to treat himself in 1922 as holding under the registered patta and that the case is within the clause which I have cited. The act of holding over after the expiration of the term does not necessarily create a tenancy of any kind, it being in each case a question of fact what the intention of the parties was. At the common law, if a tenant continues in possession by consent of his landlord, he is deemed prima facie a mere tenant at will. When, however, a tenant pays rent for a peried subsequent to the expiry of the original term, the presumption is that he ceases to be a mere tenant at will. In England in the absence of rebutting evidence, the inference arising from payment and acceptance of rent is that the tenancy is a tenancy from year to year, and prima facie, the renewed tenancy is subject to all the terms of the expired tenancy which can be applied to a tenancy from year to year. These doctrines are not applicable, to their whole extent, to cases under the Bengal Tenancy Act, but in my judgment it is clear on principle that defendant 4 in 1922 was holding under a new agreement and was not holding under the registered patta. The lessor's consent was not given by a registered patta but is to be inferred from the circumstances, from the acceptance of rent and from the conduct of the parties. I think, therefore, that there has been, after the expiry of the original term, a new subletting otherwise than by a registered instrument. If this be so, the tenancy is not valid against the landlords in the absence of proof of the landlords' consent.

In these circumstances the appeal must in my judgment be allowed, the decrees of the Courts below must be set aside as against defendant 4 and the plaintiffs must recover in ejectment against him with costs in all the Courts.

C. C. Ghose, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 263

CUMING AND GRAHAM, JJ.

Biswambar Biswas — Defendant 5—Appellant.

v.

Nilambar Murari and *others*—Plaintiff and Defendants—Respondents.

Appeal No. 561 of 1927, Decided on 3rd May 1929, from appellate decree of Dist. Judge, Chittagong.

(a) Decree — Setting aside — Person not party cannot invite Court to vacate consent decree.

It is not competent to person to invite a Court to vacate a consent decree to which he is no party; all that he can do is to get a declaration that this decree did not affect his right: 22 *C. L. J.* 383, *Foll.* [P 264 C 1, 2]

(b) Civil P. C., O. 1—Benamidar.

That benamidar is a party to the suit does not make the real owner party to the suit. [P 264 C 2]

(c) Civil P. C., O. 1—"Parties," meaning.

Parties to the suit are the persons whose names appear on the record as parties. [P 264 C 1]

(d) Transfer of Property Act, S. 54—Contract by mortgagee to sell mortgage debt—Consideration paid—Mortgagee is not benamidar of purchaser until sale-deed is completed.

The more fact that the mortgagee contracted to sale a mortgage debt to a person and received consideration for the same does not make the mortgagee a benamidar of the purchaser of the mortgage debt unless the sale-deed was completed, as till then title does not pass to the purchaser: 22 *C. W. N.* 522, *Dist.* and *A. I. R.* 1916 *P. C.* 139, *Ref.* [P 264 C 2]

(e) Words and phrases—"Fraudulently"—meaning.

Person does a thing fraudulently if he does it with an intent to defraud and so to constitute fraud two elements are necessary-deceit and injury and loss to some person. [P 265 C 1]

(f) Fraud—Decree — Fraudulent decree—Meaning.

A fraudulent decree presupposes that fraud has been practiced on the Court or on one of the parties to the suit. [P 265 C 1]

Sarat Chandra Basak and *Narendra Kumar Das*—for Appellant.

N. Sircar and *Chandra Sekhar Sen*—for Respondents.

Cuming, J.—The facts of the case out of which this appeal has arisen are these. On 2nd April 1915, defendant 4 borrowed a sum of Rs. 1,450 from defendants 1, 2 and 3. It was secured by a mortgage-deed which stood in the name of defendant 1. On 6th November 1920, it it alleged that defendants 1, 2 and 3 entered into an agreement to sell to the plaintiff the mortgage debt for Rs. 2,100. Plaintiff it is alleged paid the money. The deed of sale was not, however, completed for some reason or other.

The plaintiff then entered into an agreement with defendants 1, 2 and 3 which was that defendant 1 should bring a suit on the mortgage bond at plaintiff's cost and any money realised would be paid to the plaintiff. The suit was brought on 24th November 1922, defendant 5 who is the appellant now before us being impleaded as a purchaser of the equity of redemption. Defendants 1, 4 and 5 entered into compromise by which it was agreed that the liability of defendant 4 would be fixed at Rs. 2,100, and the suit was disposed of in terms of the compromise. It may here be stated that at the time when this compromise was entered into the plaintiff in the present suit was away in Akyab. The plaintiff then brought this present suit in which he asked; (1) that the agreement to sell the mortgage debt to him might be enforced: (2) that the decree passed on the solehnama might be declared fraudulent and inoperative; (3) that plaintiff was not bound by that decree, that that decree might be set aside, the mortgage suit restored to file and the plaintiff allowed to prosecute the mortgage suit. There was also an alternative prayer that it might be declared that the mortgage bond was sold to the plaintiff who paid the money and a decree granted to the plaintiff against defendants 1, 2 and 3 for the entire amount due on the mortgage and some further reliefs.

The suit was contested by defendant 5 alone the purchaser of the equity of redemption. The trial Court held the decree on the solehnama void and inoperative and he set it aside. He further ordered that the suit should be restored to file the present plaintiff substituted for defendant 1 as plaintiff in that suit. He also granted plaintiff specific performance of the contract to sell to him the mortgage debt against defendants 1, 2 and 3. On appeal the decree was upheld. Defendant 5 appeals to this Court.

He first of all contends that the decree passed on compromise in the mortgage suit cannot be set aside at the instance of a person who was no party to the suit. He is certainly entitled to succeed on that point. As pointed out by Mukerji, J., in *Fateh Chand* v. *Narsing Das* (1), at p. 388 it is not competent to a person to invite the Court to vacate a consent decree to which he is no party. Mukerji, J., further remarked that being a stranger to the decree the only declaration he could get was that the decree did not affect his right. The decree could not be vacated at his instance and the appeal which was terminated by the decree be heard as though no decree had been passed. That same principle applies to the present case. The plaintiff was a stranger to that decree by which expression I understand that he was not a party. He might have been interested in the result but that would not make him a party. Mr. Sircar contends that Mohesh the plaintiff in that case was the benamidar of the present plaintiff. Even if he was, that does not make the present plaintiff a party to that suit. The parties to a suit, as I undertand the expresssion, are the persons whose names appear on the record as parties. Neither indeed was Mohesh a benamidar for the plaintiff in the present suit. The plaintiff in the present suit was not at that time the owner of the mortgage debt for the sale had not been completed and no title had passed. He is even now suing for a specific performance of the contract to sell. He could not have been sued on the mortgage bond for he did not own it and Mohesh alone could have sued. Mr. Sircar seems to argue that by the agreement and the payment of consideration the title passed. To support that he relies on *Jnan Chandra Das* v. *Rajani Kanta Pal* (2). That was an entirely different case.

The plaintiff sought to eject defendant. Defendant had paid the purchase money and been put into possession by the plaintiff. The rights of no third party were in question as is pointed out in the judgment.

The Court held that in such circumstances the defendant could not be evicted. In the case of *Shive Goh* v. *Maung Inn* (3), it was pointed out that the rule of the English Court of equity had no application to the sale of real estate in Burma (and, therefore, also in India). S. 54, T. P. Act providing that apart from a registered instrument, a contract for sale created no interest in or charge upon the land.

(1) [1915] 22 C. L. J. 383=16 I. C. 988.

(2) [1918] 22 C. W. N. 522=41 I. C. 850.

(3) A. I. R. 1916 P. C. 139=44 Cal. 1542=44 I. A. 15 (P.C.).

It is, therefore, perfectly clear that the plaintiff is not entitled to have the consent decree in the mortgage suit, to which he was not a party, set aside and to have the case reopened.

Then with regard to the prayer of the plaintiff that the decree in the mortgage suit No. 175 of 1922 should be declared fraudulent and inoperative by which I understand him to mean not binding on him on the facts found the decree is not fraudulent. There is a tendency I have often noticed to use the word fraudulently without really understanding what the expression implies.

A person does a thing fraudulently if he does it with an intent to defraud. Two elements are necessary to constitute fraud: deceit that is to say, some, one is deceived, and injury or loss to the same preson. How could it be said that the consent decree was obtained by fraud? None of the parties to the decree were deceived nor is it suggested that any deceit was practised on the Court.

A fraudulent decree presupposes that a fraud has been practised on the Court or on one of the parties to the suit.

As for being binding on the plaintiff he was not a party to it and so obviously is not bound by it. The appellant has further contended that the plaintiff is not entitled to a specific performance of the contract to sell the mortgage bond to the plaintiff as there was a novation of contract and a new contract entered into.

The answer to this contention is that it is a question of fact which was not raised in the Court below. The result is that so far as the decree is for specific performance of contract as against defendant 1, 2ka, 2kha and 3 the decree of the lower Courts will remain.

The remainder of the decree by which the compromise decree in suit No. 175 of 1922 was set aside and the suit ordered to be restored to file and the plaintiff substituted in the place of defendant Mohesh is set aside and the plaintiff's suit on this respect dismissed. Appellant-defendant 5 is entitled to his costs throughout.

Graham, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 265

C. C. GHOSE AND MALLIK, JJ.

Hem Chandra Chakravarti and *others*—Plaintiffs—Appellants.

v.

Sarabala Datta and *others*—Defendants—Respondents.

Appeal No. 1541 of 1926, Decided on 25th January 1929, from appellate decree of Dist. Judge, Backerganj, D/- 22nd February 1926.

(a) Bengal Estates Partition Act, Ss. 6 and 84—Where application for separation and partition is made and estates are declared to be under separation and partition, S. 6 applies and not S. 84 and costs are to be levied on all proprietors.

Where an application is made to the Collector for separation and partition of an estate and proceedings are drawn by which the estates are declared to be under separation and also to be under partition, the case comes under S. 6 of the Act and not under S. 84, and costs under Ss. 37 and 38 are to be levied proportionately on all proprietors concerned of the estate. [P 266 C 2]

(b) Bengal Estates Partition Act, Ss. 37, 38 and 111—Order by Collector setting aside order passed by Deputy Collector under Ss. 37 and 38, is without jurisdiction.

Section 111 enumerates the orders passed by a Deputy Collector which can be interfered with by the Collector on appeal. But an order under Ss. 37 and 38 of the Act finds no place in the list under S. 111 and the Collector, therefore, has no jurisdiction to pass an order setting aside the order passed by the Deputy Collector under Ss. 37 and 38. [P 267 C 2]

(c) Bengal Estates Partition Act, Ss. 37, 38 and 119—When order of Collector only interferes with order passed under Chap. 5 and therefore is not one under Chap. 5, jurisdiction of civil Court is not barred.

An order by a Collector on appeal setting aside the order passed by the Deputy Collector under Ss. 37 and 38 is not an order passed under S. 37, but is an order whereby an order passed under those sections is interfered with. It is not an order under Chap. 5, so as to bar the jurisdiction of a civil Court under Cl. (2), S. 119. A civil Court has the jurisdiction to question the correctness of the order. [P 267 C 2]

Brajalal Chakravarti and *Ramanimohan Chatterji*—for Appellants.

Gunadacharan Sen and *Ramendra Chandra Ray*—for Respondents.

Mallik, J.—This appeal arises out of a suit for a declaration that the order of the Collector of Backerganj, dated 1st Novembor 1920, for refund of a certain amount of money deposited by the defendants as costs of the separation and partition of certain estates, is without jurisdiction, illegal and invalid and, therefore, liable to be set aside and also for the issue of a permanent injunction

restraining the said defendents from withdrawing the money from the Backerganj Collectorate.

The allegations on which the plaintiffs brought the suit were briefly these: 5 estates, bearing touzi Nos. 1744, 1751, 3563, 5566, 6100 of the Backerganj Collectorate, originally belonged to two brothers, Radhakanta Sen and Krishnaram Sen. These estates have common lands. Radhakanta's share is known as 'Barha Hisya' and it comprises estates Nos. 1751, 3566 and eight annas of 6100, while the share of Krishnaram comprises estates Nos. 1744, 3563 and the remaining half of the estate No. 6100. Defendants 1, 5 and the predecessor of defendants 2 to 4 purchased the sstate No. 1744 at a revenue sale. The plaintiffs, who became the owners of the 'Barha Hisya' of Radhakanta applied to the Collector on 22nd January 1915, for partition, after separation of the lands of estates Nos. 1751, 3566 and eight annas of 6100. To this the defendants filed an objection and in that objection they also prayed that the common land of the estate No. 1744 should be separated and a Record-of-Rights prepared. Thereupon, proceedings were drawn up on 24th July 1915, declaring the estates to be under separation and also under partition under Ss. 5, 6 and 29, Estates Partition Act (Beng. 5 of 1897). An estimate of cost was prepared—cost of separation of the lands of the five estates and also cost of partition of Estates Nos. 1751, 3566 and 6100. A certain amount was realised from the defendants, who afterwards filed an application before the partition, the Deputy Collector denying their liability to pay. This objection was disallowed, but the Deputy Collector's order was, in appeal, set aside by the Collector of the District who ordered a refund of the money to the defendants. It was this order of the Collector, which the plaintiffs sought to set aside when they instituted the the suit that has given rise to the present appeal.

The Court of first instance decreed the plaintiffs' suit and declared that the order of the Collector for the refund of the money was withot jurisdiction, illegal and invalid and it granted a permanent injunction restraining the defendants from withdrawing the said money, On appeal, the learned District Judge reversed the decision of the Court of first instance and restored the order passed by the Collector. The plaintiffs have appealed to this Court.

The chief point in controversy before us has been as to whether the learned District Judge was right in holding that the case was one under S. 84, Estates Partition Act. It was contended on behalf of the appeliants that S. 6 of the Act and not S. 84 was applicable to the case. This contention is, in my opinion, sound and should be given effect to. In the application which the plaintiffs filed on 22nd January, 1915, their prayer was twofold. They asked, first of all, for a separation of the lands of the estates, and then for a partition of the estates Nos. 1751, 3565 and eight annas share of 6,100. It is true that in the concluding portion of the application, dated 22nd January 1915, the partition of the estates was only mentioned. But, reading the application as a whole, there cannot, in my opinion, be any doubt that the plaintiff's prayer was first of all for a separation of the lands of the estate and then for a partition of the same. And it was in this light that the plaintiffs' application of 22nd January 1915, was taken by the authorities. As observed before the proceedings which the Collector drew up on 24th July 1915, were proceedings whereby the estates were declared to be under separation and also to be under partition under Ss. 5, 6 and 29, Estates Partition Act. I am, therefore, of opinion that the case was under S. 6 of the Act and not under S. 84, under which alone the costs could be realized from the plaintiffs only and the defendants could claim any exemption from liability to pay. If S. 6 of the Act applies to the case—and I have held that it does apply—the costs under Ss. 37 and 38 of the Act are to be levied proportionately on all the proprietors of the estates including the present defendants.

This is about the merits of the case, so far as the liability of the defendants to bear the costs proportionately is concerned. The correctness and validity of the order passed by the Collector allowing a refund of the money to the defendants has been questioned before us on another ground and that was that he had no jurisdiction to pass the order setting aside thereby the order that had

been made by the Deputy Collector on the point. The contention of the learned advocate for the appellants, on this point also, must, in my opinion, be maintained. S. 111, Estates Partition Act enumerates the orders passed by a Deputy Collector which can be interfered with by the Collector on appeal. But an order, made under Ss. 37 and 38 of the Act, finds no place in the list under S. 111. Our attention was drawn on behalf of the respondents to sub-S. 2 of S. 111. But this subsection can have no application, when it is remembered that the proceedings had not come up to the Collector for consideration under S. 58. I am, therefore, clearly of opinion, that the order passed by the learned Collector was an order passed without jurisdiction.

The learned District Judge set aside the order passed by the trial Judge on another ground, viz., that the civil Courts had no jurisdiction to entertain the plaintiff's suit, and in support of this view of the lower appellate Court, our attention was drawn to the provisions of S. 119, Estates Partition Act. It was said that an order passed under Ss. 37 and 38 is an order under Chap. 5 of the Act and under Cl. (b), S. 119, an order passed under Chap. 5 is not liable to be contested in any civil Court. But the short answer to this contention is that the order, the correctness of which was questioned and which was sought to be set aside in the case, was not an order passed under Ss. 37 and 38 of the Act, but an order, whereby an order passed under those sections was interfered with and vacated.

The result of the aforesaid observations is that the appeal is allowed, the decree of the lower appellate Court is set aside and that of the Court of the first instance restored. The plaintiff-appellants will get their costs from the respondents throughout.

C. C. Ghose, J.—I agree.

R.M./R.K. *Appeal allowed.*

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* A. I. R. 1930 Calcutta 267

MUKERJI AND MITTER, JJ.

Kader Bux Patwari and *others*—Appellants.

v.

Salimuddin Hazi—Respondent.

Appeals No. 598 and 608 of 1927, Decided on 30th April 1929.

*** (a) Civil P. C., O. 22, R. 10—Application for substitution of legal heir of party—If no final order made and no question of limitation arise application can be entertained.**

An application for substitution of a legal heir on the death of a party to the suit can be entertained under O. 22, R. 10, if no final order is made on the date of application and if no question of limitation arises. [P 269 C 1]

(b) Civil P. C., S. 100—Question of maintainability of suit cannot be raised in second appeal in first instance.

The question of the maintainability of a suit if not raised in the first instance before lower Courts cannot be allowed to be raised in second appeal. [P 269 C 1]

(c) Bengal Regulations, (7 of 1822)—Settlement made under Regulation—Intention—Entries in khatian only record fact of possession as basis for calculation of revenue.

The intention of the settlement made under the regulation is not to touch or disturb the possession of persons in actual possession of the lands but rather to respect such possession and that the entries in the khatians prepared for the purpose of a settlement under the regulation do not confer a title on the person in whose favour such entries are made but only record the fact of their possession to serve as a basis for calculation of the revenue. [P 269 C 2]

Sarat Chandra Roy Chowdhury, *D.L. Khastgir* and *Nogendra Nath Bose*—for Appellants.

Atul Chunder Gupta and *Radhikaranjan Guha*—for Respondent.

Mukerji, J.—These appeals arise out of a suit for recovery of khas possession of, on declaration of the plaintiffs' title to, two plots of land described in schedule gha of the plaint, and also for mesne profits.

The plaintiffs case as laid in the plaint was that the disputed land appertains to a kayemi ryoti holding comprising 7 kanis of land, which the plaintiffs formerly held under one Hasanali and now under one Salemuddi Haji and others; that the defendants or some of them dispossessed the plaintiffs from a part of the disputed lands in Jaistha 1312; that consequently the plaintiffs instituted a suit under S. 9, Specific Relief Act on 18th November 1905, obtained a decree and in execution thereof recovered possession on 20th January 1907; that they then remained in possession till Ashar 1318 when they were again dispossessed by some of the defendants from a portion, for which they instituted a suit in 1914 which they withdrew on 27th January 1916; and that, emboldened by this, all the defendants combined together and subsequ-

ently dispossessed them of the entire disputed land in Magh 1322.

The defence was that the plaintiffs or their predecessors had no title to the lands, that the lands in suit lie on two sides of a public navigable channel called Bairagir Dona; that on the east of the channel lies chur mandal, a permanently settled estate, and on the west lies chur Mirzamara, a Government khas mehal. The defendants' case was that defendant 1 was occupying certain lands in this locality when on 9th March 1891 one Rai Chandra Kumar Ray Bahadur and another who were the owners of the superior taluk called Chur Balammara Bandabust Taluk having claimed the lands as appertaining to their taluk and as being part of the reformation of chur Lakshmi in Kismat chur mandal, he attorned to these owners and they granted a lease conferring abadkari jote right to him of 12 kanis of land lying on both sides of the channel; that one Ishan Chandra Tarafdar obtained a howla lease of the lands on which defendant 1, executed a kaubliyat in his favour on 4th May 1891; that subsequently in 1904 Government made khas a part of the land and called it chur Mirzamara; that since then defendant 1 has been holding the lands on the east as under Ishan Tarafdar and those on the west as under the Government.

The facts necessary to be mentioned for the purposes of these appeals are the following. The land taken settlement of by the kabuliyat (Ex. 4) of 26th Falgoon 1297 (9th March 1891) which defendant 1 executed in favour of Rai Chandra Kumar Roy Bahadur and another was 12 kanis in area and was described as lying on the north of the land of Hasanali and Salimuddi. In the kabuliat (Ex. 4a) of 22nd Baisakh 1298 (=4th May 1891) by which defendant 1 attorned to Ishan Chandra Tarafdar who had taken a howla lease of the lands of the locality the same boundary was given and it was also stated that the area was 12 kanis. On the following day i. e., 23rd Baisakh 1298 (= 5th May 1891) Ishan Chandra Tarafdar granted a patta (Ex. 5) to Salimuddi and Hasanali of 14 kanis of land which was described therein as lying to the south of the land which had been leased to defendant 1 the day before. The land in suit lies on the border between the lands of Ex. 4 and Ex. 4 (a) on the one hand and Ex. 5 on the other. Then there was a partition between Hasan and Salimuddi, each of them having an 8 annas share in the lands,—by which partition Hasanali got the northern half and Salimuddi the southern half. On 3rd Chaitra 1308 the original plaintiffs in this suit, Amjad Ali and Asraf, took a lease of 7 kanis i. e., the northern half which fell to Hasanali's share, in kayemi ryoti right by executing a kabuliyat Ex. 1. Both the Courts below have arrived at the conclusion that the plaintiffs had a good title to the disputed lands as they are parts and parcels of the land demised by Ex. 5. The Court of appeal below however has held that out of the two plots of land of schedule gha the one being plot 2 of that schedule, which lies on the east of channel, the plaintiffs have failed to prove dispossession within 12 years and that on the other hand the defendants have been in possession of that plot for a much longer period till the institution of the suit, and in that view dismissed the suit so far as that plot was concerned. As regards plot 1, of schedule gha the Court of appeal below has decreed the suit. From this decree, some of the defendants have preferred S. A. No. 608 of 1927 and the plaintiffs a cross-objection. As regards mesne profits a separate decree was passed on appeal by the lower appellate Court from which a separate appeal has been filed by the said defendants being S. A. No. 590 of 1927, and the plaintiffs have also preferred a cross-objection. It will be convenient to take the appeals separately.

S. A. No. 608 *of* 1927.—The appeal relates to plot 1, schedule gha, and the cross-objection to plot 2 of that schedule. In connexion with this appeal the appellant's contentions are two in number, 1st that the suit was not maintainable; and 2nd, that the Courts below have misappreciated the legal effect of the settlement made under Regn. 7 of 1822, in view of which the settlement which the plaintiffs had obtained from a trespasser could not possibly prevail.

The first of these contentions is based upon two grounds. One of these grounds is that the original plaintiffs Amjad and Asraf instituted this suit on 25th May 1917 and then on 4th March 1919 they transferred their rights to certain other

persons in the name of one Nur Miah. On 17th February 1923 Amjad died and no substitution having been made in the meantime the suit abated as far as Amjad was concerned on 17th May 1923 under O. 22, R. 3. On 16th July 1923 Amjad's widow made an application to set aside the abatement. On 17th July 1923 Nur Miah applied to be substituted in the place of the original plaintiffs Amjad and Asraf. On 25th September 1923 Salimuddi and Salamatulla applied to be substituted in the place of the said original plaintiffs alleging that they were the real purchasers while Nur Miah was a mere benamidar. On 27th September 1923 the Munsiff took up all these applications and refused the widow's application holding that she was no longer the representative of Amjad and also that she had not explained the delay in making the application, and granted the applications of Nur Miah and of Salimuddi and Salamatulla. It is contended that the suit having abated the order for substitution could not be made. We are of opinion that no final order having been made in the suit at the dates when the applications were made, the applications were fit to be entertained under O. 22, R. 10, Civil P. C., and that no question of limitation arose. The suit, in our judgment was a pending suit in which an application for substitution on the ground of assignment, creation or devolution of interest could be properly made and that the order for substitution was rightly made. The other ground on which the maintainability of the suit has been questioned is that defendant 6 died during the pendency of the suit and his heirs were not substituted in his place and as it was a suit for possession against alleged trespassers the whole suit should fail. The point was not raised in any of the Courts below and as the contention involves the investigation into the question whether there was really any heir of defendant 6 who survived him, and whether defendant 6 was in possession of a specific plot separately or not and whether his heir, if any, is in such possession or not, it cannot be entertained at this stage. The ground, again, has not been taken in a memorandum of appeal.

As regards the second contention set forth above namely that relating to the effect of the settlement made made under Regn. 7 of 1822, the facts seem to be as follows; In 1905-1906 the Government had the land on the west of the channel surveyed and settled under the Land Revenue Settlement Regn. 7 of 1822. Plot 1, Schedule Gha of the plaint in respect of which the plaintiffs have obtained the decree in the present suit is plot 773 of the map prepared in that survey. The map and the khatians of that survey have been put in that case, and according to the appellants the khatian shows that plot 773 of that survey was recorded as in the possession of defendant 1 appertaining to his jote held under Ishan Taraf-dar. The appellants' contention is that this entry in the khatian created a title in defendant 1, which should be taken to have ousted that of the plaintiffs who claimed to have obtained settlement from persons who were mere trespassers. We have examined the provisions of Regn. 7 of 1822 and we are of opinion that the intention of a settlement made under that regulation is not to touch or disturb the possession of persons in actual possession of the lands but rather to respect such possession and that the entries in the khatians prepared for the purposes of a settlement under the regulation do not confer a title on the person in whose favour such entries are made but only record the fact of their possession to serve as a basis for calculation of the revenue. Where, as here, it has been found on the entire evidence that defendant 1 was not really in the possession of the plot 773 but the entry was erroneous, there is no question of defendant 1 acquiring any title or of his title prevailing over that of the plaintiffs. The intention of the settlement under the regulation as disclosed by its own terms as also by the documents Ex. C and G series was to keep in tact the incidents of Ishan Tarafdar's howla and the rights of the undertenants and not to sweep them away. It appears further from para. 5 of written statement of defendant 1 that defendant's case was that the western portion of Dag 773 which is the subject matter of this appeal was being held by the defendant under Ishan Chandra Tarafdar who was the middleman under the Government. In our opinion para. 5 recognizes the fact that the Government did not.

interfere with the rights of the howladar Ishan Chandra and the real controversy in this case therefore turned in the Courts below on the question as to whether the lands were included in the kabuliat which defendant executed in favour of Ishan Chandra on 22nd of Baisakh 1298 (May 1891) (Ex. 4 (a)) or whether they were included in the pattah granted by Ishan Chandra in favour of the plaintiffs Salimuddi and Hasan Ali on the following day i.e., 23rd Baisak 1298 and both the Courts below have concurrently found that the western portion of plot 773 is covered by plaintiffs' patta (Ex. 5) see passages 11 and 27 of the paper-book. The lower appellate Court rightly points out that the question that really arises for decision is one in the nature of a boundary dispute or in other words what is the real boundary line between the two lease holds of Exs. 4 (a) and 5. This question having been answered in favour of the plaintiff respondent by both the Courts below the question in second appeal becomes really one of parcel or no parcel and upon such a question the findings of the lower Court are conclusive. It is also to be noticed that the admission made by defendant in para. 5 of the written statement regarding the recognition by Government of Ishan's howla is in accordance with facts proved by evidence before the Court, for the lower appellate Court points out that the entries in Ex. G (1) and other khatians leave no room for doubt that the settlements made by Chur Mundal zamindars with Ishan and his tenants were left in tact and recognised by Government and their existing rights were not disturbed and were not intended by Government to be disturbed by measurement of a portion within Chur Mirzamara Khas Mehal, the Courts below, in our judgment, having taken the correct view of this matter.

The two contentions urged in support of the appeal both fail and the appeal accordingly will be dismissed.

The cross-objection is not pressed and it is also dismissed.

Each party will bear his or their costs in the appeal and the cross-objection,

S. A. 590 *of* 1927—None of the grounds urged in support of this appeal is of any substance except one which is to the effect that on calculation being made on the principle adopted by the Court of appeal below the amount of mesne profits would come up to Rs. 435 and not Rs. 450. This argument is not seriously opposed. The appeal will be dismissed subject to the modification that instead of Rs. 450, Rs. 435 will be put in the decree as the amount of mesne profits to be awarded. The other directions in the decree of the lower appellate Court will stand. The cross-objection is not pressed and is also dismissed. Each party will bear his or their costs in the appeal and the cross-objection.

Mitter, J.—I agree.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 270

CUMING AND S. K. GHOSE, JJ.

Bhabani Charan Banikya — Defendant—Appellant.

v.

Suchitra Baisnabi — Plaintiff—Respondent.

Appeal No. 864 of 1927, Decided on 22nd May 1929, from appellate decree of Dist. Judge, Tipperah, D/- 2nd February 1927.

(a) Hindu Law— Religious endowment—Shebait can grant a transferable and heritable lease, not stipulating for fixed rent but permanent so long as rent is paid regularly.

A shebait can, without legal necessity, grant a transferable and heritable lease which is permanent in so far that so long as the rent is paid regularly, tenant will continue to enjoy the land and which leaves to the idol's estate the benefit of an augmentation of rent which is not fixed and can be enhanced. Such a lease is binding on the succeeding shebait : 13 *M. I. A.* 270, *Ref.* *A. I. R.* 1927 *P. C.* 33 *Dist.* [P 272 C 1

(b) Landlord and Tenant—Where heritable and transferable tenancy is permanent so long as rent is paid regularly and rent is not fixed, landlord can enhance rent.

When from the stipulation in the patta it appeared that the tenancy was permanent in so far that so long as the rent was paid regularly the tenant was to continue to enjoy the land, but there was nothing to show that the rent was fixed and the tenancy was heritable and transferable and the patta described itself as a raiyati settlement of a tank.

Held, that the stipulations were not inconsistent with the landlord's right to enhance rent : 24 *C. W. N.* 874 and *A. I. R.* 1927 *P. C.* 20, *Ref.* [P 272 C 1]

(c) Bengal Tenancy Act, S. 3—Mere fact that tenancy is of tank does not take it out of operation of Bengal Tenancy Act.

The mere fact that the tenancy is of a tank does not take it out of the operation of

Bengal Tenancy Act, when the lease has been subject of Record-of-Rights under Bengal Tenancy Act and is on the face of it a raiyati lease. [P 272 C 2]

(d) Civil P.C. O. 22, R. 2 and O. 19 R. 3—No affidavit is necessary to support application for substitution of shebait's widow as plaintiff where evidence shows that she joined in performance of sheba with her husband.

The original plaintiff who was a shebait died after decision of suit in the primary Court and before the filing of the appeal his widow *S* got herself substituted as his widow. There was no affidavit to the effect that *S* was the present shebait

Held, that there could be no objection as to the application for substitution not being supported by an affidavit specially where the Judge was satisfied from evidence that the wife of former shebait joined in the performance of the sheba. There was no rule of law that an application of this nature must be supported by an affidavit. [P 272 C 2]

Hemendra Kumar Das—for Appellant.

Rupendra Kumar Mitra — for Respondent.

S. K. Ghose, J.—This appeal arises out of a suit for recovery of Khas possession of a tank on establishment of the plaintiff's title thereto. The plaintiff's case is that the tank is the debutter property of an idol. Hare Krishna, the last shebait, being unable to perform his duties, the plaintiff was appointed shebait in 1325 B. S. and since then he had been in possession of the tank, but he was dispossessed by the defendant in 1331, B. S. Hence the suit. The defence of defendant 1 was that the tank was the personal property of Sital Bairagi a previous shebait, that Hare Krishna let out the tank to defendant 1 the raiyati right on 29th Bhadra 1326 B. C., and that since then he had been in possession. The learned Munsiff who tried the suit found that Hare Krishna executed a lease of the tank in suit in favour of the defendant on 29th Bhadra 1326 B. S. vide Ex. A. He thought that probably the tank was the personal property of Sital Bairagi; but he considered that even if it were debutter property, the lease was binding on the plaintiff for it was not a permanent, but only an ordinary raiyati, settlement. Further he found that the defendant had re-excavated the tank and made certain improvements which were necessary. Taking all these facts into consideration the learned Munsiff thought that the lease was binding upon the plaintiff. The learned District Judge on appeal did not interfere with the trial Court's finding that the defendants had satisfactorily proved that Hare Krishna had executed pattah Ex. A. But the learned District Judge held that the tank was debutter property dedicated to the worship of the idol. He then proceeded to construe the document Ex. A and he held that by it a permanent interest was created in favour of defendant 1, and finding that no legal necessity had been made out, he thought that the lease was not binding upon the plaintiff. He accordingly allowed the appeal and decreed the suit. Hence this appeal by defendant 1.

The principal point that is raised in this appeal is that the Court of appeal below placed an entirely erroneous construction on the lease Ex. A, that it should be held that the grant made in that document was that of the rights of an occupancy raiyat, and that it was within the competence of the shebait to make such a grant. It is pointed out that the learned District Judge has put a wrong construction upon the word "niyamita" which he has taken to mean settled or fixed; whereas the proper meaning of this word is regular, implying that the rent should be paid regularly. The actual words in the lease are these (in Bengaly). I consider that the contention on behalf of the appellants is correct. The material portion of the document may be translated as follows:

"you having taken raiyati settlement of the land mentioned below and having dug a tank and you having now prayed for taking settlement thereof without any fixed term I have granted your prayer. Accordingly you having paid me Rs. 10 as najar selami for the said tank, and I having received the said money do hereby execute this patta without any fixed term. You shall pay to my office every year an annual jama of annas eight for the said tank. No objection as to payment of rent will be entertained without dakhilas. You will pay the rent according to the kists mentioned below. If you make default in paying any instalment I shall be entitled to realise an interest of Rs. 3-2 per cent per mensem with damages and costs and you will be bound to pay, and will be entitled to enjoy the (land) from son to grandson and other heirs with rights of gift and sale by paying rent regularly in respect of the said land. My sons and grandsons or any other heirs will not be entitled to object thereto. If anybody does so hi objections will be disallowed by law."

From these stipulations in the pattah it seems to me that the tenancy is permanent in so far that so long as the rent is paid regularly the tenant will continue to enjoy the land. But there is nothing to show that the rent is fixed. On the contrary there is nothing to prevent the landlord from exercising his ordinary right to enhance the rent. No doubt there are words going to show that no term is fixed, and that the tenancy is heritable and transferable. But these stipulations are not inconsistent with the landlord's right to enhance the rent. By way of illustration I may refer to the case of *Bhupendra Chandra Singh* v. *Harihar Chakravarti* (1) which was a case of a tenure. There, though the document creating the tenure showed that there were expressions going to show that the tenure was maurasi, it was held that there was nothing to show that it was intended to be mokarari. The fact that in the present case there is no recital of necessity confirms the view that it was not intended that the alienation should be permanent in the sense that the rent should be fixed for all time. The absence of a word like "mokarari" also supports my view. I may refer to the case of *Krishnendra Nath* v. *Kusum Kumari* (2) which again is a case of a tenure. On the other hand the pattah on the face of it describes itself as a raiyati settlement. My conclusion, therefore, is that in this case the lease did not stipulate for a fixed rent, but that the only stipulation was that the tenancy should be permanent so long as the rent was regularly paid, but this rent is liable to enhancement according to law. In this view, there is no doubt, the lease was within the competence of the shebait and is binding on the plaintiff. In the case of *Palanippa Chetty* v. *Devasikamony Pandara Sannadhi* (3) the lease was at a fixed rent. But in this case, as I have said, the lease is not to that effect. On the other hand it leaves to the idol's estate the benefit of an augmentation of rent from time to time and this is within the competence of the shebait as was pointed out in the case of *Maharanee Shibessouree Debia* v. *Mathoora Nath Acharja* (4).

On behalf of the respondent a suggestion has been made that the tenancy is one under the Transfer of Property Act. But no such suggestion was made in the Courts below where it seems to have been assumed that the tenancy is under the Bengal Tenancy Act. The mere fact that it is a tank does not take it out of the operation of the Bengal Tenancy Act. On the other hand it was the subject of a Record-of-Rights under the Bengal Tenancy Act and the lease on the face of it is a raiyati lease. There is therefore no force in the suggestion that the lease is under the Transfer of Property Act.

There is one other matter which has been argued before us and that is that the learned District Judge was not right in allowing the present respondent Suchitra Baisnabi to appear as the plaintiff-appellant in the place of the original plaintiff. It appears that the original plaintiff died after the decision of the suit in the lower Court and before the filing of the appeal, and that Suchitra Baisnabi got herself substituted as the widow of the original plaintiff. It is contended that this should not have been allowed in the absence of an affidavit to the effect that she was the present shebait. There is no rule of law that an application of this nature must be supported by an affidavit. In the present case it appears that the learned District Judge was satisfied from the evidence of D. W. 1 that the Baisnabi of the former shebait joined in the performance of the sheba. It does not seem to have been disputed that the original plaintiff was dead and that Suchitra was his widow. In the circumstances the learned District Judge was justified in allowing Suchitra to prosecute the appeal.

In view of my finding that the lease is binding on the plaintiff the appeal must succeed and the suit must stand dismissed. The decree of the trial Court is restored and the appellant will get his costs in all the Courts.

Cuming, J.—I agree.

R.M./R.K. *Appeal allowed.*

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(1) [1920] 24 C. W. N. 874=58 I. C. 867=32 C. L. J. 19.

(2) A. I. R. 1927 P. C. 20=54 Cal. 166=54 I. A. 48 (P. C.).

(3) A. I. R. 1917 P. C. 33=40 Mad. 709=44 I. A. 147 (P. C.).

(4) [1869] 13 M. I. A. 270=13 W. R. 18=2 Suther. 300=2 Sar. 528 (P. C.).

A. I. R. 1930 Calcutta 273

SUHRAWARDY, J.

Rakhal Chandra Dutta—Accused — Petitioner.

v.

Purna Chandra Ghosh—Complainant —Opposite Party.

Criminal Revn. No. 910 of 1929, Decided on 27th November 1929.

Bengal Food Adulteration Act (6 of 1919), Ss. 5, 6 and 7—It is no defence for accused to say that he had advertised that he was not selling pure foods and that purchaser knew the fact.

The Food Adulteration Act is intended to protect the public from using adulterated articles and therefore it has made it penal to sell these adulterated articles irrespective of the fact whether the purchaser knew the article to be adulterated or otherwise. Articles mentioned in S. 6 are ordinarily articles of food and it is no defence to say that these articles can be adulterated and sold in market with the publication of the fact that they are adulterated. [P 273 C 2]

Satindara Nath Mukerji and *Byomkesh Bose*—for Petitioner.

Siddheswar Chakravarty — for Opposite Party.

Anil Chandra Roy Chowdhury—for the Crown.

Judgment.— This rule has been issued on two grounds (1) that the elements necessary to constitute an offence under S. 6 (1), Bengal Food Adulteration Act 6 of 1919 have not been proved and (2) that as the mustard oil, the subject matter of the case was, sold to the Sanitary Inspector not as mustard oil but as mixed mill oil and as the signboards in the shop indicate that mixed mill oil for lighting purposes is only sold the conviction under S. 6 (1) of the Act is not sustainable. Both the grounds may be considered together.

The facts are that the Sanitary Inspector on the authority from the Chairman of the Municipality went to the shop of the accused and purchased a quantity of mustard oil which he says was for human consumption. After his purchase he divided the oil according to the Act into three parts one of which was kept with the shop-keeper. It was found on analysis that the oil sold was adulterated mustard oil and the owner of the shop was prosecuted and fined Rs. 200. It has been found by the trial Court that the oil was sold as mustard oil for human consumption and that the oil sold was adulterated. Reading S. 5 and Ss. 6 and 7 of the Act together it would appear that the articles enumerated in S. 6 are presumed to be articles of food therefore it has been made penal to sell any such article in an adulterated condition, the presumption being that it was sold for human consumption. This is clear as in S. 5 of the expression "articles of food" is used whereas in S. 6 there is no express provision that the "articles mentioned in that section must be sold as articles of food. But the Act itself is for making provision for the prevention of adulteration of food and therefore the articles mentioned in S. 6 are considered to be articles of food and the sale thereof in an adulterated condition is made punishable. Now in this case the facts sufficiently proved and found by the lower Court are that the oil was sold by the petitioner to the complainant and that the oil was found to be adulterated. The petitioner says that he had put up a sign board on his shop that he was selling adulterated mustard oil. With regard to this sign board I am inclined to believe the Sanitary Inspector when he says that it was not there on the day of the occurrence but it has been subsequently put up. But in my judgment even if this sign board was on the shop it will be no defence to say that he had notified to the public that he was selling adulterated food.

The Food Adulteration Act makes it penal to sell adulterated articles. It does not excuse the offence on the ground that the purchaser knew that what he was purchasing was not pure food stuff. The Act was intended to protect the public from using adulterated articles and therefore it has made it penal to sell these adulterated articles to persons irrespective of the fact that the purchaser knew the article to be adulterated or otherwise. With regard to the articles mentioned in S. 6 they are ordinarily articles of food and it is no defence to say that these articles can be adulterated and sold in the market with the publication of the fact that they are adulterated. S. 7 of the Act makes the storing of adulterated things penal. In this case it is admitted that the accused sells in his shop ghee, flour, atta etc which are sold for human consumption. He also sells

mustard oil and there is no evidence and no allegation for what purpose the mustard oil which is said to be adulterated was sold in the shop .except what is stated on the signboard. On the other hand there is evidence that mustard oil is purchased from his shop by people for consumption as an article of food. His own witness 2 says that no better stuff is available, that he always purchases mustard oil for human consumption from the shop though it was advertised as mixed oil. As I have said it is no defence to say that because it was advertised as mixed oil the seller though he sells the article for human consumption is entitled to plead that he had told the purchaser that it was not pure in defence in a presecution under the Act. As the Act is intended for the safety of the people, in my judgment it should be construed liberally. It is no defence to the accused that the adulterated oil is stored in his shop for some purpose other than for consumption as an article of human food. I cannot say that even if he had taken that defence it would have been a good answer. But it is clear that the adulterated mustard oil is kept in his shop for being sold to persons form consumption as an article of food. In the sign board which he says he put up in his shop it is said that mustard oil is sold for lighting purposes. But there is no evidence that any one purchases it for that purpose. As I understand the sign board has come into prominence since this case. There is also evidence as found by the Magistrate that the accused's shop supplies to the locality the oil at a wholesale rate to small shop keepers who sell it by retail to the inhabitants of the locality for consumption as an article of food. The mischief therefore which is done by his selling adulterated oil in his shop is very great.

I am accordingly of opinion that on the evidence in the case the learned Magistrate has come to a right decision and the conviction must be sustained. This rule is discharged.

R.M./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 274

S. K. GHOSE, J.

Nagendra Nath Saha—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 505 of 1929, Decided on 6th December 1929.

(a) Trade mark— Infringement of — Similarity—Standard of comparison should be that of lay public and not that of experts.

For the purpose of establishing a case of infringement it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use. But if the resemblance in such as not only to show an intention to deceive but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade mark belongs. Therefore the standard of comparison is not that of the experts, but it is that of the lay public, of the unwary purchaser: *Wotherspoon* v. *Averie*, (1872) *L. R.* 5 *H. L.* 508 *Rel. on.* [P 275 C 1]

(b) Merchandise Marks Act, S. 15 — Offence mentioned in S. 15 is offence charged —Accused agreeing to give up use of trade mark—Limitation runs from date when complainant is again aware of infringement.

The offence mentioned in S. 15 is the offence charged. Where after original discovery of infringement of trade mark the complainant takes some action as the result of which the accused gives an undertaking not to make use of the trade mark and it does not appear from the evidence that the complainant actually knew that the infringement of the trade mark had continued, the limitation does not run from the date of the original discovery. It runs from the date on which the complainant is again aware of the infringement and a suit brought within one year from the date, i. e.. within one year after discovery of offence charged is within time: *A. I. R.* 1928 *Cal.* 495, *Rel. on*,; 22 *Mad.* 488, *Dist.* [P 276 C 1]

Mrityunjoy Chattopadhyay— for Appellant.

A. N. Choudhury—for the Crown.

Probodh Chandra Chatterji—for Complainant.

Judgment.— The case against the appellant is that he has infringed two trade-marks belonging to the complainant Manilal Anandji, one a white deer on a red back ground and the other composed of figures 4 and 5 on a black ground in the shape of a star on a yellow label. Both the marks were used as trade marks on packets of 'biri' sold by the complainant. The learned Chief Presidency Magistrate has found that in respect of the figures on the second trademark the complainant had no monopoly but as regards the rest of the device of

the second trade-mark, and as regards the first trade-mark, the prosecution case has been established. He has accordingly convicted the appellant under S. 482, I.P.C., and sentenced him to pay fine of Rs. 500 and of Rs. 200 respectively on the two counts and in default to undergo rigorous imprisonment for three months and two months respectively. In this Court it is not disputed that the complainant did not have the trade-marks as alleged by him. The question is as to whether it has been established that the appellant used false marks in respect of the two trade-marks produced by the complainant. I have before me three sets of trade marks which are relevant to the case and I may say at once that in minor details the trade-marks of the complainant and the trade-marks used by the accused are different: but that in essential matters, that is to say, as regards the general appearance, the prominent portion of the device, the colouring, and so forth the two sets of trade-marks are similar. This view was also taken by the learned Magistrate. The question is what is the standard of comparison? It has been held that, for the purpose of establishing a case of infringement, is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use. But if the resemblance is such as not only to show an intention to deceive but also such as to be likely to make unwary purchasers suppose that they are are purchasing the article sold by the party to whom the right to use the trade mark belongs. *Wotherspoon* v. *Averie* (1). Therefore the standard of comparison is not that of the experts. But it is that of the lay public, of the unwary purchasers. In the present case it would be correct to say that it would be standard of the ignorant people who use these sorts of 'biris' and purchase them from the bazar. In view of these considerations it seems to me that the learned Magistrate correctly held that the trade-marks which had been used by the appellant were false trade-marks. In the lower Court the accused also appears to have given an undertaking to drop the use of both trade-marks.

The next point which has been urged in support of the appellant, in so far as the prosecution with regard to the stag brand is concerned is that it is barred by limitation, under S. 15, Merchandise Marks Act. It is pointed out that it is admitted and found that the complainant first came to know of the infringement in September 1927 and he brought the case in March 1929 and it is contended that the case was brought more than a year after the first discovery of the offence and that therefore it is barred by limitation.

In support of this I am referred to the cases of *Ruppell* v. *Ponnusami Tevan* (2). In that case, however, it appears the complainant had not shown that he believed that the use of the alleged counterfeit trade mark has been discontinued after the first discovery in 1893. This case was considered in *Akshoy Kumar Dey* v. *Emperor* (3). There it was held that the word 'offence' under S. 15, Merchandise Marks Act meant the offence charged. Mr. Chaudhury for the Crown has pointed out that in the present case the offence charged is an infringement in June 1928 which is well within time. It is contended that in the case reported in *Akshoy Kumar Dey* v. *Emperor* (3) the decision went upon the supposition that it was not found that before 10th March 1926, which was the date of offence charged, the prosecution party was aware that the offence had been committed. In the present case, however, it is established that after the original discovery in September 1927 some action was taken by the complainant and as the result the appellant gave an undertaking not to make use of the trade-marks. It is contended that nevertheless the complainant must have known that the accused was going on infringing the trade-marks because their places of business are only a hundred steps apart. But it does not appear from the evidence that the complainant actually knew that the infringement of the trade mark had been continued. No doubt, there was no written undertaking but there was a verbal undertaking and this is deposed to by the pleader P. W. 4 and the complainant himself. This part of the evidence has not been challenged by cross-examination. There are also the letters

(1) [1872] 5 H. L. 508.

(2) [1899] 22 Mad. 488.

(3) A. I. R. 1928 Cal. 495.

written by the complainant's agents to the accused and these were found in the "gadi" of the accused. They are of June 1928 and they refer expressly to the fact that the accused had given an undertaking. Therefore it comes to this that after the original discovery in September 1927, the accused had given an undertaking to desist from infringing the trademark any further and that there is nothing to show that before June 1928 the complainant was aware that there had been a fresh infringement. It is contended that nevertheless the limitation must run from the original discovery in September 1927. Mr. Chaudhury for the Crown has contended that if that be so, then the undertaking would be meaningless and that the complainant would be put upon his watch to see whether there was going to be another infringement within one year of the first discovery; and it might be that, if there was a subsequent infringement after one year of the original discovery, then the second offence not be punishable at all. This position reduces the argument advanced or behalf of the appellant to an absurdity. But as has been pointed out in the case referred to above that the offence mentioned in S. 15, Merchandise Marks Act, is the offence charged and this seems to me to be the only common sense view that can be taken in the present case. In this case the prosecution is clearly in within time. No other points are pressed in this appeal. The conviction of and the sentences passed on the appellant are confirmed. The appeal dismissed.

R.M./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Calcutta 276

C. C. GHOSE AND PEARSON, JJ.

Panchanan Gogai and *others*—Accused —Appellants.

v.

Emperor

Criminal Appeal No. 480 of 1929, Decided on 17th January 1930, against order of Addl. Sess. Judge, Assam Valley Dist.

(a) Evidence Act, S. 154—Hostile witness —Definition—Hostile witness is one who from his evidence shows that he is unwilling to tell truth.

A hostile witness may be defined as one who from the manner in which he gives his evidence (within which is included the fact that he is willing to go back upon previous statements made by him) shows that he is not desirous of telling the truth to the Court. [P 278 C 1]

*** (b) Criminal P. C., S. 298—Judge should explain to jury situation arising in case of hostile witness—He should tell jury to reject evidence of such witness altogether—Omission to do so amounts to misdirection—Evidence of hostile witness cannot in part be relied upon and rest rejected—Evidence Act, S. 154—Criminal Trial.**

The evidence of a hostile witness cannot in part be relied upon and the rest of it discarded or rejected. When a witness is declared hostile so that leave to cross-examine is granted to the party calling him, it is necessary that the Judge should explain what the position is, that then arises, namely, that by asking for leave to cross-examine the witness, the party calling him admits that he is not a witness of truth and one whose evidence is not entitled to credit, who is prepared to make one statement on oath at one time and another at another time and that the evidence of such witness should be rejected and left out of account in the minds of the jury. It is a rule which leans in favour of the accused and as such ought not to be departed from lightly. The Judge should tell the jury to reject the evidence of such witness altogether and his omission to do so amounts to misdirection : *A. I. R.* 1923 *Cal.* 463; *Alexander* v. *Gibson*, 2 *Camp.*556, *Ref.* [P 278 C 1]

Narendra Kumar Basu and *Abdul Kasem*—for Appellants.

D. N. Bhattacharjee—for the Crown.

Judgment.—The accused in this case (Panchanan Gogai, Gopal Gohain, Mohari Ahom alias Mohari Dursa, Kan Bap Baruah, Laghona Koar, and Ratneswar Ahom) were found guilty by the jury in manner following i. e. Pachanan and Kan Bap were found guilty under Ss.328 and 366, I. P. C., Gopal and Mali Ali or Mohari under S. 366, I. P. C. and the remaining two under S. 366 read with S. 107, I. P. C. The learned Additional Sessions Judge of the Assam Valley Districts, agreeing with the verdict of the jury has sentenced the accused to undergo various terms of imprisonment.

The main point which has been argued in this appeal before us arises with reference to the evidence of one Sashi, Prabha, a girl aged about 17, who was alleged to have been abducted. The case for the prosecution, shortly stated, was as follows: It appears that the marriage of Sashi Probha with one Lokenath had been settled and the marriage was to have taken place on 6th May 1928. Her father Durga Prosad had been away from home for some time prior to the date of the occurrence hereinafter referred to. It is alleged that taking advantage of the absence of

Durga Prosad, the accused Panchanan in conspiracy with the accused Kan Bap Gopal and Mohari, and with the approver, Sona Ram, abducted the girl after making her unconscious. They also administered dhatura poison to the adult members of the family. The abduction took place on the night of 27th April and the girl was removed from place to place until she was brought to the house of one Haranath who was the brother-in-law of the accused Panchanan. Haranath sent a wire on 26th May to Durga Prosad and ultimately the police recovered the girl on 29th May. Sashi Probha appeared before the Magistrate for the first time on 11th June 1928.

The passage in the learned Judge's charge to the jury, to which exception has been taken before us, runs as follows:

"Of course in a case of abduction, the most important witness is the abducted girl but the abducted girl in this case has retracted all that she deposed in the lower Court. But before we discuss the evidence, you should remember some dates.

The occurrence took place on the night of 27th April, corresponding to 14th Baisakh. The marriage of Sashi Probha was to have been celeberated with Lokanath on 6th May i.e., 23rd Baisakh. Durga Babu left this house a few days before to purchase articles for marriage and for other important business, he was to return on 29th April. The negotiations of the marriage were going on for about six months or so. The girl was recovered on 29th May; Haranath sent a wire on 26th May. She was examined by the police at Sibsagar on 30th May. After her examination, she was sent to her father's house immediately. She remained at her father's house for four or five days, after which she again came to Sibsagar. She was again brought home two or three days before her father's death which took place on 14th June. Her sister, Ratna's marriage was celebrated with Lokenath on 6th May, the date on which her marriage with Lokenath was to have been celebrated. On 11th June she was produced before the Subordinate Divisional Officer to have her statement recorded under S. 164, Criminal P. C. An Honorary Magistrate was deputed to verify the statement so recorded. Sashi Probha was examined by the Committing Magistrate on 22nd August 1928. Durga Prasad died on 14th June 1928. Sashi Probha left her father's house in the night of 4th September. While her mother and her little sister Santi and the youngest brother was alone living, Sashi Probha was again produced before the Magistrate on 5th September 1929, the date of commitment. On that date, Panchanan was sent to hajat. Sashi Probha was allowed to go of her own free will to the house of Panchanan. The letter Ex. 7 which goaded her to take this fatal step is dated 29th August 1928. Sashi Probha was examined in this Court on 8th May 1929. Sashi Probha personally appeared before the Additional Judge, Mr. Mehta on 7th March 1929, to apply for bail describing herself as the wife of Pachanan Gogai."

The girl has spoken in four voices. The first three statements are substantially the same. In all the statemenes, she spoke of being drugged and then carried by force in an unconscious state. All these statements have been read before you and you have also heard her deposition here. The suggestion of the defence is that what she spoke on the previous occasions were tutored and it is only here that she has spoken the real truth. It is also suggested that what she spoke to Bheduri, Kameswari and others when she was being taken from place to place were false and intended to convey wrong impression. This suggestion is made in the cross-examination to anticipate the evidence to be given by these persons. You must bear in mind the adverse comments of the defence pleader about the delay in producing her before the Magistrate and also that she did not appear before the Magistrate voluntarily. It is for you to decide in what voice she spoke the truth. The determining test should be, what version has been corroborated by the independent evidence. It has been the attempt of the prosecution to prove that her first three statements have been so corroborated."

On behalf of the accused it has been contended before us that the learned Judge had misdirected the jury in not calling their attention to the fact that the girl had been declared hostile by the prosecution and that she was allowed to be cross-examined and further that in the circumstances which happened the learned Judge ought to have directed the jury that the evidence of the girl ought to be rejected altogether. In support of this contention reliance has been placed upon the case of *Emperor* v. *Satyendra* (1) at pp. 176 and 177 (of 37 *C. L. J.*). The learned Deputy Legal Remembrancer on behalf of the Crown has argued that it is not a hard and fast rule that when a witness is cross-examined by the party calling him his evidence must be rejected in toto and has drawn our attention to a number of cases in the Courts in this country, where a somewhat different view has been taken.

Before I proceed further, I desire to refer to the order of the learned Judge under S. 154, Evidence Act, allowing the prosecution to cross-examine the girl. The order is as follows:

"The Public Prosecutor after examining the witness for sometime and found out that the witness was making statements contrary to

(1) A. I. R. 1923 Cal. 463.

what she deposed in the lower Court—wants the permission of the Court to cross-examine her after she is declared hostile. The other side objects. I am of opinion that the permission should be granted."

The order of the learned Judge is not very happily expressed but I take it to mean that he having considered the submissions made by the prosecution exercised his discretion in the matter and gave leave for the cross-examination of the witness. This the learned Judge did, because the witness was clearly, in his opinion, one who was hostile. A hostile witness may be defined as one who, from the manner in which he gives his evidence, (within which is included the fact that he is willing to go back upon previcus statements made by him) shows that he is not desirous of telling the truth to the Court. Where therefore one comes across a witness of this description, there is very high authority for the proposition that the evidence of such witness cannot in part be relied upon and the rest of it discarded or rejected: see *Alexander* v. *Gibson* (2). This case has been followed ever since 1881 and only in one case, namely, in the case *Bradley* v. *Ricardo* (3) it was not followed. Where the witness is declared hostile, so that leave to cross-examine is granted to the party calling him, it is in in our opinion necessary that the Judge should explain to the jury what the position is that then arises, namely, that by asking for leave to cross-examine the witness, the party calling him admits that he is not a witness of truth and one whose evidence is not entitled to credit, who is prepared to make one statement on oath at one time and another at another time and that the evidence of such a witness should be rejected and left out of account in the minds of the jury. On principle we can see nothing why this rule which is in accordance with justice and fair play should not be adhered to. At any rate it is a rule which leans in favour of the accused and as such ought not to be departed from lightly.

In our opinion the learned Judge should have told the jury to reject the evidence of the girl altogether and that his omission to do so amounts to misdirection. The verdict of the jury must therefore be set aside and with it the conviction and sentence. The question then arises as to what should be done. We have very carefully considered the position and have come to the conclusion in view of all the circumstances that it would not be unduly stretching the law if we were to direct that there need not be a retrial. The accused who are on bail will be discharged from their bail bonds.

R.M./R.K. *Order accordingly.*

(2) 2 Camp. 556=11 R. R. 797.
(3) 8 Bing. 57=1 M. & Scott. 133=1 L.J.C.P. 36.

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* A. I. R. 1930 Calcutta 278

C. C. GHOSE AND PEARSON, JJ.

Kartick Chandra Biswas and *others*—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 1290 of 1929, Decided on 11th December 1929, from order of Chief Presy. Mag., Calcutta, D/- 21st October 1929.

*** Criminal P. C., S. 195—Where offence is not committed by parties to any proceeding while it is pending in respect of document produced, S. 195 does not operate as bar to cognizance of offence.**

Certain criminal case in wh ch *K* was on one side and *R* on the other, ended in a compromise. In these proceedings a certified copy of a municipal plan had been filed on behalf of *R*. The copy was taken out by a person identified as *R* by a pleader *N*. *R* made an application to the Chief Presidency Magistrate asking for enquiry into the matter, his complaint being that *K* and others had tampered with the original plan and had taken out the certified copy by giving a false receipt and on false identification by *N*. The Chief Presidency Magistrate, after examining *R*, issued warrant against *K* under Ss. 417, 419 and 430 109, Penal Code.

Held : that the offences were not committed by parties to any proceedings in Court while the said proceedings were pending in respect of documents produced or given in evidence in such proceedings. The offences were committed long after the proceedings had terminated and S. 195 did not operate as a bar to the cognizance of the offences. The allegations made in the complaint of *R* were such as must be inquired into. [P 280 C 2]

N.K. Basu and *Kanaidhone Dutt*—for Applicants.

Debendra Narain Bhattacharjee—for the Crown.

C. C. Ghose, J.—This rule must be discharged for the following reasons.

This rule was issued by my learned brothers Mitter, J., and S. K. Ghose, J., on 30th September 1929, on the application of three persons, viz., Kartick Chandra biswas, Bisheswar Biswas and

Bhubaneswar Biswas. The matter of the application on which that rule was issued came up before this Court on a previous occasion in a slightly different form and in order to understand and appreciate the order that we propose to make, it is necessary to set out briefly, the circumstances giving rise to the present application.

In the year 1927 there were two criminal cases in which the petitioners or some of them were one of the parties and one Ramkrishna Saha or his men were the other party. These cases ended in a compromise and the result was that the proceedings in those cases terminated on 28th July 1927. In those proceedings a certified copy of a municipal plan had been filed on behalf of the said Ramkrishna Saha. This certified copy, it is alleged, was taken out by some person or persons, signing as or for Ramkrishna Saha on a receipt given for the purpose. The executant of the receipt was identified as Ramkrishna Saba by a pleader named Mr. Nares Chandra Sen. This took place on 25th May 1928. In August 1928, Ramkrishna Saha made an application to the Chief Presidency Magistrate asking for an enquiry into the matter, his complaint being that his name had been forged on the receipt aforesaid and the plan had been taken out by somebody not himself. This was followed up by another application made to the Chief Presidency Magistrate on 9th October 1928, in which he went into greater details and stated that Kartick Biswas and others had tampered with the original plan that was in the custody of the Calcutta Corporation and having done, that they removed the certified copy of the plan that was lying with the record of the police cases referred to above by giving a false receipt and with the false identification of the pleader Mr. Naresh Chandra Sen. On this petition the learned Chief Presidency Magistrats, after examining the complainant Ramkrishna Saha and after certain preliminary orders which he passed, eventually issued warrants against the three petitioners under Ss. 417, 419, 420, 109, I. P. C. Thereafter the learned Chief Presidency Magistrate commenced an enquiry into the matter. In the course of the proceedings the learned Chief Presidency Magistrate came to entertain some doubt as to whether a complaint by Dr. Sarbadhikary was necessary in a case of this kind but eventually thought it was. On 9th January 1929, he expressed himself thus :

"The forgery was actually a receipt for taking back the document but it appears, however, to be probably within the meaning of S. 195 (c) in respect of the document that was put in evidence."

He, therefore, suggested to Dr. Sarbadhikary to make formal complaint inasmuch as otherwise there might be difficulties in going on with the proceedings. It appears that on this matter being placed befor Dr. Sarbadhikary the latter on 14th January 1929 made an order which runs in these words :

"I did not pass the order and I do not know anything about it. I cannot therefore, make this complaint."

On the same day, evidently by reason of the order aforesaid of Dr. Sarbadhikary, the learned Chief Presidency Magistrate recorded a further order which runs in these words :

"If the Magistrate takes the trouble to read the order, to look up the law and then see the reports he will be able to learn all about it. The C. C. I should appear before him and move him to make the necessary complaint. Otherwise the case cannot proceed."

It appears further that, therefore, Dr. Sarbadhikary was moved by the C. C. I and certain papers were put before him with the result that he on 15th April 1929 made the order which forms the subject matter of the appeal. That order runs in these words :

"After perusing the abovenamed papers, I am strongly of opinion that if any offence has been committed, it has been chiefly committed by the certifying pleader Mr. Naresh Chandra Sen. He must, therefore, be made an accused in the case along with Bhubaneswar Biswas, Kartick Chandra Biswas and Bisheswar Biswas. Accordingly, all these four persons are made accused in this case."

On the strength of this order of Dr. Sarbadhikary the learned Chief Presidency Magistrate took cognizance of the case. Against the order of Dr. Sarbadhikary the petitioners preferred an appeal to this Court being Criminal Appeal No. 257 of 1929 : The appeal came on for hearing before my learned brothers Mukerji, and Jack, JJ., and by their order dated 28th August 1929, the learned Judges allowed the appeal and set aside the order which was made by Dr. Sarbadhikary. It is not necessary for us to go into the grounds of the order made by Mukerji and Jack, JJ., at length. Briefly stated, their points

were two in number: First, that S. 195, Criminal P. C., would not operate as a bar to the cognizance of any of the offences referred to hereinbefore and that Dr. Sarbadhikary in the circumstances which had happened was not competent to make a complaint under S. 476, Criminal P. C. It appears that the matter thereafter went back to the Chief Presidency Magistrate and warrants were issued for the arrest of the present petitioners, Thereafter the present petitioners came before Mitter and S. K. Ghose, JJ. and obtained a Rule, as stated above, on 30th September 1929, calling upon the Chief Presidency Magistrate to show cause why the proceedings against the petitioners should not be quashed on the following grounds, viz.:

For that the learned Magistrate has misconstrued the order of the High Court in holding that the case was one not covered by S. 195, Criminal P. C.;

For that what this Court had held was merely that no complaint by Dr. Sarbadhikary was necessary to prosecute the petitioners under S. 467, I. P. C. and

For that the allegations made in the petition of the complaint do not make out any case under Ss. 417, 419, 420/109, Penal Code or under S. 467, I. P. C.

So far as the first ground is concerned, we are of opinion that having regard to the order of this Court dated 28th August 1929, it is not open to the present petitioners to raise any such question as is referred to in the first ground. Their Lordships Mukerji and Jack, JJ. have held expressly that S. 195, Criminal P. C. would not operate as a bar to the cognizance of any offences hereinbefore referred to. Mr. Basu, however, has argued before us that having regard to the language of S. 195, Cl. 1, sub-S. (c), it is clear that the offences hereinbefore referred to were committed by parties to a proceeding in Court in respect of a document produced or given in evidence in such proceeding. We are of opinion that apart from the objection that such an argument is not admissible in this case having regard to what was laid down by Mukerji and Jack, JJ., it is quite clear on the facts of this case that the offences were not committed by parties to any proceedings in Court while the said proceeding was pending in respect of documents produced or given in evidence in such proceeding. It is not necessary to recite the facts again; but it is sufficient from what has been stated above that the offences were committed long after the proceedings in Court had come to a termination. That being so, there is no substance whatsoever in the first ground taken by the present petitioners.

As regards the second ground, it is quite true that no complaint by Dr. Sarbadhikary, the Honorary Magistrate concerned was necessary in this case; and if that is so, then this ground which is really one for the purpose of explaining what was held by Mukerji, and Jack, JJ. on 28th August 1929, must fall to the ground along with ground 1.

As regards the third ground, it is one dealing with the facts. In view of the order which we propose to make, it is neither desirable nor convenient that we, at this stage should go into the facts at any length and express an opinion thereon. We are, however, clearly of opinion that the allegations made in the complaint of Ramkrishna Saha are such as must be enquired into and it is quite impossible, having regard to the events which have happened and having regard to the nature of the complaint made by Ramkrishna Saha, that this Court should take upon itself at this stage to direct that the proceedings against the present petitioners should be quashed. It is sufficient for us to observe that ample materials are existent on the record which demand an enquiry and in this view of the matter, the only course that is open to us at this stage is to discharge the rule and to direct that the record should be sent back as early as possible.

So much for the case itself. We cannot part, however, with this case without referring to the explanation which has been submitted by Mr. Roxburgh. In our opinion, it is a matter of abiding regret that a Magistrate of Mr. Roxburgh's position and of his experience and ability and knowledge of the procedure obtaining under the Criminal Procedure Code should have addressed to this Court an explanation in the language which he has thought fit to adopt and use. It is necessary to remind the Magistrate that he has no

right to express himself in language of an annoyance nor to make sneering references to one of the Judges of this Court. Nothing is gained by using language wanting in decorum and politeness and the sooner Mr. Roxburgh gets rid of his present style of communications, the better. Reading the explanation as a whole, it strikes us that he has indulged in a criticism of Mukerji J.'s judgment—a proceeding in respect of which we must express our severe disapproval and condemnation.

Pearson, J.—I agree that this rule must be discharged for the reasons given by my learned brother. I only wish to say with reference to the latter part of the judgment of my learned brother that I endorse what he has said as regards the attitude of the learned Chief Presidency Magistrate as disclosed in his explanation and particularly the fact that it appears that the expressions to which objection may be chiefly taken appear to be based upon certain language attributed to one of my learned brothers which does not appear anywhere, so far as we can find, from the records in the proceeding. It has occurred to me that the word to which Mr. Roxburgh takes exception may have found place in a newspaper report which he has read. If so, I can only say that he has no business to utilize anything which he may have seen in the papers for the purpose of making adverse comments upon any Judge of this Court.

R.M./R.K. *Rule discharged.*

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C. C. GHOSE AND PEARSON, JJ.

Chairman, Serajganj Local Board—Complainant—Petitioner.

v.

Budhiswar Patni and *others*—Accused—Opposite Parties.

Criminal Revn. No. 752 of 1929, Decided on 17th January 1930, from order of the Deputy Magistrate, Patna.

Bengal Ferries Act, Ss. 16 and 18 — "Distance" must be measured by reference to river frontage and not by land.

The land "distance" in S. 16 means distance by river. The distance must be measured by reference to the water frontage and not by land : *Blissett* v. *Hart*; (1744) 125 *E. R.* 1923 *Huzzey and Field*, 150 *E. R.* 186 and *Anderson* v. *Jellet*, (1893) 9 *S. C. R.* 10, *Ref.*

[P 282 C 2]

Anil Chandra Rai Chowdhury — for Petitioner.

Mrityunjoy Chatterjee and *Manindra Nath Banerji*—for Opposite Parties.

C. C. Ghose, J.—The facts involved in this case, shortly stated as follows: The accused, who are four in number, were put on their trial before the Deputy Magistrate, Patna on charges under S. 16 read with S. 28, Bengal Ferries Act, on the allegation that they were plying a private ferry at a place called Simla or Sakha without the sanction of the District Magistrate within two miles of the public ferry at Dhangora. The accused plead not guilty. Evidence was adduced on the point whether the offending ferry was within two miles of the public ferry at Dhangora. The Magistrate found on the record before him that the distance between the two places by river was 3 & 17/18 miles whereas by land it was 1 & 1/2 miles and he accordingly acquitted the accused, holding that the distance contemplated by S. 16, Bengal Ferries Act, was the distance by river and not by land. It is against this order of acquittal that the present rule has been obtained, and the point for consideration is whether the word "distance" in S. 16 of the Act means distance by river or by land.

Section 16, Bengal Ferries Act, runs as follows:

"No person shall except with the sanction of the Magistrate of the district, maintain a ferry to or from any point within a distance of two miles from the limits of a public ferry.

"Provided that, in the case of any specified public ferry, the Lieutenant-Governor, may by notification, reduce or increase the said distance of two miles to such extent as he thinks fit:"

"Provided also that nothing hereinbefore contained shall prevent persons keeping boats to ply between two places, one of which is without, and one within, the said limits, when the distance between such places is not less than three miles, or shall apply to boats which the Magistrate of the District expressly exempts from the operation of this section."

A ferry is a franchise that no one can erect without a license from the Crown. It is in the nature of a highway and is the exclusive right to carry passengers across a river or stream or arm of the sea. It is publici juris and when a ferry is erected, another cannot be erected without an ad quod damnum. If a second ferry is erected without a license the Crown has a remedy by a quo warranto, and the former grantee has a re-

medy by action. *Blissett* v. *Hart* (1). The franchise of a ferry is not a grant of an exclusive right to carry across a stream by any means whatever, but only a grant of the exclusive right to carry across by means of a ferry. If, therefore, a person has a grant of a ferry another may not erect a second ferry upon the same river near to it, by which the former ferry is impaired. The erection of the second ferry in such circumstances will amount to a nuisance and an action will lie. What, however, amounts to a disturbance of a ferry must in each case be a question of fact: in other words the Court has got to determine what amounts to what is called sufficient proximity: see *Huzzey* v. *Field* (2). This question is determined by measurement of the distance from one terminus to another of the water frontage. An instructive case on this point is to be found in one of the Canadian reports: see *Anderson* v. *Jellett* (3). In that case, under a Crown license the town of *B* executed a lease to plaintiff granting the franchise "to ferry to and from the town of *B* to *A*," a township having a water frontage of about ten or twelve miles, directly opposite to *B*, such lease providing only for one landing place on each side, and a ferry was established within the limits of *B*. on the one side, to a point across the bay of *Q*., in the township of *A* within an extension of the east and west limits of *B*. Defendants established another ferry across another part of the bay of *Q*., between the township of *A* and a place in the township of *S*, which adjoins *B*., the termini being on the one side two miles from the western limits of *B* and on the *A*. shore, about two miles from the landding place of plaintiff's ferry. It was held that the establishment and use of plaintiff's ferry within the limits aforesaid for many years had fixed the termini of the ferry and defendant's ferry was no infringement of plaintiff's right. The above propositions are deducible from the cases in England and elsewhere where English law prevails. They are of some assistance in determining the precise meaning of S. 16, Bengal Ferries Act.

In India legislation was first had with respect to ferries in 1816 and Regn. 19 of that year laid down rules for the better management of ferries. Only authorized persons could erect ferries and unauthorized persons plying a ferry were liable to payment of fines not exceeding Rs. 100 or in default of payment of fine to confinement with hard labour not exceeding three months. Regn. 19 of 1816 was replaced by Regn. 6 of 1819 and by S. 6 of that regulation the exclusive right to public ferries was first declared to belong to Government and all private ferries in their vicinity were prohibited or suppressed, the language used being "immediate vicinity." See Clarke's Bengal Regulations, Vol. 2 p. 544. The expression "immediate vicinity" would in this context certainly connote neighbourhood on the river frontgage. With the passage of time, it became necessary to define the limit or limits of the vicinity and it is thus we finally arrive at S. 16, Bengal Ferries Act where the vicinity is limited to two miles. I am therefore of opinion that the distance must be measured by reference to the water frontage and not by land. The Magistrate has pointed out certain considerations which cannot be overlooked. I would therefore dischage the rule and refuse 'to interfere.

Pearson, J.—I agree.

R.M./R.K. *Rule discharged.*

(1) [1744] 125 E. R. 1293.
(2) 150 E. R. 186.
(3) [1883] 9 S. C. R. 1.

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* A. I. R. 1930 Calcutta 282

C. C. GHOSE AND PEARSON, JJ.

Sarat Chandra Bhattacharjee and *others*—Petitioners.

v.

Hari Charan De—Opposite Party.

Civil Revn. No. 10 of 1929 and Misc. case No. 207 of 1929, Decided on 5th December 1929, from order of Dist. Judge, Sylhet, D/- 12th April 1929.

(a) Jurisdiction—High Court—Bench taking criminal appellate and revisional business can entertain applications in connexion with orders by civil Courts under Ss. 195 and 196, Criminal P. C.

The Bench taking the criminal appellate and revisional business of the High Court is always authorized to entertain applications in connexion with orders made by civil Courts under Ss. 195 and 476, Criminal, P. C. 40 *Cal.* 477, *Rel. on.* [P 284 C 1]

*** (b) Criminal P. C., S. 476—Preliminary inquiry although not legally necessary, should be held.**

It is true that under the provisions of S. 476 a preliminary inquiry is not legally necessary.

But it has been laid down ever since the enactment of the present section that although a preliminary inquiry may not be legally necessary, it should in common prudence be held by every Court before it passes an order under S. 476. [P 284 C 2]

* **(c) Criminal P. C., Ss. 475 and 476-B—In case of appeal under S. 476, reference to O. 41, R. 11, Civil P. C. is irrelevant—Provisions of S. 476-B shall be complied with.**

Where an appeal is pending under the provisions of S. 476-B it should be disposed of under the provisions of S. 476-B and reference to O. 41, R. 11, Civil P. C. in the order dismissing the appeal is irrelevent. An appeal from order passed under S. 476 is an appeal in exercise of statutory right of appeal and the provisions of S. 476-B should be complied with. The Court should issue notices to both the parties concerned in the matter, it should send for the record, examine the case and should come to an independent finding whether, under the circumstances, the petitioners would be put in jeopardy by a complaint being lodged against them. [P 284 C 2]

Sashadhar Roy (*Sr*)—for Petitioners.

Chandra Sekhar Sen — for Opposite Party.

Judgment.—This matter comes before us under somewhat peculiar circumstances and having regard to the lapse of time since the date of the original rule in this case being Civil Revision No. 10 of 1929, namely, 3rd May 1929, it is desirable to set out the facts which have given rise to the present application, on 24th September 1929. They are as follows :—It appears that petitioner 1 was plaintiff in a certain suit in the Court of the Munsiff of Karimganj in the District of Sylhet. The three otner petitioners were his witnesses in the case. The plaintiff's suit was dismissed by the Munsiff on 5th October 1926. There was an appeal to the District Judge, but it was dismissed. A second appeal thereafter to this Court was summarily rejected under the provisions of O. 41, R. 11, Civil P. C. What has happened since then, shortly stated, is this. One of the defendants named Gopinath made an application to the Munsiff, who had succeeded the Munsiff who had tried the case in the first instance, for an order against the petitioners under S. 476, Criminal P. C. on the allegation that certain offences mentioned in S. 195, Criminal P. C. had been committed by the plaintiff and his witness. That application was disposed of by the Munsiff on 8th December 1928, the Munsiff holding that there was no case for enquiry and therefore for the lodging of a complaint under S. 476, Criminal P. C. Gopinath did not prefer any appeal against the order of the Munsiff dismissing his application. But it appears that within a week or so another defendant of the name of Haricharan who, it is alleged, it an uncle of Gopinath, made a substantive application on his own account for an order similar to that which was prayed for by Gopinath against the petitioners. This last mentioned application was disposed of by the Munsiff on 15th March 1929. The Munsiff held that there was a case for enquiry and he thereupon lodged a complaint under S. 476, Criminal P. C. on 27th March 1929. The petitioners thereupon preferred an appeal to the District Judge Mr. Edgley under the provisions of S. 476-B, Criminal P. C. If appears that Mr. Edgley without sending for the record and without issuing notices to both the parties concerned in this case summarily dismissed the appeal on 12th April 1929. Against that order the petitioners moved this Court and obtained a rule on 3rd May 1929, from my learned brother Mr. Justice Pearson sitting with Mr. Justice Mallik. That Rule being Civil Revision No. 10 of 1929 came on for hearing before Mr. Justic Graham and Mr. Justice Lort-Williams on 3rd September 1929, and the order that was passed by their Lordships on that date runs as follows :

"This rule is directed against an order of the District Judge of Sylhet dismissing an appeal summarily under O. 41, R. 11, Civil P. C. We discharge the rule on the ground that we have no jurisdiction in the matter."

Thereafter the present petitioners moved the Vacation Bench (Mitter and S. K. Ghose, JJ.) and obtained a rule on almost the same terms as were stated in the original rule No. 10 of 1929.

No doubt in Mr. Edgley's order reference is made to O. 41, R. 11, Civil P. C. But it is quite clear that Mr. Edgley had to dispose of the appeal which was pending before him under the provisions of S. 476-B, Criminal P. C. and under no other section. The reference, therefore, to O. 41, R. 11, Civil P. C. was clearly irrelevant in the circumstances. As regards the question whether the learned Judges, Graham, J. and Lort-Williams, J. had jurisdiction to dispose of the rule in the way in which such rules are ordinarily disposed of by this Court the position appears to

have been this. It appears that for a number of years when Sir Lancelot Sanderson was Chief Justice and more especially after the decision of the Full Bench in the case *Emperor* v. *Har Prasad* (1), the Bench taking the criminal, appellate and revisional business of the Court had always been authorized to entertain applications in connexion with orders made by civil Courts under Ss. 195 and 476, Criminal P. C. We have made enquires into the matter and we have satisfied ourselves that in the Daily List which was printed, it was specifically stated that the Criminal Bench were to deal with applications in connexion with orders made by Civil Courts under Ss. 195 and 476, Criminal P. C. Through some omission or other on the part of the office, this authorisation of the Criminal Bench had not been printed in recent years in the Daily List and, in consequence thereof, doubts arose whether the Criminal Bench had authority from the Chief Justice to deal with such applications. Those doubts are mainly responsible for the form of the order passed by Mr. Justice Graham and Mr. Justice Lort-Williams. Administrative action is being taken by the learned Chief Justice to prevent all such doubts in future. Be that as it may, it is perfectly clear that the order of 3rd September 1929, was passed by Graham,and Lort-Williams,JJ. under a misapprehension. That being so, although the rule that was granted by my learned brothers, Pearson, and Mallik, JJ., was discharged on 3rd September 1929, we are of opinion that that order would not stand in the way of our disposing of this rule which was granted by the Vacation Bench on its merits. To hold otherwise would amount to a denial of justice. Besides, the present Criminal Bench have been specifically authorised by the learned Chief Justice to dispose of the present Rule on its own merits. That being so, we have felt ourselves completely at liberty to go into the whole matter for ourselves and see whether or not there is any substance in the contention put forward before us by Mr. Roy on behalf of his clients. It is perfectly clear that Mr. Edgley's order is unsupportable. Mr. Sen on behalf of the opposite party has made a vigorous attempt, as indeed it was his duty to do so, to support that order. But, as stated above, Mr. Edgley has not complied with the provisions of S. 476-B, Criminal P. C., the appeal to him being one which was in the exercise of the petitioners' statutory right of appeal from the order passed by the Munsiff under S. 476, Criminal P. C. He has neither issued notices to both the parties concerned in the matter nor has he sent for the record and examined the case for himself and come to an independent finding of his own whether, in the circumstances disclosed, the present petitioners should be put in jeopardy by a complaint being lodged against them That being so, if not for anything else, Mr. Roy is entitled to ask us to make the rule absolute. We have not been content with merely listening to the technical complaints made by Mr. Roy: but we have gone into the substance of the thing and we are of opinion that on the merits Mr. Roy's clients have a good case. The Munsiff who gave the sanction at the instance of the defendant Hari Charan did not make any enquiry before he made a complaint against the present petitioners. It is true that under the provisions of S. 476, Criminal P. C. a preliminary enquiry is not legally necessary. But it has been laid down ever since the enactment of the present S. 476, Criminal P. C. that although a preliminary enquiry may not be legally necessary, it should in common prudence be held by every Court before it passes an order under S. 476, Criminal P. C. That, as we understand, is the present case law in this Court. This preliminary enquiry was not held by the Munsiff. Further, it is to be remembered that the application was made to the Munsiff who, it may be noted again, was the successor of the Munsiff who had originally tried the case, nearly two years and a half after the disposal of the case itself. The Munsiff who made the order complained of had no knowledge of the case, had not seen the witnesses and had to rely on the judgments which had been pronounced by the primary Court and by the Court of appeal below. In addition to all this, there is the circumstance that one application, made by one defendant namely, Gopinath, had already been dismissed. That was a factor which

(1) [1913] 40 Cal. 477=17 C. L. J. 245=19 I. C. 197=17 C. W. N. 647.

should have been and had to be taken into consideration. But it does not appear from the order of the Munsif that this was taken into consideration; indeed none of these circumstances were ever taken into consideration by Mr. Edgley who had to dispose of the appeal. In these circumstances, in our opinion, it would not be just and proper that Mr. Roy's clients should be put to further trouble, inconvenience and expense. We think this is one of the cases in which this Court should interfere and put an end to these proceedings. We, therefore, direct that the rule be made absolute, that Mr. Edgley's order be set aside and that the complaint which had been made by the Munsiff at the instance of Hari Charan and all proceedings following thereon be set aside.

R.M./R.K. *Rule made absolute.*

A. I. R. 1930 Calcutta 285

SUHRAWARDY, J.

Bishnu Pada Dey — Accused—Petitioner.

v.

Corporation of Calcutta — Opposite Party.

Criminal Revn. No. 1083 of 1929, Decided on 27th November 1929.

Calcutta Municipal Act (1923), Ss. 271 and 278 (1) (b)— Whether there is proper access to privy is question in which corporation is not interested and requisition for that purpose is not covered by S. 278(1) (b)— It has to see only whether accommodation is sufficient and privy is in sanitary condition.

The words "take such other order" must be construed ejusdem generis with the words preceding. Whether proper access is available to a privy by people living in a particular portion of a house is a question in which the corporation is not prima facie interested. The tenants having just grievance can take such steps for securing proper access as the law provides but the corporation is only entitled under the Municipal Act to see that privy is in a sanitary con dition. and the privy accomodation is sufficient. A requisition by the corporation that proper access should be provided to a privy is not, therefore, covered by S. 278 (1) (b). [P 285 C 2]

Mrityunjoy Chattopadhya and *Rabindranath Mukherjee*—for Petitioner.

Probodh Chandra Chatterjee and *Gopendra Krishna Banerjee*—for Opposite Party.

Judgment.—This rule has been issued against the conviction of the petitioner for not complying with the requirements of S. 278 (1) (b), Calcutta Municipal Act 1923. The requisition with which we are concerned in this case was to the effect that the petitioner should provide access to the northern connected privy of the first floor through the nearest verandah. The question which I am called upon to determine in this case is first whether the requisition is one which the corporation was entitled to issue under the Act; and secondly, whether the corporation has the right to say that access to the privy provided by the petitioner is insufficient. S. 278 (1) (b) authorizes the corporation to renew, repair, cover, recover, trap, ventilate, pave and pitch, cleanse, flush or take such other order with the same (including a privy) as the corporation may think fit to direct. It is argued on behalf of the corporation that the requisition is covered by the words "take such other order." In my judgment this contention is not sound. The words "take such other order" must be construed ejus dem generis with the words preceding, whether proper access is available to a privy by people living in a particular portion of a house is a question in which the corporation is not prima facie interested. It is a tenanted house and the tenants living in the first floor may have just grievance that they have no proper access to the privy. They can leave the premises if they like or they can take such steps for the purpose of securing access as the law provides; but the corporation is only entitled under the Municipal Act to see that the privy is in a sanitary condition. I am clearly of opinion that the requisition made by the corporation in this case is not covered by S. 278 (1) (b). It appears that there was a partition decree between the joint owners of this house and the first floor was allotted to the petitioner and he was required under the decree to provide access to the privy. The corporation is trying to execute that decree.

It further appears that petitioner has provided a wooden ladder from the ground to the privy. The corporation objects to this mode of access on the ground that it will be too inconvenient for the occupants of the first floor to go down to the ground and from that mount up the privy. This is a question which is beyond the function of the corporation to raise. It is not the case for the corporation that the privy is in an insanitary condition. The only objection

is that it is inconvenient for the petitioner's tenants to use the privy. This is a matter which is between the petitioner and his tenants. In this connexion reference may be made to S. 271 which provides as follows :

" When any premises intended for human habitation are without privy or urinal accommodation or if the corporation are of opinion that the existing accommodation therefor available for the persons occupying the premises is insufficient, inefficient or for sanitary reasons objectionable, the corporation may, by written notice require the owner to provide such additional privy as they may prescribe or to make such structural or other alterations in the existing privy or urinal accommodation as they may prescribe."

The corporation if it thinks that the privy accommodation for the occupants of the first floor is not sufficient it may take such steps as it is authorised under the Act to do. But it cannot insist upon the owner to provide facilities for the tenants.

In my judgment the rule must be made absolute and the order of the Municipal Magistrate imposing fine upon the petitioner should be set aside. The fine, if paid, will be refunded.

R.M./R.K. *Rule made absolute.*

A. I. R. 1930 Calcutta 286

MUKERJI, J.

Pran Nath Kundu—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn: No. 182 of 1929, Decided on 8th May 1929, against order of Sub-Deputy Magistrate, Rajbari, D/- 15th October 1928.

(a) Easement — Right of way — Three kinds enumerated.

In India just as much as in England there are three distinct rights of way. First there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of the city, tenants of a manor or the inhabitants of a parish village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exists for the benefit of all the King's subjects and the sense of these is ordinarily dedication. 15 *Cal.* 460 (*F. B.*), *Foll.* [P 287 C 1]

(b) Easement—Public right of way can be acquired by user or dedication to public in general.

A public right of way in the full sense of the term and as to all King's subjects is unconnected with dominant tenements. Such right of way may be acquired by user of or dedication to the public in general. In this connection the fact that there were no thoroughfares at the termini is not of much importance on the point of dedication, but the question whether public in general use the way as pathway or only the inhabitants of the village or some other village do, are questions of considerable materiality. For where the privelege to use a road is enjoyed by a particular section of the public community or by inhabitants of two or three villages and not by others the road is not a public road. 25 *W. R.* 233 and 9 *All.* 434, *Ref.* [P 287 C 2, P 288 C 1]

(c) Easement—Public right of way which have their origin in custom –Evidence to support user sufficient to raise presumption of dedication must be cogent.

Ways permitted to be used by a section of of the public or ways used by all in particular cases are private ways which have their origin in custom and such customary ways can be converted into an ordinary highway after user by the general public sufficient to raise the presumption of dedication, but the evidence in support of the public claim must be cogent. *Brocklebank* v. *Thompson*, 2 *Ch.* 344 ; *Furquhar* v. *Newbury Rural District*, 1 *Ch.* 12; *Bermondsay* v. *Brown*, *L. R.* 1 *Eq.* 204, *Ref.* [P 288 C 1]

(d) Penal Code, Ss. 283 and 341—S. 283 does not contemplate pathway with regard to which there is no testimony of universel user sufficient to raise presumption of dedication to public.

A pathway, which lies over a private land and which is used by the villagers and perhaps by the inhabitants of some of the villages, but with regard to which there is no testimony of universal user sufficient of raise a presumption of dedication to the public, is not a public way within the meaning of S. 283. To establish a customary right of way to the same pathway the Court must be satisfied of the reasonableness and certainty of the user and that such user was not permissive nor exercised by stealth or force and that the right has been exercised for such length of time as to suggest that by agreement or otherwise the usage has become the customary law of the particular locality: 17 *All.* 87; 33 *All.* 257 ; 20 *Mad.* 389 and 23 *Bom.* 666, *Ref.* [P 288 C 2]

Surajit Ch. Lahiri for *Suresh Ch. Talukdar* – for Petitioner.

Order.—The proceedings in this case originated in an application addressed to the Circle Officer of Pangsa Circle by which a number of persons complained that the petitioner Prannath Kandu had placed some refuse etc., on a public road running through plots 511, 512 and 513, which was in use for a very long time, in order to convert it into land in his possession and had thus caused inconvenience to the applicants. It prayed that the public road ight be cleared up and opened to the public as before. It was forwarded by the Circle Officer to the

Sub-Divisional Magistrate who summoned the petitioner under Ss. 283 and 290, I. P. C. The case was tried by another Magistrate who eventually convicted the petitioner under Ss. 283 and 426, I. P. C. and sentenced him to pay a fine of Rs. 20, in default to undergo simple imprisonment for one month. On appeal the District Magistrate has altered the conviction to one under S. 341, I. P. C. keeping the sentence intact. The learned District Magistrate has found that the path lies on the land of the accused and to that extent it is not a public path, but that the public have been using it for over twenty years and that right of way has been established. The petitioner's contention is that these findings, and for the matter of that the evidence, is not sufficient for the conviction of the petitioners.

In the Full Bench decision of this Court in the case of *Chuni Lal* v. *Ram Kissen Sahu* (1) Wilson, J., in one of his classical judgments, agreed in by the other members of the Bench, explained that in India just as much as in England there are three distinct classes of right of way:

"First there are private rights in the strict sense of the term, vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of a city, the tenants of a manor or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exists for the benefit of all the Queen's subjects; and the sense of these is ordinarily dedication."

The first question that falls for determination is, to which class of rights does the right alleged to be infringed in the present case appertain? In the application to which I have referred the way is described as a public way. The evidence bearing on the matter stands thus :

P. W. 1 "The public of the village Magura-dangi and others walk by this path. . . . . The path is 4 or 5 cubits wide and 5 or 6 rasis long. It does not go beyond his (meaning witness's,) house. From witness's house it goes to accused's house and then by Sham Lal Kundu's house and thence to the Railway line."

P. W. 2—"The path is 6 cubits wide. The path from the accused's house up to the railway line to the north and then east is raised, but not so on the south up to the house of P. W. 1."

P. W. 3 "The path was used by public for a very long time for over 20 years."

P. W. 4 "The path does not meet the halot on the south. It passes along the south east of house of P.W. 6 and then along the south of his house. The path is not a raised one. The witness comes southward from his house and going along the south of the house of P. W. 1 and then east, he uses the path, P. W. 3's house is south of witness's, and he goes eastward by the south of the house of P. W. 1 and then east and then uses the path in question. Another halot to the south of the house of P. W. 1 is 200 cubits away from the path alluded to by the witness along the south of the house of P. W. 1"

P. W. 5 Witness, P. W.'s. and the public walk over it. There is no other path for going to that direction."

It has been found that the plots over which the path is alleged to pass belong to the petitioner. The evidence quoted above shows that the way begins at or near the house of P. W. 1 and ends at or near the railway line and does not join any highway or public thoroughfare at either end. It alsc shows taken at its highest that the inhabitants of this village and possibly of other villages, use the way, but such user must be for the purpose of going to or from one of the houses. abutting on the way, for the termini of the way are not on any highway or public thorough fare. A public right of way in the full sense of the term and as to all the King's subjects is unconnected with any dominant tenement. Such right of way may be acquired by user of or dedication to the public in general. But as the Judicial Committee has pointed out in the case of *Muhammad Rustam Ali Khan* v. *Municipal Committee, Karnal City* (2)

"in order to constitute a valid dedication to the public of a highway by the owner of the soil, there must be an intention to dedicate, there must be an animus de-dedicandi, of which the user by the public is evidence and no more"

It has also been pointed out in that case that while there may be dedication to the public for a limited purpose as for instance, an access to a particular building, or a footway, horseway or driftway, there can be no such thing in law as a public right of way constituted by dedication to only a section of the public. The fact that there are no throughfares at the termini is consequently of not much importance on the point of dedication, but the question

(1) [1888] 15 Cal. 46 (F. B.).

(2) A. I. R. 1920 P. C. 43=1 Lah. 117=47 A. 25 (P. C.).

whether the public in general use the way as a pathway or only the inhabitants of this village and also of some other villages do so is a question of considerable materiality. Where the privilage to use a road is enjoyed only by one particular section of the community or by inhabitants of two or three villages and not by others, the road is not a public road *Sham* v. *Nonee* (3), *Fattehyab* v. *Mohammad* (4), where there is the intention to allow not the public generally but merely visitors to or traders with the people of the village, or ways allowed to be used by villagers to go to a church or a market or the common fields of a village such ways are not regarded as public ways but private ways, and they generally have their origin in custom. *Brocklebank* v. *Thompson* (5). Such a customary way can be converted into an ordinary highway after user by the general public sufficient to raise the presumption of dedication *Farquhar* v. *Newbary Rural District* (6), but the evidence in support of the public claim must be cogent "*vestry or Bermondsey* v. *Brown* (7). See Peacock's Law of Easements 3rd Edn. p. 237 footnote. The evidence of user such as there is in this case does not support an inference of dedication for the use of the public in general and the pathway alleged is not one which S. 283, I. P. C. contemplates.

Section 283, I. P. C. being out of the way, it will have to be considered whether one of the other two kinds of rights has been established so that the case may come under S. 341, I. P. C. In the present case there is no question of the complainant, whose case is that the obstruction put upon the way has prevented him from going in a particular direction has acquired a right of way by either grant or prescription. The question really is whether the prosecution has established a customary right of way on the part of the villagers, amongst whom the complainant is one, to use this land as a pathway. The English common law rule of the immemorial user is not required to establish a custom in India, and it has been held that it is sufficient if the Court is satisfied of its reasonableness and certainty and that the user on which it is founded was not permissive nor exercised by stealth or force and that the right had been injoyed for such a length of time as to suggest that by agreement or otherwise the usage has become the customary law of the particular locality. *Kuar Sen* v. *Mamman* (8); *Shadi Lal* v. *Mohammad Ishaq Khan* (9). *Palaniandi Tevan* v. *Puthirangonda Nandan* (10), *Mohidin* v. *Shirlingappa* (11). For the conviction of the petitioner under S. 341, I. P. C. this customary right of way has necessarily to be proved by the prosecution in order to make out that the complainant had the right to proceed on the pathway in some particular direction. The difficulty of proving a customary right of way, with all its requisite elements, upon the oral testimony of two or three witnesses, who are only able to say that for over 20 years the way has been used by the villagers, is considerably enhanced by the exception to the definition contained in S. 339, I. P. C. It is extremely difficult in a case of this nature to say that the accused who has caused the obstruction did not in good faith believe that he had a right to obstruct the further user of his land as a pathway.

For this reason I am of opinion that this conviction cannot be supported. The rule is made absolute. The petitioner's conviction and sentence are set aside. The fine, if paid, will be refunded.

Before parting with the case I may point out that in cases of this nature the law has provided for a remedy in the shape of proceedings under S. 133, Cr. P. C. which speaks of "obstruction" on "any way" and not merely "public way." The original application of the complainant and his co-applicants clearly suggested that course, but unfortunately it was not adopted, for reasons which are not apparent. Those proceedings were clearly more appropriate than a prosecution for a criminal offence.

V.B./R.K. *Conviction set aside.*

(3) 25 W. R. 233.
(4) [1887] 9 All. 434=(1887) A. W. N. 82.
(5) [1903] 2 Ch. 344=72 L. J. Ch. 626=19 T. L. R. 285=89 L. T. 209.
(6) [1909] 1 Ch. 12=78 L. J. Ch. 170=25 T. L. R. 39=7 L. G. R. 364=73 J. P. 1=100 L. T. 17.
(7) [1865] 1 Eq. 204.
(8) [1895] 17 All. 87=(1895) A. W. N. 10.
(9) [1911] 33 All. 257=9 I.C. 198=8 A.L.J.10.
(10) [1897] 20 Mad. 389.
(11) [1899] 23 Bom. 660=1 Bom. L. R. 170.

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RANKIN, C. J.

Ismail Biswas and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1189 of 1929, Decided on 3rd December 1929.

(a) Penal Code, S. 430—Offence under S. 430 is grave form of mischief as defined in S. 425 and elements of S. 425 must be proved.

Offence under S. 430 is particularly a grave form of the offence of committing mischief as defined in S. 425. It is necessary to prove in such cases the elements that constitute mischief under S. 425. No doubt a person who takes water from a tank causes loss but it should be shown that whether he has caused a diminution of the supply of water for agricultural purposes. [P 289 C 2]

(b) Evidence—Sufficiency of — Evidence that person has occupation of lands and that he takes water from tank to irrigate it is good evidence of fact that he has right to do so—Easement.

The evidence that a person has the occupation of lands and that he has been taking water to irrigate his lands through a channel from a tank is good evidence that he has some right to do so. This is not one of those things that can be concealed. The fact of enjoyment of such a right is some evidence of the right itself. [P 289 C 2]

Bireswar Bagchi—for Petitioners.

Mrityunjoy Chatterjee and *Gopal Chunder Mookerjee*—for the Crown.

Judgment.—In this case the petitioners have been convicted of an offence under S. 430, I. P. C., that is, of committing mischief by doing an act which caused or which they knew to be likely to cause a diminution of the supply of water for agricultural purposes. This offence is perhaps a particularly grave form of the offence of committing mischief which is defined in S. 425:

"Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously."

Now it appears that the tank in question is in the middle of two others. It appears that the complainant has a channel from which he has been getting the water of the tank in question to irrigate his lands. The finding of the Courts below is that the petitioners have cut a new channel in another part of the tank and they have been taking water to their own lands across a certain road.

At the hearing of the case, it was necessary, first of all, to prove the elements that constituted "mischief" under S. 425, I. P. C. and that involved showing that the petitioners knew that they were likely to cause wrongful loss or damage to the public or to any person. The first question is whether this conviction should be set aside on the ground either that it is not shown that this question of wrongful loss or damage is made out or that it is shown that the question has been wrongfully dealt with by either of the Courts below. It appears to me that, if the evidence is that a person has the occupation of lands and has been taking water to irrigate his lands through a channel from this tank, that is pretty good evidence that he has some right so to do. This is not one of those things that can be concealed or that can be done behind the back of people so that no body in the neighbourhood can possibly get to know of it. It is done openly and on the face of it, it appears to me that the fact of enjoyment of such a right as that is some evidence of the right itself. Now, when the case came before the District Magistrate it is complained that he did not deal sufficiently with this matter. I am bound to say, as I read the grounds of appeal before him, that I see no indication that the accused persons on that appeal were suggesting to him that the complainant did not have the right to take water from the tank to irrigate the lands. It appears to me that what was then complained of was the finding of the Magistrate to the effect that the complainant was in possession of it. The Magistrate says that that is so. In the notice of appeal to the District Magistrate it is said that it was never admitted that the three tanks were in the possession of the complainant; but the question which was before the Court and about which the witnesses spoke was about the right to take water. That suggests that the mistake of the Magistrate was that he thought that the accused admitted the right to possession of the tank whereas he only admitted the right to take water. In my judgment there was no occasion at all on the part of the District Magistrate, on the case

coming before him, to deal expressly or fully with this question whether or not the complainant was a person who had a right to take water, so that even assuming that the accused had no right it was shown sufficiently that the complainant was a proper person to be heard to complain. In the same way, it seems to me that it was entirely nugatory and idle to ask, in the circumstances of this case, for a finding from the District Magistrate in terms following the language of S. 430, I. P. C. No doubt a person who takes water is causing loss and here one has to show whether he has caused a diminution of the supply of water for agricultural purposes. In my opinion, the facts in this case and the case which came before the District Magistrate render it entirely trivial to complain that it is not shown that the amount of water taken diminished the supply of the complainant's water. It has been pointed out to me that there is paragraph in the grounds of appeal which says that it is not shown how much water the accused people took. That is a paragraph which is criticizing the passage in the judgment of the trial Judge where he said that these accused had only got a little bit of land and that it was entirely unnecessary for them to get water from this tank. These two criticizms to my mind come to nothing.

It has been complained very much that the Magistrate took a wrong view in saying that the question before him was not a question of title and that the question of possession of the tank was not of primary importance. Of course, if a case was made to the effect that, though he had been out of possession one of the accused had his title to the tank, the Magistrate could not find wrongful loss until he dealt with that claim of title. The claim of title in the part of the accused in such a case has to be dealt with. In this case, what was said is that the tank belonged to another mouza altogether, it belonged to another landlord altogether and that these people who were tenants of that landlord had acquired a right of easement by continued user. In this particular case, it was not necessary to investigate questions of the documentary title very far because on the facts of the case the Courts were both satisfied that the accused people had cut a new channel and the accused themselves, among other things, made a case which rendered their position very difficult as regards this matter because as is pointed out they called witnesses to show that the second channel had existed for a number of years and that the accused had been in the habit of irrigating their lands by means of it.

One version was that the channel ran beside the bund of the tank but did not cross the road, another was that it crossed the road, and another was that there was no channel to cut across the road but that water overflowed. The Courts below have found that this story of there having been a channel there before is entirely untrue and that entirely negatives any question of easement right in the accused persons. A case was referred to in which it was pointed out that certain tenants were prosecuting their landlord for interfering with the tenant's right to water for agricultural purposes. In that case, if the facts are looked into, the tank in question was admitted to belong to the landlord, the water was admittedly the landlord's and the landlord had admittedly the right to settle the fishery right; and the tenants were prosecuting the landlord, therefore, for doing something with the landlord's own water; and, in order to show that there was any right in them to complain, they had to establish that they had right of easement in what was prima facie the landlord's. In that case it turned out that the claim of the tenants to make good their right to take water raised difficult questions and this Court pointed out the these questions were of a character difficult to determine in a mere police Court. That is not this case. That decision is not to be read as wiping S. 430 out of the Penal Code altogether. This is a case where somebody who made a claim to an easement which is found to be false was taking water from somebody else's tank. In my judgment, the complainant has shown to have a perfectly good right to complain if he has shown that he has been openly in enjoyment of the water of that tank. In my opinion, in this case there is no force in the submission of these accused before the District Magistrate that the complainant had no right to take water from the tank. In

these circumstances, I think that the Rule must be discharged.

R.M./R.K. *Rule discharged.*

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* A. I. R. 1930 Calcutta 291

GRAHAM AND LORT-WILLIAMS, JJ.

Supdt. and Remembrancer of Legal Affairs, Bengal—Appellant.

v.

Bhajoo Majhi—Accused—Respondent.

Criminal Govt. Appeal No. 1 of 1929, Decided on 2nd September 1929, against order of Sess. Judge, Maldah.

(a) Criminal P. C., S. 274 (2)—Objection as to jury raised for first time in appeal against acquittal cannot be entertained.

An objection as to the constitution of the jury raised for the first time at the hearing of an appeal against acquittal cannot be entertained. [P 291 C 2]

*** (b) Evidence Act, S. 27—Out of statement containing confession only such portion as leads to discovery is admissible.**

Per *Graham, J.*—S. 27 being a proviso to the preceding sections must be strictly construed and any relaxation must be sparingly allowed, care being exercised to see that the purpose and object of Ss. 25 and 26 are not rendered nugatory by any lax interpretation. [P 292 C 1]

A statement made by an accused while in police custody which contains a confession of guilt and also supplies information in consequence of which a discovery is made is not admissible in its entirety under S. 27, but only so much of it is admissible as relates distinctly or immediately to the discovery. [P 292 C 1]

Per *Lort-Williams, J.*—S. 27 is not a proviso to either S. 24 or S. 25. It follows that some restricted or limited meaning narrower than the natural meaning must be attached to the words in S. 27. [P 292 C 2]

The practice in England now is and doubtless was at the time when the Evidence Act was passed to allow to be stated in evidence that in consequence of information received from the prisoner certain facts had been discovered, thus to the extent of fixing the prisoner with knowledge. To this extent evidence under S. 27 may be given. [P 294 C 1]

D. N. Bhattacharyya—for Appellant.

A. K. Dhar—for Respondent.

Graham, J.—This is an appeal by the Superinteudent and Remembrancer of Legal Affairs, Bengal against the verdict of the jury and order of acquittal passed thereon by the Sessions Judge of Malda on a charge under S. 302, I. P. C.

The case for the prosecution was that the accused Bhajoo Majhi murdered one Baneswar on the night of 25th February 1928, the motive for the crime being alleged to be a love intrigue between the accused and the deceased's wife Munia.

The jury brought in a unanimous verdict of not guilty and the learned Judge accepting it acquitted the accused.

In support of the appeal against that order two main grounds have been urged, firstly, that the jury was not constituted according to law, as there were only seven jurors instead of nine as required by S. 326 (1) read with the proviso to S. 274 (2), Criminal P. C. This ground has not as a matter of fact been taken in the petition of appeal and was only put forward at the 11th hour. We do not think, therefore, that it ought at so late a stage so be entertained. It appears moreover that no objection of any kind was raised at the trial, nor has any allegation been made that the accused were prejudicad in any way.

This ground accordingly fails and must be disallowed. The second ground urged on behalf of the appellant is that the learned Sessions Judge erred in rejecting evidence as to certain statements and conduct of the accused in pointing out places at which discoveries of importance were made as a consequence of the information given by him. These statements are referred to in para. 8 of the petition of appeal, and the question which arises in connexion with them is, whether they should have been allowed to go in evidence in their entirety, that is to say, including the admissions said to have been made by the accused that he had killed the deceased and had thrown his body into the river, or whether only so much of the information given by the accused as related to the actual discovery of the blood stains near the tree and the articles of clothing in the river was admissible.

The answer depends upon the construction to be put on S. 27, Evidence Act. That section is in the nature of a proviso to the preceeding S. 26. S. 26 reads as follows :

"No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

Section 27 goes on to say :

"Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

The precise meaning to be attached to S. 27 is not altogether free from difficulty, and it is possible to interpret it as allowing even a confession of guilt to go in provided it has led to discovery. On the other hand it may be read as meaning no more than that the facts discovered may be proved excluding the actual confession So far as this Court is concerned the more restricted interpretation has been given to the section, and it appears to be well settled that only so much of the information can be allowed to go in as relates distinctly or immediately to discovery. That seems to be the correct view of the section. The language bears that interpretation, and I do not think it can ever have been the intention of the legislature to admit statements containing an actual confession of the crime. A distinction is apparently drawn between that part of the information which leads directly to discovery of material facts, and that part of it which cannot in itself be held to lead to any discovery, the principle underlying the distinction being that discovery affords some guarantee of the truth of a portion of the statement, but not necessarily of the whole. If that portion of the statement or information which contains a confession of the commission of the crime, were admitted there would be a great temptation for the police to drag in statements of this nature. It has been hold over and over again that the prohibition contained in Ss. 25 and 26 Evidence Act against false and fabricated confessions must be strictly applied. S. 27 being a proviso to the two preceding sections must be strictly construed and any relaxation must be sparingly allowed, care being exercised to see that the purpose and object of Ss. 25 and 26 and the safeguard provided in S. 27 are not rendered nugatory by any lax interpretation.

Section 27, it is true, says "whether it amounts to a confession or not" and it may be argued that these words favour the wider interpretation. But in using these words the legislature had, as I think, in mind the meaning of the word confession, viz. :

> "an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime,"

and it means, therefore, no more than this that so much of the information as leads to discovery may be proved, even if the facts discovered lead to an inference of guilt. For statements of this kind obviously do suggest a very strong inference of guilt although taken by themselves they would fall short of proof.

In my judgment the Sessions Judge was right in adopting the restricted view of S. 27. This ground, therefore, also fails. The appeal is dismissed and the accused if in custody will be released.

Lort-Williams, J.—There is a school of legal thought in India which holds that in construing Acts of the Indian legislature, the natural meaning of the sections should be given effect to regardless of previous decisions, and especially of decisions other than those of Indian Courts. The Evidence Act in general and S. 27 in particular are examples which in my opinion, indicate the falsity of this point of view.

If their natural meaning were given to the words of S. 27 regardless of of their parentage and history. I am satisfied that the result would be contrary to the intention of the legislature. It would be so wide as to render S. 26 practically useless. "Relates to" means ordinarily, "is connected with" or "has reference to" while "distinctly" means "clearly" or "definitely" or "positively" or "undeniably" or "undoubtedly" (see the Oxford Dictionary.) If, therefore, so much of the information as is clearly connected with, or has reference to, the fact thereby discovered, is admissible under S. 27, it is difficult to see where the line can be drawn. The presence of S. 26 to which S. 27 is only a proviso, shows that this conclusion cannot have been intended. I agree with Mahmood, J., in his most learned interesting judgment in *Queen Empress* v. *Babulal* (1), at p. 520 that S. 27 is not a proviso to either S. 24 or S 25. It follows that some restricted or limited meaning, narrower than the natural meaning must be attached to these words.

The Evidence Act, as stated by Sir James Fitzjames Stephen in his introduction, is little more than an attempt to reduce the English Law of Evidence to the form of express propositions ar-

(1) [1884] 6 All. 509=(1884) A. W. N. 229 (F.B.).

ranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India.

The English Law of Evidence consists mostly of negative rules declaring what is not evidence. It is almost wholly judge-made law, formed by degrees, to meet the exigencies of particular cases and comparatively of very modern date, to which have been added the glosses which successive textbook writers have put upon the decisions of the Judges. The Evidence Act, as stated by Woodroffe, was drawn up chiefly from Taylor on Evidence, and he based his treatise largely on the work of former authors. S. 27 was an attempt to apply the English Law of Evidence about information unduly obtained from a prisoner to information given by an accused while in the custody of a police officer and is merely a paraphrase of Taylor's, para. 902 (see the Edn. 11, p. 614). The words "relates distinctly', are taken directly from that source. And reference to the decision upon which his paragraph is based *R.* v. *Butcher-postea* (2) shows that the words were his own invention, or that of a previous author, and are not to be found in the decision itself.

It is necessary, therefore, to ascertain what meaning Taylor himself attached to these words. Para. 902 reads as follows:

"When, in consequence of information unduly obtained from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact, has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement as to his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found; but it would not, in such a case of a confession improperly obtained, be competent to inquire whether he confessed that he had concealed it there. So much of the confession as relates distinctly to the fact discovered by it may be given in evidence, as this part at least of the statement cannot have been false."

The crucial words are in the last line. Only that part of the statement which cannot have been false is admissible. For example that the prisoner stated that the thing would be found by searching in a particular place and that it was accordingly so found but not that he confessed that he concealed it there.

The difficulty of applying these English rules about information unduly obtained, and their unsuitability, to the Indian situation where information is given by an accused while in the custody of a police officer is manifest. Under the English rule it is assumed that the prisoner has confessed, but that his confession must be excluded because being obtained improperly, it may be false. His admission, however, of knowledge about the whereabouts of the thing cannot be false, because it is discovered subsequently in the place indicated by him. But the position in India is that confessions to or while in the custody of a police officer are excluded because if alleged to have been made to the police officer, they may have been invented by him and if made to others while in the custody of a police officer, they may have been induced by him and may be false. In neither case is the discovery of the thing any gurantee that the accused had knowledge of its whereabouts.

Phipson (Edn. 6, p. 270), states that facts disclosed in consequence of inadmissible confessions are receivable if relevant and where property has been discovered or delivered up in this way so much of the confession as "strictly relates" thereto will be admissible, for these portions at least cannot be untrue, but independent statements not qualifying or explaining the fact though made at the same time will be rejected. It will be observed that his statement of the rule is much narrower than that of Taylor, being restricted to property which has been discovered or delivered up, nor does he use Taylor's word "distinctly" but the word "strictly" which is the word used in the reporter's note of the case of *R.* v. *Butcher* (2) tried at Maidstone Summer Assizes in 1798, which is the main authority relied upon by both Taylor and Phipson.

Phipson moreover states that the earlier rule admitted the facts but excluded the accompanying statements *R.* v. *Warwickshall* (3), and the reporter in the note above referred to,

(2) [1798] 1 Leach. C. C. 265.

(3) [1783] 1 Leach. 263.

goes on to quote Mr. East 2, C. L. 658, as saying:

"But it seems that this opinion namely the opinion expressed in the note to *R.* v. *Butcher* (2) must be taken with some grains of allowance, for even in such case the most that is proper to be left with the jury is the fact of the witness having been directed by the prisoner where to find the goods and his having found them accordingly, but not the acknowledgment of the prisoner having stolen or put them there which is to be collected or not from all circumstances of the case and this is now the more common practice."

And Taylor in a note to para. 902 says that Ld. Eldon laid down the rule somewhat more strictly saying in *Harvey's* case (4), that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession from being given in evidence, he should direct an acquittal, unless the fact proved, would itself have been sufficient to warrant a conviction without any confession leading to it.

Whether or not the rule laid down by the Judges at one period was as wide as is suggested in Leach's note upon *R.* v. *Butcher* seems to me very doubtful and the evidence on this point is extremely, meager, see especially: *R.* v. *Griffen* (5), where the Judges were divided *R.*v.*Jones* (6), *R.* v. *Mosey* (7). I am satisfied from personal experience that it has not been the practice so to apply it in England during the last quarter of a century, and I do not believe it to be the law in England today. In my opinion Ld. Eldon's view is the correct one. However, I have no doubt that the practice in England now is, and doubtless was at the time when the Evidence Act, was passed, to allow to be stated in evidence that in consequence of information received from the prisoner, certain facts had been discovered, thus to that extent fixing the prisoner with knowledge.

And to this extent, I am satisfied that such evidence may be given under S. 27.

This was the view taken by the learned Sessions Judge, and I am of opinion that he was right in excluding the remaining part of the statement of the accused, which the Crown has urged should have been admitted, apart altogether from the wider question which I have been discussing, I do not consider that the facts discovered in this case were discovered in consequence of the prisoner's alleged statement that he felled the deceased, and threw his body into the river, but in consequence of the prisoner taking the witnesses to the spots referred to in the evidence and pointing out to them the marks in the grass and the clothing of the dead man. On the second point taken by the prosecution, I do not think that this Court ought to listen to any argument by the Crown against an acquittal, which is based on a technical objection about the constitution of the jury. Especially in view of the fact that no objection was raised at the trial, and that this point was not even included among the grounds of appeal but was raised for the first time at the hearing.

For these reasons, I am of opinion that this appeal should be dismissed.

R.M./R.K. *Appeal dismissed.*

(4) [1800] 2 East. 658.
(5) [1809] R. & R. 151.
(6) [1809] R. & R. 152.
(7) [1784] 1 Leach. 265.

A. I. R. 1930 Calcutta 294

MUKERJI, J.

Dhanoo and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 400 of 1929, Decided on 15th May 1929, against order of Sess. Judge, Tipperah, D/- 21st February 1929.

Criminal P. C., S. 107—Several persons bound over to keep peace—Individual finding showing reason for each person's liability is necessary.

Where in a case under S. 107 several persons are bound over to keep the peace there must be individual finding showing how each person against whom order is made deserves to be so treated. The mere fact that the persons were followers of one party or other will not justify making an order in lump against the whole body of men. [P 295 C 1]

Surajit Chandra Lahiri for *Nurul Huq*—for Petitioners.

Order.—The defect that is noticeable in the judgment of the learned Sessions Judge is that he has not dealt with the evidence which would justify the order as against each of the 14 accused persons who were the appellants before him, separately and individually. This defect would not have been of much materiality if the inquiring Magistrate

had done so in passing the order that he did. That officer, it appears, considered it sufficient to find that all the accused belong to a party known as "Rahimuddin's party" or "Abani Babu's party" Rahimuddin being the immediate leader, Abani Babu the guiding or controlling authority and the remaining accused persons being Abani Babu's tenants and adherents. Considerations such as these are not sufficient for making an order in a lump against a body of men. Facts and figures have to be given showing how each person, against whom the order is to be made, deserves to be so treated.

The Rule is made absolute, and the judgment of the learned Sessions Judge being set aside it is ordered that the petitioner's appeal be reheard by the Additional Sessions Judge.

V.B./R.K. *Rule made absolute.*

A. I. R. 1930 Calcutta 295

RANKIN, C. J. AND PATTERSON, J.

Peary Mohan Saha—Accused—Petitioner.

v.

Harendra Nath Roy—Complainant—Opposite Party.

Criminal Revn. No. 832 of 1929, Decided on 5th September 1929, from an order of Dy. Magistrate Naraingung, D/- 30th April 1929.

Bengal Food Adulteration Act (1919) S. 6 (1)—Both owner and servant selling come under S. 6 (1).

Section 6 (1) applies, not only to master or owner of the adulterated article sold, but also the servant or agent who sells such article : *Brown* v. *Foot*, (1892) 66 *L. J.* 649 and *Hotchin* v. *Hindmarsh*, (1899) 2 Q. *B.* 181, *Ref.*

[P 296 C 2]

Suresh Chandra Taluqdar and *Syama Prosanna Deb*—for Petitioner.

Birbhusan Dutta—for Opposite Party.

Rankin, C. J.—The accused in this case has been convicted of an offence under Cl. (1), S. 6, Bengal Food Adulteration Act 1919. The offence charged was committed on 25th January 1929 and consisted in the accused having sold to a Health Officer a quantity of mustard oil which was not derived exclusively from mustard seed. The accused has been fined Rs. 150 and ordered to undergo two months' simple imprisonment in default of payment.

This rule was issued on the grounds that Cl. 1, S. 6, Bengal Food Adulteration Act does not apply to the facts of the case, and that S. 6, makes the master or owner of the article sold guilty of an offence but not the servant.

It is clear that the sale was made by the accused in his capacity of servant of a certain firm which used the name of one Josada Lal Roy Chowdhury. Josada Lal is dead, but there is no question that the accused sold the mustard oil as a servant of the proprietors of the said firm and that he is a servant and not a partner therein.

The Act in question applies to the province of Bengal outside Calcutta and it is in the power of the local Government to extend any of the sections of the Act to any local area outside Calcutta. The prosecution in this case was sanctioned by the Chairman of the Municipality of Naraingunge. So far as Calcutta itself is concerned, the provisions against the adulteration of food were contained in S. 495, Municipal Act of 1899, and in the Calcutta Municipal Act of 1923, S. 407 contains similar provisions to those which we are now concerned with in the Act of 1919.

The contention of the accused is that the opening words of the first clause of S. 6 of the Act of 1919 are designed to constitute the sale of mustard oil in contravention of the provisions of the section, an offence on the part of the master or principal on whose behalf the sale is made, but that the servant or other person selling on behalf of the principal is not guilty of an offence by reason of his act. He contends that this section is not to be construed in the light of the interpretation put by English decisions upon similar, but somewhat different, words in S. 6 of the sale of Food and Drugs Act 1875 (38 and 39 Vic. Cap. 63), but is to be arrived at by the Court upon a consideration of the terms of the Bengal Act by themselves. The material words are as follows :

"No person shall directly or indirectly himself or by any other person on his behalf sell, expose for sale or manufacture or store for sale any of the following articles etc."

The accused's contention is that the phrase "himself or by any other person on his behalf" points to a principal who may either sell at his own hand and on his own acoount or by some other person on his behalf. This, it is said is en-

forced by the use of the word "vendor" in Cl. (3) of the section.

On the other hand, it is contended for the prosecution that the words "directly or indirectly, himself or by any other person on his behalf" cannot and are not intended to cut down the effect of the words "no person shall sell;" that the acts which are made offences by the section are physical acts ; that the question of the party who is responsible as a matter of contract to the purchaser is irrelevant ; that the servant in such a case as the present is a person who does the prohibited act himself, and that the effect of the words in a case like the present is to make both the servant and the master liable as offenders against the section. In other words the contention of the prosecution is that the words to which I have referred elaborate and emphasize the prohibition against certain classes of acts being done at all, and declare explicitly the meaning which in *Brown* v. *Foot* (1892) 66 *L. T.* 649 ; 17 *Cox. C. C.* and *Hotchin* v. *Hindmarsh* (1899) 2 *Q. B.* 181 was put upon the words "no person shall sell" in S. 6 of the sale of Food and Drugs Act of 1875.

No doubt only a master or principal is a person who has a choice of selling himself or by any other person on his behalf, and the contention of the defence, as the Magistrate has in this case observed, at first sight looks like a sound view. It is also true that in Hotchin's case T. W. Chitty arguing for the prosecution said :

" possibly if the Statute had used the term "vendor" that might have been construed strictly as meaning the person who has the property in the article."

Ordinarily one would not refer to a person as "himself selling" except in a case in which selling by a servant or agent was contemplated as a thing to be negatived.

The Magistrate has argued, on general principles, that the legislature to effect its purpose must have intended by the words now under consideration to make the act of the servant as offence, because the provisions of the law as to abetment would be insufficient to enable the purpose of the prevention of adulteration to be effectively attained. This line of reasoning is certainly precarious. No doubt a desire to prevent the sale of adulterated articles may be attributed to the legislature, but it is a question of the correct meaning of the words used by the legislature, whether it has thought fit to bring a servant within their scope. It is by no means inconceivable that an Indian legislature might consider it unfair or inadvisable to penalize the servant, and it is no part of the duty of the Court to go beyond the immediate meaning of the words in question.

In my opinion the real question for determination is whether or not there is sufficient in the words of the section to show that it is directed against the physical acts of selling, exposing for sale etc. If so, then, as Coleridge, C. J. said in *Hotchin's* case :

" A person who takes the article in his hand and performs the physical act of transfering the adulterated thing to the purchaser is a person who sells within this section."

As used in an Indian statute, I do not think that the word "vendor" throws any light upon this question, as it is common to speak of petty traders or hawkers as vendors.

The present case is one in which the Health Officer exercised his powers under the Cl. 3, S. 10, which says that

" any person in possession or exposing the same for sale shall be bound to sell such quantity."

Clause. 1, S. 11 speaks of "the seller or agent selling the article." It appears to me, therefore, that the agent or servant is within the prohibition of the words "no person shall sell." The legislature is not necessarily contemplating a person who has a choice to sell at his own hand or by any other person on his behalf. It is concerned to make the act of selling an act which is imputable both to the person with whose hand it is committed and to any other person, if such there be, on whose behalf it is committed. Precisely similar language will be found in the Sale of Tea Act 1922 (12-13 Geo. V. C. 29) and that it is intended to hit the servant is shown clearly by Cl. 6 of the schedule thereto. The accused in this case is a person who himself sold and as such was, in my opinion, rightly convicted.

The rule must, therefore, be discharged.

Patterson, J.—I agree.

V.S./R.K. *Rule discharged.*

*A. I. R. 1930 Calcutta 297
Special Bench

RANKIN, C. J., C. C. GHOSE AND BUCKLAND, JJ.

In the matter of Lachiram Basantalal Nathani.

Civil Revn. No. 7 of 1929, Decided on 2nd August 1929.

*** Income-tax Act (11 of 1922), S. 5 (4)—Income-tax officer appointed "to deal with those persons whose cases may be handed over" from time to time is not officer contemplated by S. 5 (4).**

The Income-tax Officer appointed by the Commissioner of Income-tax "to deal with these persons whose cases may be handed over to him by the said Commissioner of Income-tax from time to time" is not an Income-tax Officer directed to function as such in respect of any class of persons, as contemplated by S. 5(4) and assessments made by such an officer cannot be supported in law. [P 297 C 2]

S. N. Banerjee, Profulla Chandra Chatraburty and *C. C. Bose*—for Assessee.

N. N. Sarkar and *Radhabinode Pal*—for Commissioner of Income-tax.

Rankin, C. J.—In this case the Commissioner of Income tax, Calcutta, has referred to the Court under Cl. (1), S. 66, Income-tax Act the question whether 'the Special Income-tax Officer' had any jurisdiction over the petitioner's case within the meaning of sub-Ss. (4) or (5), S. 5, Income-tax Act.

The petitioners have been assessed to Income-tax in default of compliance with the requirements of notices directed to them under Cl. (2), S. 23 and Cl. (4), S. 22 by a gentleman to whom the name of "Special Income-tax Officer" has been given in view of the provisions of Cl. (4) S. 23 of the Act. Divers objections were taken to the assessment and an appeal was taken to the Assistant Commissioner which was rejected. An application was then made under S. 33 to the Commissioner himself to revise the order of the Assistant Commissioner. In connexion with that proceeding, the Commissioner has used his discretion and referred the question to us which I have set out.

Under the provisions of S. 23 of the Act and the cognate sections, the person who, in the ordinary course, has to make assessment is an officer called "the Income-tax Officer," and by S. 64 of the Act the place of assessment is defined as the place of the residence of the assessee or where he carries on business or, if more places than one, the principal place of business. The question before us turns upon Cl. (4), S. 5 of the Act. The officer who, in this case made the assessment, was Babu P. L. Bhattacharya and the complaint of the assessees is that he was not the Income-tax Officer of the District in which the petitioners resided or had their principal place of business, though he is a person who has been appointed by the Commissioner of Income-tax under Cl. (4), S. 5. Now, the Commissioner under that section has power given to him by the following words of the clause :

"They shall perform their functions in respect of such classes of persons and such classes of income and in respect of such areas as the Commissioner of Income-tax may direct."

For the present purpose we may leave out of account the reference to "classes of income" and the reference to "areas." So, the power given to the Commissioner is that the Income-tax Officers shall perform their functions in respect of such "classes of persons" as the Commissioner may direct. We have been provided with a copy of the order D/- 13th December 1927 under which a direction is given by the Commissioner with respect to the officer in question. It is as follows :

"In exercise of the powers conferred on me by S. 5 (4), Income-tax Act (11 of 1922), I hereby appoint Babu Phanindra Lal Bhattacharya, Income-tax Officer, to perform all the functions of an Income-tax Officer in respect of those persons in Calcutta whose cases may be made over to him by me from time to time."

The question is whether :

"those persons in Calcutta whose cases may be made over to him by me from time to time."

is a class of persons within the meaning of Cl. (4), S. 5. I am clearly of opinion that it is not. It is not possible for any assessee or other person by looking to the definition given in this order to ascertain whether or not his case is one which is affected by it. This order requires a special direction to be given under it from time to time assigning not classes but individual cases to the officer in question. There may or may not be objections, serious or otherwise to such a course but I am clear that it is not a course warranted by sub-S. (4), S. 5 of the Act.

In these circumstances, it appears to me that we ought to answer the question put to us in the negative.

The result is that the assessment order made upon the petitioners cannot be supported.

The petitioner must have their costs of the reference.

C. C. Ghose, J.—I agree.

Buckland, J.—I agree.

V.B./R.K. *Answer in negative.*

A. I. R. 1930 Calcutta 298

MUKERJI, J

B. N. Ry. Co. Ltd.—Defendant 2—Petitioner.

v.

Dhanjishah Pestonji and *another*—Plaintiff and Defendant 2 — Opposite Party.

Civil Revn. No. 562 of 1929, Decided on 7th June 1929, from decree of Small Cause Court Judge, Sealdah, D/- 19th February 1929.

(a) Railways Act, S. 72—Risk-note H—Wilful misconduct — Wilful misconduct means misconduct to which will is party—Something opposed to accident.

The word "misconduct" means the doing of a wrong thing. Wilful misconduct means misconduct to which the will is a party, something opposed to accident or negligence: the misconduct, not the conduct, must be wilful. Wilful misconduct is very different from negligence and is not necessarily established by proving culpable negligence. Wilful misconduct is included in misconduct: *Graham* v. *Belfast & Northern Counties Ry.* (1901) 2 *Ir. R.* 13; *Lewis* v. *G. W. Ry. Co.* (1877) 3 *Q. B. D.* 195; *Joshua Buckton & Co.* v. *L. & N. W. Ry.* (1918) 87 *L. J. K. B.* 234; *Glenister* v. *G. W. Ry. Co.* (1873) 29 *L. J.* 423 and *other English Cases Referred.* [P 299 C 1, 2]

(b) Railways Act, S. 72 — Risk-note H—Negligence—By negligence is meant the doing of act which reasonable man would not do or omission of act which is expected of reasonable man.

By negligence is meant substantially the doing by a person of some act which a reasonable and prudent man would not have done under the circumstances of the case in question or the omission to do everything that could fairly and reasonably be expected of such a man under such circumstances. The words "gross" and "culpable" do not alter the character of the thing omitted. The word "gross" does not define the negligence but expresses a practical difference between the degrees of negligence, and when the degree is such that in view of all the circumstances it amounts to a breach of duty, it is culpable: *Wilson* v. *Brett*, (1843) 11 *M. & W.* 113; *Blyth* v. *Birmingham Water Works Co.* (1856) 11 *Ex.* 781, and *other English Cases Referred.* [P 300 C 1]

Ramesh Chandra Sen and *Jitendra Kumar Sen Gupta*—for Petitioner.

R. C. Bonnerjee and *Harendra Nath Bhattacharji*—for Opposite Party.

Order.—This rule is directed against a decree made by the Small Cause Courts Judge of Sealdah for Rs. 671 as compensation and Rs. 123 as proportionate costs in favour of the plaintiff and as against the petitioners, the B. N. Ry. Co. Ltd., who were defendant 2 in the suit.

The plaintiff's claim related to a consignment of 65 bales of cotton piece goods despatched from Nagpur to Sealdah, 15 of which were damaged by wet in transit.

There were two rival theories before the Court. The plaintiff's case was that the roof of the wagon in which the consignment was carried was leaky and the damage was caused by rain water entering through the leaks. The defence was that the damage was due to rain water entering through the crevices of the flap door. The Judge has accepted the plaintiff's version and the reasons given therefor are quite sound.

Having done so the Judge proceeded to resort to the following process of reasoning:

"A considerable amount of rain water found its way into the wagon . . . . In all probability there were holes big enough to be easily detected, on inspection in the roof of the wagon, and through these holes the rain water entered into the wagon. I, therefore, find that there were holes in the roof easily detectible . . . . Their (i. e., of the Railway Company) servants stored the consignment of cotton piece goods in the wagon in the roof of which were holes easily detectible. This was certainly very careless and unbusinesslike conduct on the part of the servants and in my opinion amounted to misconduct."

Having thus found misconduct on the part of the company's servants the Judge held that the risk-note H which says:

"Except upon proof that such loss, destruction, deterioration or damage arose from the misconduct of the railway administration's servants,"

did not absolve defendant 2 from liability.

Before dealing with this finding, which is a finding of fact, it would be convenient to have a clear appreciation of the exact import of the word "misconduct." The expression "wilful misconduct" is a well-known expression in connexion with risk-notes. As Avory, J., observed in the case *Sheppard & Son* v. *Midland Railway* (1):

"If the principle upon which wilful misconduct is to be inferred from one case, the fewer cases beyond that which are referred to the less likely is confusion to result".

(1) [1916] 85 L.J.K.B. 283=114 L.T. 515.

Johnson, J., in the case of *Graham* v. *Belfast & Nothern Counties Ry.* (2) said:

"Wilful misconduct" in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail, or to omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure or omission, regardless of consequences."

In the case of *Forder* v. *G. W. Ry.* (3), Lord Alverstone, C. J., accepted this definition with the addition of the words:

"or acts with reckless carelessness, not caring what the result of his carelessness may be."

Some confusion is likely to arise from the addition of these words, but there can be no objection to them so long as they are meant to include only "reckless indifference:" see *Sheppard & Son* v. *Midland Ry.* (1), and *Norris* v. *Great Central Ry.. Ibid* p. 285 Foot note.

An oftener quoted definition of "wilful misconduct" is that given by Bramwell, L. J,, in *Lewis* v. *G. W. Ry. Co.* (4). "Wilful misconduct," said he:

"means misconduct to which the will is a party, something opposed to accident or negligence : the misconduct not the conduct must be wilful."

Brett, L. J., in the same case said:

"In a contract where the term wilful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something or the omitting to do something which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the act which he is doing or that which he is omitting to do is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong; I think that if he knows that what he is doing will seriously damage the goods of a consignor, then he knows that what he is doing is a wrong thing to do, and also as my Lord has put it, if it is brought to his notice that what he is doing or omitting to do, may seriously endanger the things which are to be sent, and wilfully persists in doing that against which he is warned, careless, whether he may be doing damage or not then I think he is doing a wrong thing, and that that is misconduct, and that as he does it intentionally he is guilty of wilful misconduct, or if he does or omits to do something which everybody must know is likely likely to endanger or damage the goods, then it follows that he is doing that which he knows to be a wrong thing to do. Care must be taken to ascertain that it is not only misconduct but wilful misconduct and I think, these two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission."

Cotton, L. J., also observed to the same effect. *In re, Lord Mayor of London and Tubb's Contract* (5), Londley, L. J. observed that he was disposed to concur with Lord Bramwell's observations on the term 'wilful misconduct' and that they were quite consistent with Lord Bowen's observations in *In re, Young and Harston's Contract* (6), if it be remembered that Lord Bowen presupposed knowldge of what was done and intention to do it, and was not addressing himself to a case of an honest mistake or oversight.

The above as well as various other authorities on the meaning of the term 'wilful' have been discussed in *In re, City Equitable Fire Insurance Co. Ltd.* (7), and there is hardly any doubt today as to what it means. Wilful misconduct is very different from negligence (Astbury, J., in *Joshua Buckton &Co.* v. *L. and N. W. Ry.* (8) and is not necessarily established by proving culpable neglience (*Glenister* v. *G. W. Ry. Co.* (9) and *Forder* v. *G. W. Ry. Co.* (3). It has also been held that though gross negligence and wilful misconduct are not controvertible terms, the latter may include the former and that there are many cases in which wilful misconduct and gross negligence correspond.

Risk-note H with which we are concerned speaks of 'misconduct and not 'wilful misconduct.' The word misconduct means the doing of a wrong thing (Per Brett, L. J., in *Lewis* v. *G. W. Ry Co* (4). That wilful misconduct i included in misconduct goes withou saying. But as Tindal, C. J., observed in *In re, Hall and Hinds* (10).

"Lata culpa or crassa negligentia both by the civil law and our own, approximated and in many instances cannot be distinguished from dolus malus or misconduct,"

quoting Vinn. Instit. Imper. Comment lib. 3 tit. 15 b. 605). Culpable negligence or gross negligence as distinguish-

(2) [1901] 2 I. R. 13.
(3) [1905] 2 K. B. 582=74 L.J.K.B. 871=21 T. L. R. 625=53 W.R. 574=93 L.T. 344:
(4) [1877] 3 Q.B.D. 195=47 L.J.Q.B. 131=26 W. R. 255=37 L. T. 774.
(5) [1894] 2 Ch. 524=63 L. J. Ch. 580=70 L. T. 719.
(6) [1885] 31 Ch. D. 168=50 J. P. 345=34 W. R. 84=53 L. T. 837.
(7) [1925] 1 Ch. 407.
(8) [1918] 87 L. J. K. B. 234.
(9) [1873] 29 L. J. 423.
(10) [1840-41] 2 Man & Grang 847.

ed from ordinary negligence may thus amount to 'misconduct.. What this distinction is it is not easy to define. Rolfe, B., in the case of *Wilson* v. *Brett* (11) said:

"I said I could see no difference between negligence and gross negligence that it was the same thing with the addition of a vituperative epithet; and I intended to leave it to the jury to say whether the defendant, being as appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence."

Negligence has been variously defined. Alderson, B. in the case of *Blythe* v. *Birmingham Water Works Co.* (12) said:

"Negligence is the omission to do something which a reasonable man guided upon these considerations which ordinarily regulate the conduct of human affairs. would do or doing something which a prudent and reasonable man would not do. The defendants would have been liable for negligence if unintentionally they omitted to do what a reasonable person would have done, or did what a reasonable person could have done."

A somewhat similar definition has been given by *Snook* v. *Granp Junction Water Work Co Ltd.* (13)

"By negligence was meant substantially the doing by a person of some act which a reasonable and prudent man would not have done un- the circumstances of the case in question, or the omission to do everything that could be fairly and reasonably expected of such a man under such circumstances."

Or as Bramwell, B. put it in the case of Caroline *Degg* v. *Midiand Ry. Co* (14)

"Their is no absolute or intrinsic negligence: It is always relative to some circumstances of time, place or person."

The words 'gross' and 'culpable' do not alter the character of the thing omitted. The word 'gross' does not define the negligence, but expresses a practical difference between the degrees of negligence and when the degree is such that in view of all the circumstances it amounts to a breach of duty it is culpable.

To turn once more to the facts. The learned Judge has, as already mentioned found that there were easily detectable holes in the roof of the van. If this finding is capable of being maintained, the case would clearly be one of wilful misconduct if the Company's servants seeing the holes recklessly put the goods in it, or a case of culpable negligence if they omitted to see the holes that were easily detectable. The difficulty of upholding this finding, however is very great. The evidence stands thus; P. W. 2 says:

"The roof of the wagon was rusty in the centre and showed traces of leakage. There was no water on the roof of the wagon. There was red rust on the roof."

P. W. 3 says:

"When the goods were taken out I went inside it and found one or two holes in the roof. Kesho Babu and I entered into the wagon and I showed him the bales."

But Kesho Babu P. W. 2 says nothing about the holes. Then D. W. 2, the consignor's man says definitely that he inspected the wagon before it was loaded and did not notice any hole in the roof; and further says:

"I inspect every wagon I load. I inspect the roof. I reject wagon if I find it faulty."

Over and above, there is the evidence of the defendants' servants at Nagpur who found nothing wrong with the wagon when the consignment was loaded, On this evidence it is impossible to uphold the Judge's finding, and the case does not seem to be anything more than that of leaks not discernible on inspection giving way in the course of the journey.

The result is that, in my opinion, negligence has not been estabished, far less any negligence that is gross or culpable. The plaintiff having failed to prove misconduct his claim must fail.

The rule is made absolute, the decree passed by the Court below is set aside and the suit dismissed, but there will be no order for costs.

R.M./R.K. *Rule made absolute.*

(11) [1843] 11 M. & W. 113=12 L. J. Ex. 264.
(12) [1856] 11 Ex. 781=4 W. R. 234=2 Jur. (n.s.) 333=25 L. J. Ex. 212.
(13) [1886] 2 T. L. R. 303.
(14) [1856-57] 1 H. & N. 773=5 W. R. 364=3 Jur. (n.s.) 395=26 L. J. Ex. 171.

A. I. R. 1930 Calcutta 300

B. B. GHOSE AND BOSE, JJ.

Kiron Chandra Ghose and *others*—Decree-holders—Appellants.

v.

Hamid Khan and *others*—Judgment-debtors—Respondents.

Appeal No. 483 of 1928, Decided on 21st May 1929, from order of Sub-Judge, Jessore, D/- 27th August 1928.

(a) Bengal Tenancy Act (8 of 1885), S. 155—Decree under S. 155 is alternative.

The decree as contemplated by S. 155, is a decree in the alternative If the part directing removal of mischief and the compensation is satisfied the part directing ejectment cannot be enforced. But in case the part directing removal of mischief and compensation is not satisfied, part directing ejectment can be enforced without obtaining a further decree.

[P 301 C 2]

(b) Bengal Tenancy Act (5 of 1885), S. 155—Failure to pay compensation and remedy misuse does not entitle plaintiff to ejectment and compensation but only to ejectment.

If the defendant does neither pay the compensation within the fixed period nor remedy the misuse, the proper course for the plaintiff is to ask for ejectment and not ejectment and compensation both. [P 301 C 2]

Brojolal Chakravarty and *Bhuddar Halder*—for Appellants.

Brojendra Nath Chatterjee and *Satindra Nath Rai Choudhury*—for Respondents.

B. B. Ghose, J.—This is an appeal by the decree-holders who obtained a decree purported to have been made under S. 155, Ben. Ten. Act against defendants 1 and 2. The decree was to the effect that the defendants should pay to the decree-holder plaintiff Rs. 60 within a certain period and remove the structures on schedule 'kha' of the plaint within that period. On their failure to do so, they would be liable to ejectment under the provisions of S. 155, Ben. Ten. Act. The decree-holders thereupon applied for execution of the decree in these terms that they asked for compensation awarded by the Court as well as for ejectment. One of the judgment-debtors deposited the amount of compensation into Court. The structures on the land of schedule kha 'had' not been removed. The trial Court held that the decree-holder was entitled to execute the decree after rejecting the objections raised on behalf of one of the judgment-debtors. That judgment-debtor preferred an appeal against the order of the Subordinate Judge.

On appeal the Subordinate Judge held that when the decree-holder asks for realization of the compensation, he cannot at the same time ask for ejectment without allowing the judgment-debtor an opportunity to perform the other part of the decree. So far, his opinion has not been controverted by the appellants. But the learned Subordinate Judge has held later on that the decree for ejectment is incapable of execution as it stands. In his view the decree-holder was bound to obtain another decree in ejectment before he can ask for ejectment of the judgment-debtors. In my view that opinion cannot be supported. The decree as made by the Court is in accordance with the terms of S. 155, Ben. Ten. Act; and under sub-S. (4) of that section it has been provided that if the defendant within the period or the extended period fixed by the Court pays the compensation mentioned in the decree and remedies the misuse or the breach to the satisfaction of the Court, the decree shall not be executed. The decree as contemplated under S. 155, Ben. Ten. Act is a decree in the alternative. If one part of the decree is satisfied, the other part, that is to say, the part directing ejectment cannot be enforced. But if the part of the decree which awards compensation to the plaintiff and directs the defendant to remove the mischief is not complied with, then without obtaining a further decree the plaintiff is entitled to execute that part of the decree which directs ejectment. In this case, however, the plaintiff's petition was wrong in form because he asks for realization of the compensation as well as for ejectment.

The proper course for him to take was to ask for ejectment on the allegation that the defendant had not paid compensation within the time limit nor had he remedied the misuse. But that does not affect the question in the present case as regards the rights of the decree-holders. The judgment of the Subordinate Judge and the order holding that the decree as regards ejectment is incapable of execution, must, therefore, be set aside and it should be directed that the decree-holder would be entitled to execute his decree in ejectment, unless the defendant remedies the misuse within the period fixed by the Court. It is unnecessary to make any order as regards compensation, because it has been already deposited, although it seems beyond the period mentioned in the decree. We, therefore, make this order in lieu of the order of the Subordinate Judge that the decree-holder be allowed to execute his decree in ejectment but ejectment will not be directed if the judgment-debtor remedies the misuse within a period of three months from this date. As the original application was not in accordance with law, there will be no order as to costs in any of the Courts.

Bose, J.—I agree.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 302

B. B. GHOSE AND S. K. GHOSE, JJ.

Abdul Gafur Mulla and *another*—Applicants—Appellants.

v.

Kalidhan Mondal and *others*—Respondents.

Appeal No. 105 of 1929, Decided on 7th August 1929, against appellate order of Dist. Judge, 24-Parganas, D/- 20th December 1928.

(a) Bengal Tenancy Act (8 of 1885). S. 174—Short deposit made due to mistake of Court official—Deficiency paid on discovery of mistake—Judgment-debtor has complied with provision of S. 174.

When a judgment-debtor deposits money, if by some mistake a short deposit is made and that deposit is accepted by the Court official as the correct amount and when the mistake is discovered the judgment-debtor pays the full amount, the judgment-debtor has complied with the provisions of S. 174, provided the judgment-debtor establishes that he was prejudiced by the act of the Court and the mistake was attributable to that act. The only thing that can be done in such a case is that at most he should be made liable to pay interest for a a few days that the mistake was not discovered and the money was not paid. 26 *Cal.* 449 (*F.B.*), *Foll.* [P 304 C 1]

(b) Bengal Tenancy Act, S. 174—Order under—Civil P. C., S. 47.

An order under S. 174, Ben. Ten. Act does not fall within S. 47, Civil P. C. 3 *C. W. N.* 344, *Foll.* 11 *C. L. J.* 202, *Dist.* [P 303 C 2]

(c) Bengal Tenancy Act (8 of 1885), S. 174—"Appeal."

No appeal lies against an order setting aside a sale under S. 174. [P 303 C 2]

Jogesh Chunder Roy and *Jatindra Nath Sanyal*—for Appellants.

Amarendra Nath Bose, *Kanaidhone Dutt* and *Phanindra Nath De*—for Respondents.

B. B. Ghose, J.—This is an appeal by the judgment-debtor against an order of the District Judge reversing the order of the Subordinate Judge setting aside a sale in execution of a rent decree on the ground that the judgment-debtor had deposited the amounts necessary under S. 174, Ben. Ten. Act. The facts are these: A decree was obtained by the landlord for about Rs. 2,430, The sale was held on 11th August 1928 and a third party purchased the property in question for Rs. 5,400 and odd. On 22nd August the judgment-debtor deposited the sum mentioned in the sale proclamation together with 5 per cent of the purchase money and on 18th September the Court made an order setting aside the sale. It was found afterwards that the amount which was necessary to be deposited for having the sale set aside fell short by Rs. 60 or Rs. 80. The reason for the error apparently was that the judgment-debtor deposited the sum given in the sale proclamation which only was necessary to be deposited if the application fell within O. 21, R. 89. Civil P. C. Under S. 174, Ben. Ten. Act the judgment-debtor was bound to deposit the entire money which the decree-holder was entitled to recover. The amount which fell short was apparently on account of the interest that had to be calculated since the date of the sale proclamation and the date of deposit.

The decree-holder subsequently made an application for review of judgment before the Subordinate Judge and he also preferred an appeal against the order of the Subordinate Judge to the District Judge. The Subordinate Judge refused to reconsider the order setting aside the sale. The learned Judge, however, on appeal preferred by the decree-holder has directed the order for setting aside the sale to be vacated and for confirming the sale. The appeal is preferred against that order of the learned District Judge. It is necessary to state that the auction-purchaser did not appeal against the order of the Subordinate Judge setting aside the sale. In this Court the decree-holder does not appear: the auction-purchaser appears and he takes a preliminary objection to the maintainability of the appeal here. The learned advocate for the appellant answers by saying that there was no appeal before the District Judge against the order of the Subordinate Judge and he has made an application in the alternative for setting aside the order of the District Judge on appeal on the ground that he had no jurisdiction to entertain the appeal. The same objection was raised by the judgment-debtor before the learned Judge but he overruled the objection on the authority of the case of *Sital Rai* v. *Nanda Lal* (1) and he held that the appeal to him was competent under S. 47 of the Code. If the learned Judge was right in his view that S. 47 governed the proceedings, then there can be no question that there would be a second appeal. But

(1) [1909] 11 C. L. J. 202 = 1 I C. 304=13 C. W. N. 591.

the learned advocate for the respondent auction-purchaser contends that this is not a matter falling under S. 47 of the Code but there was an appeal before the learned Judge under O. 43, R. 1 (j), Civil P. C,, and he relies in support of his contention on the case of *Banshibadan* v. *Chhaunat Bibi* (2). In my opinion, this contention is untenable because the provision of O. 21, R. 89 has no application to sale under the Bengal Tenancy Act (see S. 170 of the Act). The order of the trial Court was not made under O. 21, R. 92 of the Code on which the case cited was decided. It was made under S. 174, Ben. Ten. Act and therefore this argument on behalf of the respondent has no force whatsoever.

We have next to consider whether the matter in question falls within the provision of S. 47 of the Code as has been argued on behalf of the appellant that it does not. The case of *Sital Rai* v. *Nanda Lal* (1) to which the learned District Judge has referred as supporting the proposition that the matter in controversy falls within S. 47, Civil P. C. does not appear to support the proposition in its entirety. What the learned Judges say there is this :

"It cannot be affirmed as a general proposition of law either that an order under S. 174, Ben. Ten. Act or under S. 310-A, Civil P. C., is or is not appealable. Whether an order made under either of those sections is appealable, must depend upon the circumstances of the individual case before the Court."

It seems to me with great respect that the learned Judges proposed a problem in each case to be solved by the Court whenever a question arises under S. 174, Ben. Ten. Act with which only we are now concerned. That problem seems to have been solved by the learned Judges in that case and in some other cases by holding that where the decree-holder was the purchaser the matter falls under S. 47 of the Code and an appeal lies. That has been held in some cases previous to this and also in subsequent cases. I must add again with the greatest respect that this decision seems to me to be fallacious having regard to the view of the Privy Council in the case of *Prosanno Coomar Sanyal* v. *Kali Das Sanyal* (3). There has, however, been a series of cases which lay down that rule. In my judgment, an order under S. 174, Ben. Ten. Act does not fall within S. 47, Civil P. C. in any case and, in my opinion, the true rule was laid dow in the case of *Subh Narain Lal* v. *Goroke Prosad* (4) although all the reasons stated there do not commend themselves to me. If all proceedings for setting aside a sale are considered to be questions falling under S. 47, then by what sort of reasoning can it be said that an order passed under R. 92, O. 21 of the Code for setting aside the sale on the ground of irregularity, faud or otherwise is not a question falling under S. 47, Civil P. C.? This, however, has never been contended in any Court nor can it be contended that proceedings under R. 92, O. 21 can by any stretch of language be brought within the purview of S. 47 of the Code. I might have considered it necessary to refer this question to the Full Bench : but having regard to the fact that this question has been solved by the new amendment of the Bengal Tenancy Act, I do not think it necessary to do so. Under the new S. 174, sub-S. 5, an appeal has been allowed against an order setting aside or refusing to set aside a sale. I content my self by following the case *Subh Narain* v. *Gorokh Prosad* (4) referred to above. In my opinion, therefore, the appeal to the learned Judge was not competent and on that ground the order of the learned Judge is liable to be set aside and that of the Subordinate Judge restored.

In disposing of this matter, I may refer to one other fact. This matter of short deposits on account of mistake in calculation is not infrequent. What the parties usually do is to apply to some Court official to make the calculation as to the amount which it is necessary for them to deposit in order to set aside a sale either under O. 21, R. 89, Civil P. C., or under S. 174, Ben. Ten. Act. As a matter of practice and it is also to be found in this case, a calculation is made on the back of the petition for execution presented by the decree-holder and the calculation is made with reference to the application. Then chalans are filed and those chalans are passed by the Sheristadar according to the General Rules and Circular Orders, Civil of this Court. Now

(2) A. I. R. 1926 Cal. 400.
(3) [1892] 19 Cal. 683=19 I. A. 166=6 Sar. 209 (P.C.)
(4) [1898] 3 C. W. N. 344.

in this case also it was the duty of the Sheristadar to see as to the correctness of the amount to be deposited under R. 20, Chap. 9 of the Court's rules and Circular Orders, (Civil). The Sheristadar in this case signed the challans and evidently he was of opinion that the exact amounts required to be paid to the different parties were deposited by the judgment-debtor. That being so, it seems to me that it falls within the observations of Jenkins, J., as he then was in the Full Bench case of *Chundi Charan Mandal* v. *Banke Behari Lal Mandal* (5) where that learned Judge stated that in order to succeed the judgment-debtor must establish that he was prejudiced by the act of the Court and that the mistake that was made was attributable to that act. Jenkins, J., was careful to point out that what constituted act of the Court must depend upon the circumstances of each case.

When the judgment-debtor deposits the money if by some mistake a short deposit is made and that deposit is accepted by the Court official as the correct amount and when the mistake is discovered the judgment-debtor pays in the full amount it would hardly be consistent with common sense or justice to say that the judgment-debtor has not complied with the provisions of S. 174, Ben. Ten. Act, and that he must lose the property. The only thing that can be done in such a case is that at the most he should be made liable to pay interest for the few days that the mistake was not discovered and the money was not paid. It seems to me to be still worse when the Court of first instance sets aside the sale on the ground that the full amount has been deposited and the appellate Court reverses that decision and deprives the judgment-debtor ofhis property although the decree-holder has been satisfied in full. The position in this case is again worse because in the lower Court it was the decree-holder who was fighting the judgment-debtor. The auction-purchaser was satisfied with his 5 per cent and did not want to take the property. Here the decree-holder is not taking any interest but the auction purchaser is resisting the appeal and the application for revision. Under these circumstances the proper order to make is to dismiss the appeal, to allow the application in revision to set aside the judgment of the lower appellate Court and to restore the order of the Subordinate Judge.

Having regard to the fact that the judgment debtor gave the wrong rule in in his petition under which he professed to deposit the amount of the decree, there will be no order as to costs in any of the Courts, each party bearing his own costs throughout.

S. K. Ghose, J.—I agree.

V.B./R.K. *Order accordingly.*

(5) [1899] 26 Cal. 449=3 C. W. N. 283.

A. I. R. 1930 Calcutta 304

B. B. GHOSE AND B SE, JJ.

Hatimulla—Judgment-debtor — Appellant.

v.

Sukhamoy Chaudhuri and *others*—Decree-holders—Respondents.

Appeal No. 10 of 1929, Decided on 3rd July 1929 from appellate order of Dist. Judge, Silhet, D/- 24th September 1928.

(a) Limitation Act, Art. 182—Verbal application.

A verbal application for amendment of the petition for execution which was already in proper form cannot be said to be a step-in-aid of execution. [P 305 C 1]

(b) Limitation Act, Art. 182—Judgment-debtor informing adjustment—Decree-holder contesting application—Act is step-in-aid of execution.

Where on the judgment-debtor's application under O. 21, R. 2, the decree-holder attends the Court with witnesses to contest the application informing payment out of Court, the act can be construed to mean a step taken in aid of execution. [P 305 C 2]

(c) Limitation Act S. 19—Acknowledgment by judgment-debtor of liability in application for adjustment under O. 21, R. 2, gives fresh start for limitation.

An acknowledgment by the judgment-debtor of his liability for portion of money by means of an application for adjustment under O. 21, R. 2, gives a fresh start of limitation in respect of the entire amount. [P 305 C 2]

Benoyendra Nath Palit—for Appellant.

Hemendra Kumar Das—for Respondents.

B. B. Ghose, J.—This is an appeal by the judgment-debtor against the order of the learned District Judge affirming the decision of the Munsiff by which he held that the application for execution of a decree was not barred by limitation. The first application was made on 4th September 1924 and it was dismissed on 7th January 1925. The

present application out of which this appeal has arisen was made on 30th November 1927. The question arises whether the last application has been made within three years of any steps taken in execution of the decree. What happened on 7th January 1925 was that the learned Munsiff considered that the application for execution and the sale proclamation were not quite in form. The properties which were advertised for sale consisted of separate shares in separate revenue-paying estates. Those were not described in separate lots and that is the defect which, the learned Munsiff thought, prevented the sale from being held. The learned pleader for the decree-holder verbally prayed for amendment of the execution petition, but the learned Munsiff refused the prayer and dismissed the execution case. In the present execution the learned Munsiff held that the verbal prayer of the pleader for the decree-holder was a step-in-aid of execution and so did the learned District Judge. An attempt was made by the judgment-debtor before the District Judge to establish the fact that the first execution of 4th September 1924 was not in accordance with law. That was negatived by the learned Judge and the finding of the District Judge has not been questioned before us. The objection that is taken on behalf of the judgment debtor is that the learned District Judge has rightly found that the execution petition of 4th September 1924 was in accordance with law. That being so, the verbal prayer for amendment of the execution petition could not have been a step in aid of execution, because what was already correct could not be further corrected. Then logic of this argument, in my judgment, cannot be contested. But it is contended by the learned advocate for the respondent that the statement in the order that the execution petition was sought to be amended is wrong. The verbal prayer was to amend both the execution petition and the sale proclamation. The sale proclamation, it is urged, was not in proper form, because it ought to have given the value of the property separately and the revenue payable separately in each share. If we accept that view then the verbal prayer for amendment would be a step-in-aid of execution. But the learned advocate for the appellant points out that the District Judge on appeal while dealing with this question expressed his opinion that there was no particular reason why the Munsiff on the previous occasion should not have allowed the petition for execution to be amended on 7th January 1925, but the best course for the decree-holder to have adopted at that time was to have asked that the sale proclamation might be amended. So it is contended that the finding of the learned Judge was that the pleader for the decree-holder asked for amendment not of the sale proclamation but of the execution petition. Whatever that may be, it is not necessary to pronounce a definite opinion whether the application was for amendment of the execution petition only or of the execution petition as well as of the sale proclamation; because in my view, the application for execution made is within time. The judgment-debtor presented a petition on 10th December 1924, saying that there was an adjustment of the decree and presented an application under O. 21, R. 2, Civil P. C. As the learned Munsiff in the present case points out, the decree-holder contested that petition and attended the Court with witnesses and filed hajiras to dispute the judgment-debtor's allegation. This act on the part of the decree-holder should be taken to be an application to the Court to take a step-in-aid of execution. (See the case of *Brojendra Kishore* v. *Dil Makmud Sarkar* (1). There is a further ground on which it must be held that the application is within time. In the judgment-debtor's petition of 10th December they acknowledged liability for a sum of Rs. 1,500 alleging that there has been a set off or payment of Rs. 500. This acknowledgment gives a fresh start under S. 19, Lim. Act. The Munsiff is not quite right in saying that the fresh start for saving limitation is confied to the sum of Rs. 1,500 admitted by the judgment-debtors. It gives a fresh start according to the provisions of the section to an application for execution of the entire decree. The appeal is, accordingly, dismissed with costs. Hearing fee, three gold mohurs.

Bose, J.—I agree.

V.B./R.K. *Appeal dismissed.*

(1) [1918] 22 C. W. N. 1027=44 I. C. 604.

A. I. R. 1930 Calcutta 306 (1)

B. B. GHOSE AND BOSE, JJ.

Corporation of Calcutta—Appellant.

v.

Manik Lal De—Respondent.

Appeal No. 29 of 1928, Decided on 28th June 1929, from original order of Offg. Small Cause Court Judge, Calcutta, D/- 22nd September 1927.

Calcutta Municipal Act, S. 141—Small Cause Judge should record evidence sufficient to enable appellate Court to decide whether decision of trial Court was right or wrong.

As the law provides for an appeal from the decision of Small Cause Court Judge revising the valuation by the corrporation for assessment of rent and taxes, it is incumbent upon the trial Judge in such a case to record the evidence in such way as to enable the appellate Court to come to its own decision whether the decision of the trial Judge is right or wrong: *A. I. R.* 1927 *Cal.* 659, *Ref.* [P 306 C 1]

Krishna Lal Banerji—for Appellant.

Debi Prasad Dutt and *Sushil Chandra Dutt*—for Respondent.

B. B. Ghose, J.—The judgment in this case cannot at all be supported. Under the Municipal Act there is an appeal to this Court against the decision of the Small Cause Court Judge revising the valuation by the corporation for assessment of rent and taxes. When there is a right of appeal one expects that the trial Judge should record the evidence in such a way that the appellate Court may come to its own decision as to whether the decision of the trial Judge is right or wrong upon the evidence. In this case the evidence has been recorded in a slip-shod way. There is nothing on the record from which the observation of the learned Small Cause Court Judge that the place has been made unhealthy by the workmen of the iron-yard can be supported. Consequently the order of the learned Judge reducing the valuation of the land cannot be supported, because the reason for this reduction cannot be found from the record. It would, however, be unjust to the respondent to decree the appeal on the ground that the learned Judge of the Small Cause Court has not taken down the evidence more fully. The only thing that we consider right to do in such a case as this is to set aside the judgment and order of the learned Judge, and send back the case for a proper trial after taking the evidence of both sides and recording it more fully.

I should draw the attention of the learned Judge of the Small Cause Court to the observations made by this Court in the case of *The Corporation of Calcutta* v. *Ashutosh De* (1). The costs of this appeal will be in the discretion of the learned Judge when the case is finally decided. Hearing-fee of this Court is assessed at one gold mohur.

Bose, J.—I agree.

V.B./R.K. *Retrial ordered.*

(1) A. I. R. 1927 Cal. 659.

A. I. R. 1930 Calcutta 306 (2)

SUHRAWARDY AND JACK, JJ.

Suresh Chandra Das—Plaintiff—Appellant.

v.

Gobinda Chandra Mandal and *others*—Defendants—Respondents.

Appeal No. 1446 of 1927, Decided on 6th May 1929, from appellate decree of Sub-Judge, Khulna, D/- 25th March 1927.

(a) Landlord and Tenant — Ejectment—Landlord purchasing holding—Tenant continuing in possession does not by itself constitute recognition—Tenant must prove payment of rent.

Where a holding has been purchased by the landlord in execution of a decree the mere fact that after the purchase the tenant continued in possssion does not constitute recognition. The only way to prove recognition by the landlord is by proving that the landlord had accepted rent from the tenant. [P 307 C 1, 2]

(b) Landlord and Tenant—Landlord holding settlement from Government of khas mahal or temporarily settled estate is bound to recognize tenants mentioned in settlement papers—Right independent of settlement can however be enforced.

Although a person holding settlement from Government of Government khas mahal or temporarily settled estate is bound under terms of the settlement to recognize the tenants or tenure-holders mentioned in the settlement papers, there is nothing in the law which prevents the settlement holder from enforcing a right he has obtained otherwise than under settlement from Government: 32 *Cal.* 463 *n.*; 37 *Cal.* 449; 5 *C. L. J.* 67; 11 *C. L. J.* 68; 24 *C. W. N.* 53 and 3 *P. L. J.* 394, *Ref.* [P 307 2, P 308 C 1]

The landlord who was a temporary tenant holder from the Government, purchased the tenant's holding in execution of a rent decree and obtained symbolical possession in 1918, but having failed to get actual possession sued the tenant for khas poesession. Previous to filing the suit the landlord had executed an agreement in favour of the Government and thereby agreeing to respect the rights of the recorded right in settlement papers. The tenants were recorded as settled raiyats in the Record-of-Rights as finally published. It was also pleaded that the tenant was recognized as such

though no rent was paid as a suit was instituted by the cosharer of the landlord for rent for period subsequent to 1918 to which the landlord was made a party.

Held: (Per *Suhrawardy, J*).—That the landlord was entitled to eject the tenant as the suit was brought not as settlement holder but as purchaser and, therefore, he had right to enforce his right obtained under the decree as opposed to his rights under the settlement. [P 308 C 1]

That the mere fact the landlord was a party to the rent suit did not constitute any recognition. [P 307 C 1]

Per *Jack, J*.—That in agreement under the settlement with the Government to respect the rights of the tenants as recorded in the Record-of-Rights, the landlord in the circumstances of the case should not be held to have undertaken to forego his existing right under the decree. [P 308 C 2]

Sarat Chandra Roy Choudhuri and *Hemendra Chandra Sen* — for Appellants.

Mukunda Behari Mullick—for Respondents.

Suhrawardy, J.—The facts of this case are that the plaintiff obtained a decree against the defendants who were his tenants and in execution of that decree the defendants' holding was purchased by the plaintiff on 21st March 1918. The plaintiff's case is that he obtained possession of it through Court on 23rd December 1918 but did not get actual possession as the defendants refused to vacate it. The present suit by the plaintiff is for recovery of possession. The plaintiff's suit succeeded in the trial Court but the learned Subordinate Judge dismissed it and hence this appeal by the plaintiff.

The learned Subordinate Judge has disposed of this case on two principal grounds. The first is that there had been a recognition of the defendants by the plaintiff since his purchase in 1918. On that point his finding is based on the facts that some of the cosharers of the plaintiff brought suits for rent against the defendants after 1918 to which suits the plaintiff was made a pro forma defendant. In the Collectorate the plaintiff submitted some hastabuds in which the defendants were shown as tenants in occupation of the holding.

With regard to the first ground the mere fact that the plaintiff was a pro forma defendant in a suit for rent for a period subsequent to 1918 by other cosharers does not constitute any recognition by the plaintiff. The only way to prove recognition by the plaintiff of the defendants after the sale of the holdings was by proving that the plaintiff had accepted rent from the defendants. On that point the learned Subordinate Judge has agreed with the trial Court in holding that the evidence adduced by the defendants to prove that the plaintiff accepted rent from the defendants is unsatisfactory. As to the second ground on which the learned Subordinate Judge relied, we think that the view taken by the trial Court is more correct, namely, that the hastabuds were filed by the plaintiff in the Collectorate for the purpose of showing the present assets of the tenure and as the defendants were in possession of the holding paying a certain amount of rent it was necessary that it should be shown in the hastabuds. This does not constitute a recognition by the plaintiff of the defendants' tenancy nor does it estop the plaintiff from showing that the defendants are not at any rate his tenants. The findings based on this ground cannot stand.

The other ground on which the learned Subordinate Judge has held that the plaintiff cannot recover khas possession of the land though he got his title established in a previous suit is that the plaintiff entered into an engagement with the Government that he would respect the entries in the Record-of-Rights. This ground is not applicable to the facts of the present case. So far as the question of law is concerned, it is well settled that a person holding settlement from the Government of Government khas mahal or temporarily settled estate is bound under the terms of the settlement to recognize the tenants or tenure-holders mentioned in the settlement paper. *Tapanidhi Puri* v. *Pitambar Mahapaty* (1), *Chandramoni Mohanti* v. *Manmatha Nath* (2), *Jarip Sardar* v. *Jogendra Nath* (3) and *Maharaja Kunwar Manmatha Nath Roy* v. *Amir Khan* (4). But there are to the contrary other cases of which the case of *Zamir Mandal* v. *Gopi Sundari* (5), is the type in which it has been held that in spite of the terms in the agreement between the landlord and the Government the landlord can enhance the rent of the

(1) [1907] 5 C.L.J. 67.
(2) [1910] 11 C.L.J. 68=5 I.C. 301.
(3) [1920] 24 C.W.N. 53=54 I.C. 719=31 C. L.J. 78.
(4) [1918] 3 Pat. L.J. 394=46 I.C. 98.
(5) [1905] 32 Cal. 463n.

tenant if agreed to by the tenant. The ratio of these cases is that the settlement holder can enforce a claim not based on the settlement but upon contract and secondly on the principle that a person not a party to the contract cannot seek to enforce its terms. The question was considered in in *Jahandir Baksh Mullick* v. *Ram Lal Hazra* (6) and we agree with the view expressed by the learned Judges in that case. In the present case the plaintiff is not trying to enforce any right which he has obtained under the settlement from the Government but he is attempting to enforce a right he has acquired under a decree of the Court. In other words the suit is brought by the plaintiff qua purchaser and not qua settlement holder from the Government. There is nothing in the law which prevents a person enforcing a right he has obtained otherwise than under settlement from the Government. This point has been in our opinion wrongly decided by the learned Subordinate Judge.

The learned Subordinate Judge has about the end of his judgment remarked that the plaintiff's purchase was not a purchase of the existing tenancy but of one which existed before. If the learned Subordinate Judge meant by this expression, which is not very intelligible, that the previous tenancy came to an end by the purchase of the plaintiff in March 1918 and a new tenancy was created since then, we have expressed our opinion that the finding on this point by the Subordinate Judge is without support.

There is another observation made by the learned Subordinate Judge which needs some reference. He says that there is no evidence of delivery of possession adduced by the plaintiff. We find, from an examination of the record that the record of the execution case in which the plaintiff after purchasing the defendants' holding obtained delivery of possession was before the trial Court which is the same Court that executed the decree. The learned Munsiff has referred to the execution case in his judgment. The learned Subordinate Judge thinks that as the order sheet of the execution case was not formally put in it could not be referred to. This is not the right way of doing justice and as no objection was taken by the defendants to the use of the record of the execution case, before the same Court, we do not think that this omission should stand in the way of the appellant.

The result is that this appeal is allowed, the decree of the lower appellate Court set aside and that of the Court of first instance restored with costs both here and in the Court of appeal below.

Jack, J.—I agree with the order passed by my learned brother but would base it simply on the ground that, in agreeing under the settlement with Government to respect the rights of the tenants as recorded in the Record-of-Rights, the appellant, in the circumstances of the case, should not be held to have undertaken to forego his existing rights under the decree. He obviously had no such intention nor was it the intention of Government to make the settlement subject to any such relinquishment of his rights.

V.B./R.K. *Appeal allowed.*

(6) [1910] 37 Cal. 449=11 C.L.J. 364=5 I.C. 565=14 C.W.N. 470.

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B. B. GHOSE AND PANTON, JJ.

(*Dewan*) *Abdul Alim*—Defendant 1—Appellant.

v.

Amatul Bibi and *others*—Plaintiffs—Respondents.

Appeal No. 375 of 1927, Decided on 15th March 1929, from original decree of Sub-Judge, 2nd Court, Mymensingh, D/- 30th July 1927.

Civil P. C., O. 20, R. 12—Suit for recovery of possession and mesne profits—Decree passed not covering whole property claimed—Plaintiff only appealing—Appeal disallowed affirming decision of lower Court—On application for execution for decree for possession it was decided that decree to be executed was decree of appellate Court—Subsequent execution of decree for mesne profits—Mesne profits should be calculated on basis of decree of same appellate Court.

S brought a suit for the recovery of immovable property and mesne profits included in four schedules attached to his plaint. The suit for the properties included in Schs. 1, 2, and 3 was dismissed, and he obtained a decree for possession and mesne profits for properties contained in Sch. 4. The defendant did not appeal against this decree only *S* appealed against that portion of the claim which was dismissed. The appeal was dismissed finally by the Privy Council affirming the decision of the lower Courts. The plaintiff then sought to execute the decree for possession as decreed. Executing Court executed

the decree of the Privy Council with regard to possession. Subsequently an application was made for executing the decree for mesne profits.

Held: that as already the decree given effect to for possession was the decree of the Privy Council mesne profits had to be calculated on the basis of the same decree and not the decree of the lower Court whose decision was affirmed by appellate Courts and the Privy Council: 35 *Cal.* 1017, *Dist.*; *A.I.R.* 1927 *Cal.* 83; 6 *All.* 261 (*P.C.*); *A.I.R.* 1921 *P.C.* 11 and 23 *All.* 152 (*P.C.*), *Ref.* [P 310 C 1]

Girija Prosanna Roy Choudhury and *Ananda Charan Karkoon*—for Appellant.

Ramendra Chandra Roy—for Respondents.

B. B. Ghose, J.—This is an appeal by defendant 1 against the final decree made by the Court below with reference to mesne profits. The plaintiffs brought a suit for recovery of immovable properties with mesne profits included in four schedules attached to their plaint. The suit for the properties included in Schs. 1, 2 and 3 was dismissed. The plaintiffs obtained a decree for the properties included in Sch. 4. This decree is dated 31st March 1908. The defendants did not appeal against that decree but the plaintiffs appealed against that portion of the claim which was dismissed by the trial Court to the High Court that is, with reference to the properties included in Schs. 1, 2 and 3. That appeal was dismissed by the High Court on 25th June 1912. The plaintiffs preferred a further appeal to the Privy Council which was also dismissed on 20th January 1920. The plaintiffs then sought for execution of the decree with regard to the properties in the fourth schedule to the plaint on 8th December 1922.

The present appellant raised the question that the execution was barred by limitation. This was decided against the defendants by a decision of this Court to which I shall refer presently. There were subsequently other executions. Eventually the plaintiffs succeeded in obtaining possession of the properties in question in June 1923, and afterwards applied for assessment of mesne profits which has been allowed by the Court from the date they claimed mesne profits till the date of recovery of possession, that is, for a period of about 19 years. Against that final decree of the trial Court defendant 1 appeals.

The first and the most important point taken is that the plaintiffs are not entitled to mesne profits for any period beyond three years from the date of the decree of the trial Court, dated 31st March 1908. It is urged that the defendants never having appealed against the decree of the trial Court, the plaintiffs might have enforced that decree which was made in their favour and the fact that they were dissatisfied with the portion of the decree dismissing their claim and carried their appeal to the Privy Council does not entitle them to have the mesne profits assessed with reference to the decree made by the Privy Council on 20th January 1920. The decree in this case which is sought to be executed was passed in the trial Court before the new Code came into operation. The assessment was, therefore, made in the execution proceedings according to the procedure under the Civil Procedure Code of 1882. No authority was brought to our notice about the meaning of the expression 'decree' with reference to S. 211 of the Code of of 1882. It is contended on behalf of the appellant that as the decree made in favour of the plaintiffs with regard to Sch. 4 was not jeopardised by any appeal, the decree of the final appellate Court should not be considered as the basis of calculation of the mesne profits. There is authority for the proposition that if the decree of the trial Court is reversed on first appeal and on further appeal the original decree is restored, then the mesne profits should be calculated until three years as from the date of the decree in the final appeal: see *Raja Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (1). In *Trailokya Nath Roy* v. *Jogendra Nath* (2), it was held without question that where a decree of the trial Court is affirmed on appeal, the decree of the appellate Court should be considered as the decree for calculation of mesne profits. But there is no case in which the condition as has happened in the present case, has been considered with reference to the question of mesne profits. In a fit case the question may perhaps be one which should be decided by a Full Bench, having regard to the great divergence of opinion both with regard to the question of execution and with regard to the

(1) [1901] 23 All. 152=27 I.A. 209 (P.C.).
(2) [1908] 35 Cal. 1017.

question of restitution where a decree is appealed against and affirmed on appeal. But we are relieved from the necessity of referring a general question on the point to the Full Bench in this case having regard to the fact that as between the parties to this case the question has been decided at a previous stage that the decree of the Privy Council is only the decree that has to be executed. That case is *Abdul Alim* v. *Abdul Hafez* (3). As between the parties it must be held that the question is concluded by the previous decision, on the authority the cases, *Ram Kirpal Shukul* v. *Mt. Rup Korri* (4), *Bani Ram* v. *Nanku Mal* (5) and *Hook* v. *Administrator General of Bengal* (6). As was observed in the case of *Raja Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (1) an executing Court cannot take the view that with regard to the question of the decree for possession it was executing the decree of the Privy Council dated 20th January 1920 and for the purpose of calculating the mesne profits it was executing the decree of the trial Court dated 31st March 1908. The first ground, therefore, raised against the judgment of the lower Court must fail. It was contended by the learned advocate for the appellant that this decision would cause great hardship to his client, but as was pointed out by Cuming, J., in his judgment in the previous case between the parties *Abdul Alim* v. *Abdul Hakim* (3) defendant might have saved himself from trouble by at once relinquishing possession in favour of the plaintiff as he did not choose to appeal from the decree of the trial Court and serving notice through Court of such relinquishment of possession.

The second point urged on behalf of the appellant is that the mesne profits should not have been calculated on the basis of the produce as the Subordinate Judge has done, but he ought to have allowed mesne profits at the rate allowed for the years 1312 to 1314, that is to say, at the rate of Rs. 14 per year. It is also urged that the mesne profits should not have been allowed on the basis of what the loss was to the plaintiffs but on the basis of what the defendants got. But the definition of mesne profits shows that it should be calculated as the profits which the person in wrongful possession actually received or might with ordinary diligence have received. Before dispossession during the time of the plaintiffs' predecessor the land was in possession of persons who used to render services to the owners. But the defendants dispossessed the plaintiffs by forbidding those persons from acknowledging the plaintiffs as owners, after they became entitled to the properties, and the defendants instigated the washermen who were in possession to resist khas possession being taken by the plaintiffs. It appears that those persons were willing to deliver khas possession to the plaintiffs when one of these men who was in actual possession had left the land, the judgment-debtor appellant took khas possession and caused the land to be cultivated for some years by his own servants. It is urged on behalf of the appellant that for those years only the plaintiffs might have been allowed mesne profits on the basis of the produce. That argument can hardly be accepted having regard to the fact that the appellant might have with ordinary diligence cultivated the land himself as he did for a certain period during dispossession. The lower Court was, therefore right in allowing mesne profits in the manner it has done.

The next point urged is that interest should not have been allowed up to the date of the suit. There is hardly any substance in that argument, because the appellant having in his hands money which was payable to the plaintiffs for mesne profits was bound to pay compensation by way of interest.

There is, however, a slight inaccuracy in the matter of calculation of the mesne profit and it is this that it should be calculated until three years of the date of the decree made by the Privy Council, that is, 20th January 1920, which would take us to 20th January 1923. Instead of doing that, the Subordinate Judge calculated the mesne profits up to 30th June 1923 when possession was delivered.

The decree, therefore, of the lower Court should be modified to this extent that the amount should be reduced by Rs. 190, that is the profits with interest

(3) A.I.R. 1927 Cal. 89=53 Cal. 901.
(4) [1884] 6 All. 269=11 I.A. 37.
(5) [1884] 7 All. 102=11 I.A. 181 (P.C.).
(6) A.I.R. 1921 P.C. 11=48 Cal. 499=48 I.A. 187 (P.C.).

for the period from 20th January 1923 to 30th June 1923. With this modification the appeal is dismissed with costs, the hearing fee being assessed at five gold mohurs.

Panton, J.—I agree.

V.B./R.K. *Appeal dismissed.*

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SUHRAWARDY AND GARLICK, JJ.

Mohim Chandra Basak and *others*—Defendants—Appellants.

v.

Kanailal Saha and *others*—Plaintiffs—Respondents.

Appeal No. 958 of 1926, Decided on 20th July 1928, against appellate decree of Sub-Judge, 3rd Court, Dacca, D/- 8th December 1925.

(a) Evidence Act, S. 157—Suit for possession of land—Dispute regarding boundaries—Documents relating to neighbouring lands are admissible to prove title of plaintiff if boundaries and their correctness admitted by person in whose favour such documents are executed.

In a suit for possession of land if the opposite party disputes the boundaries of the land in suit, it is open to the plaintiff to produce documents relating to neighbouring lands in which there is recital as to particular boundaries of the land in suit, and such documents will be admissible to prove the plaintiffs' title if the persons in whose favour the documents are executed are examined and admit the correctness of the boundaries : *A. I. R.* 1927 *Cal.* 230, *Ref.* [P 311 C 2]

(b) Bengal Tenancy Act (8 of 1885) Sch. 3, Art. 3—Application of Art. 3 is not restricted only to suits for dispossession between landlord and tenants.

Article 3 does not speak of dispossession by the landlord. It prescribes the period of two years within which a suit by a raiyat or an under-raiyat must be brought for recovery of his holding. There is nothing in the law to show that such a suit must be by a tenant against the entire body of landlords. [P 312 C 1]

(c) Bengal Tenancy Act (8 of 1885) Sch. 3 Art. 3 — Special provision contained in Art. 3 overrides general principles of Limitation Act, and is not restricted to suits between landlord and tenant only.

The idea which induced the legislature to enact the special provision of limitation in Tenancy Act was to benefit the landlord by enabling him to give security of his right to let out the land if the old tenant does not claim to be reinstated within two years from dispossession. It being a special provision intended for the benefit of landlord it overrides the general provisions of Limitation Act and it does not exonerate a mortgagee or other transferee of the holding from bringing the suit within two years. [P 313 C 1]

Gunada Charan Sen and *Krishna Kishore Basak* for *Kanai Lal Saha*—for Appellants.

Gopal Chandra Das and *Bhuban Mohan Shaha* —for Respondents.

Judgment.—Two points have been pressed by the appellants in this appeal first that the Courts below have admitted certain documents which are not admissible in evidence in support of the plaintiffs' title and, secondly that the Courts below should have found that the plaintiffs' suit was barred under Art. 3, Sch. 3 to the Bengal Tenancy Act. The facts are that the holding in suit belonged to defendants 1 to 4 in their raiyati right. It was mortgaged with the plaintiff in 1910. He brought a suit upon the mortgage and purchased it in execution of the mortgage decree in March 1923. The present suit was filed in September 1923 for possession of a plot of land which according to the plaintiff formed part of the raiyati of defendants 1 to 4 and according to the contesting defendants was within their jote in which they had a fractional maliki right. Both the Courts have decreed the plaintiff's suit and defendants 5 to 8 appeal.

With regard to the first ground the lower appellate Court has relied upon three documents relating to neighbouring plots in which the boundaries described are in favour of the plaintiff. They are Exs. 5, 2 and 7. As regards Ex. 2, the objection is not pressed. Ex. 5 is a kabala executed in 1309 in favour of the appellants. The land covered by this kabala lies to the West of the disputed land. This document is admissible inasmuch as it shows that the appellants accepted the description of the boundary as correct as their conduct. It can be proved as inconsistent with the fact in issue in this case. Ex. 7 is a kobala executed in favour of one Jadub Chandra Saha by the former owner in respect of the land immediately to the north of the disputed land in which the boundary mentioned was as Brindaban's Palan Brindaban being one of the mortgagors. This Jadub Chandra Saha has been examined in this case and he has proved the kabala and the correctness of the boundaries therein, So no objection can be taken to this document. *Ketabuddin* v.

Nafar Chandra (1). We accordingly think that there is no error of law committed by the Court below in admitting these documents in finding title with the plaintiff's mortgagor.

The next question relating to limitation is one of some difficulty which has arisen due to the findings of the lower appellate Court which are not very clear. The appellants alleged in their written statement that they were in possession of this land as included within their jote and in their maliki right. The Court of first instance disposed of the objection on the ground of special limitation by observing that the appellants were fractional maliks and therefore Art. 3, Sch. 3 to the Bengal Tenancy Act did not apply. This view has not been attempted to be supported before us by the respondent. Art. 3 does not speak of dispossession by the landlord. It prescribes the period of two years within which a suit by a raiyat or an under-raiyat must be brought for recovery of his holding. But the cases have interpreted it to mean that as the Bengal Tenancy Act is an enactment relating to the relationship between the landlord and tenant the suit in which that article applies must be a suit by the tenant against his landlord. There is nothing in the law to show that such a suit must be against the entire body of landlords. The lower appellate Court however has based its decision upon a different ground. The settlement operation in this case began in 1909. The Record-of-Rights was published some time after (but we have not got the exact date) which shows that the appellants were in possession of this disputed land in their jote right. If that entry be accepted as correct the suit of the plaintiff will be barred by adverse possession under the Limitation Act. But the learned Subordinate Judge thinks that the entry in the Record-of-Rights was the result of collusion between the appellants and defendants 1 to 4. He presumes that the entry was made evidently in 1316 after the execution of the mortgage. We do not know upon what materials he has based his opinion but if the entry was made in 1316 it might have been made before the execution of the mortgage which was executed in Falgun 1316. The learned Subordinate Judge records his finding in these words:

"I am satisfied that the entry was made after the execution the mortgage with the object I have already stated. So the entry of the appellants into the land was not adverse either to defendants 1 to 4 or the plaintiff or the appellants did not set up a hostile title openly . . . I am also inclined to accept the evidence of the plaintiffs' witnesses that the appellants began to possess the land 8 or 9 years before the institution of the suit."

The Subordinate Judge probably means to hold that the entry of the appellants into the land was due to the collusion between them and defendants 1 to 4 and therefore there was no dispossession by the appellants as maliks within the meaning of Art. 3. But this idea if it was in his mind has not been conveyed in clear language. He has not considered the various points which may be urged in this connexion.

If the entry in the Record-of-Rights was due to the collusion between the appellants and the mortgagors in order to defraud the plaintiff why was actual possession postponed for 5 or 6 years. He has not found in so many words that the possession which the appellants obtained 8 or 9 years ago was also due to collusion between them and the mortgagors. The sentence from the judgment which we have quoted shows that his idea was that because the entry in the Record-of-Rights was collusive, the entry of the defendants into the land was permissive. But this he has not expressed in so many words and we are unable to say that this finding has been arrived at on a consideration of all the circumstances in the case. The land in dispute forms a small portion of the holding which has been purchased by the plaintiff. The result appears to be that no reason has been given by the Courts below to hold that with respect to this small portion only there was collusion between the appellants and the mortgagors in order to defraud the plaintiff. Then there is the other fact which we have already indicated that there is no reason given by the Courts below for holding that the collusive entry in the Record-of-Rights was made 14 years before the institution of the suit but the appellants actually came into possession of this piece of land 8 or 9 years before the suit. We do not think that the

(1) A. I. R. 1927 Cal. 230.

finding of the lower Court is so clear as to induce us to hold that Art. 3, Sch. 3 to the Bengal Tenancy Act does not apply to this case. In our opinion the judgment of the lower appellate Court should be set aside and the case remanded to that Court for a clear finding on the question of special limitation raised all other points having been taken to be settled by the concurrent findings of the Courts below.

The learned Subordinute Judge has also expressed an opinion that the dispossession of the mortgagee having commenced after the date of the mortgage time should not run against him. This is a correct principle where the Limitation Act has to be applied. But Art. 3 is a special provision of limitation enacted for the benefit of the landlord and the general principle stated above cannot be held to be applicable in a case like this. If it is allowed to prevail the result will be that a tenant out of possession is unable to recover possession of a holding from the landlord after the lapse of two years but his mortgagee is entitled to do so within 12 years of dispossession. The idea which apparently induced the legislature to enact the special provision of limitation in the Tenancy Act was to benefit the landlord by enabling him to give security of his right to let out the land of the old tenant who does not claim to be reinstated within two years from dispossession. It was also intended to settle dispute between landlord and tenant as specially as possible. The plaintiff as mortgagees of a non-occupancy raiyat has no higher right than the raiyat himself even though the dispossession might have taken place after the mortgage. The result is that this appeal is allowed the decree of the lower appellate Court set aside and the case remitted to that Court for a rehearing of the appeal on the question of limitation raised. Costs will abide the result.

V.B./R.K. *Appeal allowed.*

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C. C. GHOSE AND SUHRAWARDY, JJ.

Surendra Nath Choudhury and *others* —Appellants.

v.

Barisal Loan Co. Ltd.—Respondent.

Appeal No. 2599 of 1926, Decided on 31st July 1929, against appellate decree of Addl. Dist. Judge, 1st Court, Bakarganj, D/- 14th August 1926.

(a) Limitation Act, Art. 144 — Adverse possession against mortgagor commencing after mortgage does not affect right of mortgagee.

Adverse possession against mortgagor does not affect the right of the mortgagee when it commences after the mortgage, but this rule does not apply if it had begun before the mortgage which was effected when the mortgagor was not in possession. [P 315 C 1]

(b) Limitation Act, Art. 144—Mortgage.

The mortgage by a mortgagor does not stop running of time against him or any one claiming through him. [P 315 C 1]

Sarat Chandra Roy Choudhury and *Nilkanta Ghose*—for Appellants

Brojendra Nath Chatterjee with *Indu Bhusan Roy*—for Respondents.

Suhrawardy, J.—The facts involved in this appeal, shortly stated, are as follows : Defendants 5 and 6 were the holders of a nimhowla right in a certain property described as property No. 1 under the howladar one Bepin Behary Ghose on the basis of a kabuliyat dated 13th Chaitra 1301 B. S. Bepin was defendant 49 in this suit and he died during the pendency of the suit. It appears that Bepin obtained a rent decree against defendants 5 and 6 and in execution of the said decree, he purchased the nimhowla in question on 15th April 1906. On 1st Chaitra 1314 B. S. corresponding with 14th March 1908, Bepin mortgaged property 1 and certain other properties to the plaintiff company. The date of repayment under the mortgage was some time in May 1908. On 12th March 1909, defendants 5 and 6 made an application under O. 21, R. 90, Civil P.C., for setting aside the sale of the nimhowla. Meanwhile it appears that Bepin had instituted a rent suit against one Felu and others in respect of a Miras karsa under the Nimhowla and that in execution of the decree in the said rent suit, defendants 5 and 6 purchased the Miras karsa in question. On 10th April 1910, the said defendants 5 and 6 sold the Miras

Kasra to one Purna Chandra Sen, who, it is said, was the benamidar of defendants 1 to 4. On 12th April 1910 the sale of the nimhowla in execution of the rent decree obtained by Bepin was set aside. It is said that it was set aside as a result of a compromise. In 1914, the plaintiff company brought a suit against Bepin on the mortgage and obtained a decree in execution of which the property in question was purchased by the company. It is stated that symbolical possession was taken by the plaintiff company. The plaintiff company brough a rent suit in 1921 against defendants 5 and 6 in respect of a Miras karsa held under the said nimhowla. The suit was dismissed.

The plaintiff company allege that they came to know for the first time in that suit in 1921 that on 14th April 1910, the sale of the nimhowla in execution of the rent decree referred to above had been set aside. The plaintiff company was not made a party to the proceedings for the setting aside of the sale and as they did not know of these proceedings, defendants 5 and 6 and the other defendants who had purchased their interest were not made parties by the plaintiff company to the suit on the mortgage. The present suit has been brought by the plaintiff company for recovery of possession of the property in question subject to the right of redemption of the parties who had not been joined in the suit on the mortgage.

Defendants 1 to 4 as stated above, are the purchasers of the nimhowla from defendants 5 and 6 in the benami of one Purna Chandra Sen and the main point taken in the written statement on their behalf was that the suit was barred by limitation. The trial Court decreed the suit. There was an appeal to the lower appellate Court but the appeal was dismissed subject to certain modifications regarding the amount of redemption. Thereafter defendants 1 to 3 have preferred the present appeal.

Two questions have been argued before us, (1) that the present suit is not maintainable and (2) that it is barred by limitation, it having been instituted on 14th December 1921 i. e., more than 12 years from the due date of payment under the mortgage in favour of the plaintiff. When the matter came before us in the first instance on 12th December 1928, we were of opinion that it was necessary that findings should be arrived at by the lower appellate Court on two questions, i. e., (1) whether the appellants were aware of the mortgage in favour of the plaintiff company at the time when they had the sale of the nimhowla set aside and, (2) whether the proceedings leading up to the setting aside of the rent sale on 12th April 1910 by compromise were fraudulent. The lower appellate Court has now recorded its findings on the two points mentioned above and is of opinion that the appellants were not aware of the mortgage at the time when they had the sale of the nimhowla set aside and that the proceedings leading up to the setting aside of the rent sale on 12th April 1910 were not fraudulent.

There can be no doubt on the facts of this case as set out in the judgments of the two Courts below that no notice was served upon the plaintiff company under O. 21, R. 92, Civil P. C., in the matter of the proceedings for the setting aside of the sale of the nimhowla. Further it has been found that the plaintiffs were not aware before they instituted their suit on the mortgage (which resulted in a decree in their favour and in execution whereof the properties in question were purchased by them on 18th July 1916) that defendants 5 and 6 or defendants 1 to 4 had any interest whatsoever in the mortgaged property. Further, the evidence is that not until the suit in 1921 referred to above, did the plaintiff company become aware at any time of the interest of the said persons. In these circumstances I entertain no doubt whatsoever that the present suit for recovery of possession subject to the right of redemption of the defendants concerned is maintainable. The cases on this point are to be found referred to in the judgments of the two Courts below and it will serve no useful purpose if I were to go through them once again.

The next question is whether limitation should run from 18th July 1916, the date of the plaintiff's purchase or from 15th April 1906, the date of Bepin's purchase of the nimhowla. Courts below have held that limitation should run from the date of the plaintiff's purchase. The learned Subordinate Judge observes that the plaintiff having come to know

of the interest of defendants 1 to 4 in the rent suit of 1921 and that adverse possession against the mortgagor is of no avail against the mortgagee, time against the plaintiff should be computed from the date of the purchase and not from the due date fixed by the mortgage. The proposition of law as stated by the Subordinate Judge is correct but in my judgment it is not applicable to the facts of this case. It has been found that since his purchase in 1906 Bepin never obtained actual possession and it must be considered that the defendants remained in adverse possession of the nimhowla ; so that when Bepin mortgaged the Nimhowla to the plaintiff company, Bepin was not in possession of the mortgaged property and the defendants were in adverse possession thereof. (The mortgage by Bepin did not stop running of the time against him or any one claiming through him.) One test may be usefully applied in determining this question. If Bepin had not mortgaged the nimhowla to the plaintiff company, could he have succeeded in a suit for possession brought in December 1921 (the date of the institution of the present suit)? The answer must be in the negative. There is no reason why his mortgagee or any person claiming through him should acquire a higher right or an act by him creating an interest in the property of which he is not in possession should stop the running of limitation in contravention of S. 9, Lim. Act or create a fresh terminus. Adverse possession against mortgagor does not affect the right of the mortgagee when it commences after the mortgage but this rule does not apply if it had begun before the mortgage which was effected when the mortgagor was not in possession.

In the above view the plaintiff's suit must be held to be barred by limitation. The appeal accordingly succeeds, decrees of the Courts below are set aside and the plaintiff's suit is dismissed with costs throughout.

C. C. Ghose, J.—I agree.

V.B./R.K. *Decree set aside.*

A. I. R. 1930 Calcutta 315

RANKIN, C. J. AND MUKERJI, J.

Abdul Hamid and *others* – Defendants —Appellants.

v.

Eakub Ali Pandit and *another* — Plaintiffs—Respondents.

Letters Patent Appeal No. 3 of 1929, Decided on 30th May 1929, from decree of Mitter, J., D/- 7th December 1928, *reported in A. I. R.* 1929 *Cal.* 450.

(a) Bengal Tenancy Act (8 of 1885), S. 85 —Occupancy.

No kabuliyat can grant an occupancy right. [P 316 C 2]

(b) Record-of-Rights—Entry in Record-of-Rights that under-raiyat had right of occupancy—Presumption is that rights were acquired by custom.

Where it is recorded in the Record-of-Rights that a certain person being an under-raiyat has a right of occupancy it must be presumed that that right of occupancy has been acquired by him under and by virtue of a custom : *A. I. R.* 1922 *P. C.* 272, *Dist.* [P 316 C 2]

Sarat Chandra Basak and *Jitendra Kumar Sen Gupta*—for Appellants.

Kshetra Mohan Ghose, *Mohendra Kumar Ghose* and *Biraj Mohan Majumdar* — for Respondents.

Rankin, C. J.—In this case, the appeal is brought from a judgment and decree of my learned brother Mitter, J. sitting in second appeal. The case is this : The plaintiff brought his suit to eject the defendants on the footing that the defendants were under-raiyats to whom notice to quit had been given. The suit was brought under S. 49-B, Ben. Ten. Act.

The view taken by the Munsiff was that the service of notice to quit was proved. He also dealt with a defence to the effect that the defendants were persons who had acquired by custom an occupancy right, notwithstanding that they were only under-raiyats and not raiyats. On that point, the Record-of-Rights was in favour of the defendants. It was finally published in the year 1918. The Munsiff held that the evidence adduced before him was sufficient to disprove the Record-of-Rights and that there was enough to enable him to say that the entry that the defendants had occupancy right was erroneous.

The matter went on appeal to the learned Subordinate Judge. The learned Subordinate Judge held that it was not proved that the notice to quit had been served and he further held that it was not shown by the evidence that the Record-of-Rights was wrong as regards the entry that the defendants had occupancy right.

On second appeal to this Court, my learned brother Mitter, J. considered that the judgment of the learned Subordinate Judge in which he held that the evidence of service of the notice to quit was unsatisfactory was not a proper judgment or method of dealing with the case. The judgment certainly was very short and summary and the learned Judge in this Court regarding that as unsatisfactory directed a remand on that question. It appears to me to be unnecessary for this Court to deal with that question and I do not desire to be understood as differing in any way from the view taken by Mitter, J.

The question and the main question, however, is whether or not the defendants' defence of occupancy right is a good defence to the suit. On that point the Record-of-Rights is in favour of the defendants. Mitter, J. took the view that the entry in the Record-of-Rights was based and it would seem, as he thought, solely based upon the terms of a registered kabuliyat a reference to which was made in the remarks column of the khatian. The registered kabuliyat was dated December 1901. He came to the conclusion that this registered kabuliyat by its terms would not confer a right of occupancy. He dealt, therefore, with the khatian on the basis that it had been shown that the only materials before the Settlement Officer did not justify the entry and, in that way, he held that the Record-of-Rights had been disproved. He would not appear to have been quite satisfied with the way in which the learned Subordinate Judge dealt with the evidence upon the question whether the Record-of-Rights could be rebutted and, in sending the matter back on remand, his language distinctly suggests that it will be for the lower appellate Court on remand to consider whether the defendants have given positive proof of the custom to the satisfaction of that Court. On this question, I much regret that I am unable to see eye to eye with the learned Judge. In the first place, it appears to me that there is no evidence to prove that the entry as to the right of occupancy is based at all let alone solely, based, upon the terms of the registered kabuliyat of 1901. It is said that that kabuliyat does not purport to give a right of occupancy, but it is said that there is something in it which gives a colour to the suggestion that it purports to give a right of occupancy. It is quite certain that no kabuliyat can grant a right of occupancy; but it has been pointed out that there may be something in a document which is evidence, by way of admission or otherwise, of a right of occupancy, In my judgment, it is not only speculation but is, to some considerable degree, improbable to say that the entry as to the right of occupancy is based upon this kabuliyat. I find as a matter of fact that another under-raiyat of the plaintiff in this very same village is also recorded in the same way as enjoying a right of occupancy and, in the remarks column, the word "oral" is put showing that there is no question of the holding being governed by a written document. In these circumstances, it seems to me that the judgment of the learned Judge of this Court cannot be supported.

The next question is whether the lower appellate Court has properly dealt with the evidence as to the existence of the alleged custom. When it is recorded in the Record-of-Rights that a certain person being an under-raiyat has a right of occupancy, it must be presumed that that right of occupancy has been acquired by him under and by virtue of a custom. What that custom is, its exact terms and so forth does not appear on the face of the khatian ; but it appears to me that it is for the plaintiff to show that that entry to the effect that the tenants have a right of occupancy is erroneous. A case has been cited to us *Jagdeo* v. *Baldeo* (1) at 48 (*of* 2 *Pat.*) on the strength of which we are invited to hold that, the presumption being that there is no right of occupancy on the part of an under-raiyat, the entry in the Record-of-Rights is not a thing which has to be overthrown but is itself overthrown by the initial presumption and that, therefore, the defendant in whose

(1) A. I. R. 1922 P. C. 272=2 Pat. 38=49 I.A. 393 (P.C).

favour the entry is made is really in no better position than if that entry had not been made at all. That may or may not be a good criticizm of the logic of the case cited to us ; but it is quite clear in my judgment, that that cannot be the law as regards the particular matter with which we are now concerned. It appears to me quite clear that the plaintiff in this case, when he wants to eject the defendants who have got this entry in their favour, has to show in one way or another that the entry is wrong. He produced seven khatians belonging to this village. He showed that they were cases of under-raiyats. He showed that they were all under-raiyatis 20 to 30 years old and he pointed out the fact that these particular under-raiyats were not recorded as having a right of occupancy. This fact impressed the Munsiff very much because he thought that the plaintiff's evidence showed that these under-raiyatis having lasted for more than 12 years the under-raiyats were bound to be vested with occupancy right if the custom, as alleged, was true in that particular village.

Now, in coming to that conclusion, the Munsiff, it seems to me, made a mistake because he forgot that the particular person in occupation at the time of the Record-of-Rights would have to be shown to have been in occupation himself for a time sufficient to satisfy the custom unless indeed it could be shown that the custom in the case of this village included a custom which made occupancy right heritable. That being so, the seven khatians adduced in evidence by the plaintiff in no way disprove the custom and we have to examine the rest of the evidence to see whether the lower appellate Court's view ought to be interfered with. The lower appellate Court thought that the evidence on either side was very meagre and that Court also found that the plaintiff as regards this village was unable to give an instance of an under-raiyat who had been ejected. In these circumstances, that Court thought that, on the evidence, it was wrong to say that the Record-of-Rights had been rebutted or should be interfered with. The evidence was scanty and highly inconclusive. In these circumstances, it was not prepared to interfere with the Record-of-Rights. It appears to me that that was quite a sound reason.

There is a further point to which our attention has been directed. It has been pointed out in a very able argument that in 1919 a suit was brought by the plaintiff against these defendants under S. 66, Ben. Ten. Act. S. 66, Ben. Ten. Act is not applicable to occupancy raiyats. It does not in its terms profess to be inapplicable to under raiyats having right of occupancy. It is said that, if an under-raiyat has a right of occupancy, it cannot be that he is liable to be ejected for mere non-payment of rent. To my mind, these are not questions that can be readily decided. Whether an under-raiyat with an occupancy right can be ejected under S. 66 or not, I do not propose to decide. What happened in this case was that one of the defendants filed a written statement which is not put in evidence in this case. That defendant who appeared asked for time when the case came on for hearing. In the end, he was given a little time and untimately he did not appear at all. The case went ex parte against him and there can be no doubt that rent was due. The form of the decree was that if he did not pay the rent in so many days, he was liable to be ejected. He did pay the rent and he never was ejected and it is said now that because that was a proceeding under S. 66, because the form of the decree was that if he did not not pay he was liable to be ejected, that is conclusive against him to the effect that he has no right of occupancy or, at all events, it is evidence which the lower appellate Court should have regarded as sufficient to overthrow the entry in the Record-of-Rights. In my judgment, that contention cannot be acceded to. I am not satisfied in the anomalous state of the law that the defendant had a defence under S. 66, Ben. Ten. Act. But, in any case, what happened was that he was ordered to pay his rent and he did pay.

If the question be a question of evidence, it appears to me that, the conduct and the circumstances of the parties being what they were, the form of the decree given in that case is worth little or nothing as evidence on the question of fact as to occupancy right, it being remembered that this right had been solemnly recorded in the khatian a

year before the suit was brought. Whether rightly or wrongly recorded it was obviously recorded in the interest of the tenants and presumably not without their knowledge. In all the circumstances, I am of opinion that in this case no mistake in law has been made by the lower appellate Court in dealing with the question whether the entry as to occupancy right has been disproved or not.

That being so, the plaintiff's suit necessarily fails and, in my opinion, we should allow this appeal, set aside the decree of my learned brother Mitter, J. and restore the decree of the lower appellate Court with costs of this Letters Patent Appeal and before my learned brother Mitter, J.

Mukerji, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 318

RANKIN C. J. AND PATTERSON, J.

Ashutosh Ghose and *another* — Accused—Petitioners.

v.

Emperor —Opposite Party.

Criminal Revn. No. 23 of 1929, Decided on 9th August 1929, against order of Sub-Deputy Magistrate, Khulna, D/- 15th August 1928.

(a) Penal Code, S. 430 — Landlord and Tenant—Right to water supply—Interference—Essentials of offence discussed.

Before a landlord or his agent can be convicted under S. 430 on a complaint by tenants, for interfering with water supply of tenants, it is absolutely necessary to prove that there was intentional inflicting of loss and that the landlord had no such right to interfere in any way and the tenants had a right to the supply or preservation of water. [P 319 C 1]

(b) Jurisdiction — Civil Court — Alleged interference of right under S. 430, Penal Code— Proper Court to determine existence of rights is civil Court.

The proper Court for the determination of the existence of a right to supply or preservation of water which is alleged to have been interfered with in a case under S. 430, Penal Code is the civil Court. [P 320 C 1]

Narendra Kumar Bose and *Anil Chandra Roy Choudhury*—for Petitioners.

Rankin, C. J.—In this case the two petitioners have been convicted under S. 430, I. P. C. for the particular form of mischief which consists in interfering with the water supply of a particular abad called Maheshwaripur Abad. It appears that the petitioner Ashutosh Ghose is the manager and the petitioner Nripendranath Prodhania is the naib of the landlords of this abad. It would appear to be a very large place which some few years ago was a jungle and which has been made cultivable to some extent by raising bunds to protect it from rivers which surround it on three sides. It is divided into three chaks and we are concerned with chak No. 3, it being the northernmost chak. In the abad there are a large number of small and also some large khals and the opening of the large khals is controlled or closed by sluice gates. The actual condition of the abad is not very clear at least to me upon the evidence and I cannot gather how many of the large khals are within the particular chak No. 3 with which we are concerned, but a number of small khals certainly are.

In the ordinary way during the rains these khals get filled with rainwater which is not saline or not so saline as the river water. No question seems to arise in this case of the letting in of river water upon these lands, but the complaint is this that after the rains and at a time when there are no crops or agricultural operations going on the maliks were mined to make some revenue out of the fishery right in these different khals. As regards the larger khals, they are fished by nets. As regards the smaller khals, for the first time, as the prosecution alleged, the maliks made up their minds to fish in a special manner, that is to say, by cutting the bunds of the small khals so as to let out a considerable amount of water and then placing what is called khait or obstruction of some kind at intervals along the small khals and bailing the water out into the next higher part. For purposes of fishing in this manner, the maliks for the first time emptied out all the small khals with the result that the tenants of chak No. 3 suffered from a scarcity of fresh water.

On the findings of the Courts below it would appear that the tenants and the landlords have of late been at daggers drawn, the landlords in some cases having taken kabuliyats at a higher rent and the tenants refusing thereafter to pay. It would also appear from the findings that the method of fishing adopted was adopted for the first time on this occasion and the inferences of the

Courts below are to the effect that the landlords being minded to pay back the refractory tenants adopted this particular method of fishing with a view to harass them with the intention that they should not have sufficient water either for their own domestic purposes or for their cattle or for agriculture.

Before we come to have a duty to consider whether the action of the landlords was a piece of intentional oppression or not, it is quite evident that before the landlords or their agents can be convicted under S. 430, I. P. C. it must be made absolutely clear that the landlords did not have a right to do what they did with reference to these small khals. If the tenants have no legal claim to have the water in these khals preserved in such a way that they can use it either for purposes of agriculture or otherwise then, while the conduct of the landlords may be very shabby or very objectionable, it is not an offence under S. 430 the essence of which is that they have intentionally inflicted wrongful loss upon the tenants. This was a point which was taken as appears clearly enough from the judgment of the Court of appeal. It appears that the matter was put in this way :

"The main point urged before me was that admitting for the sake of argument the facts alleged there has been no infringement of tenants' rights so that there can be no offence under S. 430, Penal Code."

Then the learned Judge refers to certain rulings and says that they lay down the principle that for a conviction under S. 430 there must be some infringement of right resting in *B* by the act of *A*. That proposition urged on the part of the defence is incontestable and the appellate Court deals with the matter in the end in the following way :

"The issue then comes to this. Did the appellants know they were likely to cause or did they intend to cause wrongful loss or damage by draining the khals ostensibly for fishing to complainant and other tenants? Did they at least know they were infringing a right of the tenants not to use the water for cattle and agriculture. I think these questions must be answered in the affirmative."

In abad areas entirely surrounded by bunds agriculture depends on their efficiency as much as it depends upon the soil, sun and rain."

"It is also in evidence from P. Ws. that the maliks gave assurance to the tenants that they could use the water. I doubt that any such definite assurance was given, but that such an assurance was implied in the contract between onants and zamindars, I have no doubt. The cutting of an abad bund entirely without regard to the interests of the tenants is in my opinion an infringement of a natural right which is implicit in the kabuliyats."

In my judgment, this is much too summary a method to deal with what may well be a somewhat complicated question of the law of easement or profits. To my mind, if there is to be a conviction in this case on the ground that the tenants have a right that at all times of the year this water is to be kept for their use although the khals admittedly belong to the landlords and although the landlords have admittedly the right to settle them with fishermen in order to make a profit, it is necessary that the question of the nature of the tenants' right should be somewhat more carefully considered than it is easy to do in a police Court or as has been done in the judgment of the learned Court of appeal. To begin with, if one is to hold that something is implied in a contract between the parties, it is very necessary not only that the nature of the land should be most carefully explained with reference to the position of the khals where the larger khals are as well as the smaller ones, but the circumstances under which the contract was entered into and above all, the contract itself if it is in writing must be proved and produced. In the present case, though it has been held to be a right implicit in the kabuliyat, I do not gather that the kabuliyat of the complainant or of anybody else has been so much as put in evidence. How it can be a natural right and at the same time a matter to be implied in the contract I do not quite understand, but it is evident to me that a very serious question of civil law has been dealt with in these criminal Courts in a somewhat cavalier manner and in almost complete absence of the necessary materials which would enable a lawyer to give an answer to the questions which are raised. In my judgment, a case of this sort can only succeed where the right infringed is reasonably clear and plain. If in a case of this kind a complicated question of civil law has to be considered before it can be decided whether the tenants have any actual right to this water or not, then the police Court is not only a very unsuitable place for the discussion of such right but the prosecution would probably fail upon the ground that the

landlords might honestly have thought that they had the right which they claimed.

It appears to me that it is not possible to let this conviction stand and the proper course for these tenants, if they desire to assert a right to have the water in these khals kept in such a way as they can use it, is to take proceedings for an injunction in a civil Court or to take measures by which the rights of the parties can effectively be ascertained.

In my judgment, the rule must be made absolute, the conviction and the sentences must be set aside the accused acquitted and the fines, if paid, must be refunded.

Patterson, J.—I agree.

V.B./R.K. *Conviction set aside.*

A. I. R. 1930 Calcutta 320

RANKIN, C. J. AND C. C. GHOSE, J.

Hamid Ali Haldar—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 842 of 1928, Decided on 20th February 1929, against order of Sess. Judge, Tippera, D/- 27th September 1928.

(a) Criminal P. C., S. 304—Judge is not obliged to accept an absurd verdict— He can ask jury to reconsider matter over again.

In a criminal trial with the help of a jury a Judge is not obliged to accept an absurd verdict either as a verdict of guilty or as a verdict of not guilty. He is quite entitled to tell the jury to consider the matter over again.

[P 320 C 2]

(b) Criminal P. C., S. 298 It is not duty of Judge to accept and interpret unintelligible verdict.

It is no part of a Judge's duty to accept and interpret for himself a verdict of an unintelligible character when the members of the jury are there and can give a proper verdict.

[P 320 C 2]

(c) Criminal P. C., S. 297—Judge can recharge jury after unintelligible verdict— Cross-examination of jury in such case is not proper.

When in case of an unintelligible verdict from a jury, a Judge thinks it better to recharge the jury on specific points there is nothing in the Criminal P. C., to prevent him from doing so. In such a matter it is most unsatisfactory for a Judge to cross-examine the jury which as a matter of fact means cross-examination of the foreman of the jury. [P 321 C 1]

A. K. Basu and *Satindranath Mukerji*—for Appellants.

Khundkar—for the Crown.

Rankin, C. J.—In this case when the trial had proceeded to the end of the learned Judge's charge to the jury, the jury considered their verdict. There were eleven accused and the foreman read out the names of those eleven people and said that the jury found them all guilty under S. 147, I. P. C. So far as the learned Judge is concerned, the foreman was then heard to read out the names of five of those accused and to say that the jury found them guilty under S. 364 and to go on to say that the others were not guilty under that section. Thereupon the learned Judge recorded that as their verdict. He typed out a little judgment and sentence on that basis and he read it out in Court, when, to his astonishment, the foreman said :

"No that is not what we said. What we said was that these five people were guilty under S. 364, but we gave them the benefit of the doubt."

Thereupon, the learned Judge has, I think, exercised a most admirable discretion. He recharged the jury, telling them particularly about the benefit of the doubt and what S. 364 meant and sent them back to consider and find out what their verdict really was. They came back. They delivered their verdict perfectly properly, finding the eleven accused guilty under S. 147 and finding certain accused guilty under S. 365. It is not said that there is anything wrong with the charge, and the verdict cannot be attacked upon that ground. It is said, first, that in this course there is something contrary to the Code and that the learned Judge had no right to recharge the jury at all; secondly that he should have taken this absured verdict as a verdict of not guilty; and, thirdly, that at all events he was confined to asking certain questions of the jury.

I desire to say that I protest against all three of these suggestions. The learned Judge was not obliged to accept an absured verdict, either as a verdict of guilty or as a verdict of not guilty. He was quite entitled to tell the jury to consider that matter over again. In the case in which the jury have not considered the matter over again, a verdict of that character would doubtless be construed afterwards as a verdict of not guilty; but that there is any duty upon the Judge to accept and interpret for himself a verdict of that character, when

the jury are there and can give a proper verdict, is to my mind a proposition which has no foundation. Again, the learned Judge could, if he liked, have asked questions of the jury. He was not obliged to do so. If he thought it fairer and clearer and simpler to re-charge the jury on certain specific points and to tell them to go and get their heads clear on the subject and give a proper verdict, there is nothing in the Code against that. The Judge put the matter in a much better position than it would have been if he had endeavoured to cross-examine the jury, which, as a matter of fact, means cross-examination of the foreman. That is generally a most unsatisfactory procedure.

Then it is said that, because the learned Judge has not treated as part of the record the piece of paper on which he typed out the foreman's verdict of guilty as the Judge understood him, which the foreman afterwards disclaimed as not being the verdict at all, that is contrary to the Code and ought to vitiate this trial. In my judgment, the intention of the Code has in this case been most scrupulously fulfilled. You cannot put down in black and white a misunderstanding, and if the learned Judge had allowed that record to remain, it would have been obviously wrong unless he coupled it with something to say that there was a discrepancy between what he took the verdict to be and what the foreman afterwards said it was. The learned Judge, accordingly, recorded in the greatest detail everything connected with this incident; and, in my judgment, there is no ground whatsoever for interference with the result of this trial.

The appeal must be dismissed. The applicants must now surrender to their bail and serve out the remaining periods of the sentences imposed on them.

C. C. Ghose, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 321

RANKIN C. J., AND MUKERJI, J.

Jogesh Chandra Roy—Plaintiff—Appellant.

v.

Sasi Kumar De and *others*—Defendants—Respondents.

Appeal No. 50 of 1928; Decided on 6th June 1929.

Letters Patent (Calcutta), Cl. 15—Court not confined to facts and circumstances given in judgment appealed against but can look into judgment of lower appellate Court.

In an appeal under Cl. 15, the Court is not required to confine itself to facts and circumstances as disclosed by the judgment appealed against under Letters Patent but is entitled to look into the judgment of the lower appellate Court: *A. I. R.* 1921 *P. C.* 80, *Ref.* [P 323 C 2]

Amarendra Nath Bose and *Nripendra Chunder Das*—for Appellant.

Chandra Sekhar Sen—for Respondents.

Mukerji, J.—This appeal has arisen out of a suit for declaration of title and recovery of possession in respect of a piece of land. The land was recorded in the Record-of-Rights as comprising a tenancy held by the defendants. The certified copy of the Record-of-Rights which has been filed on behalf of the defendants shows that the area of the land is 1·13 acres and that it consists of a homestead, some ditches and a tank. In the column provided for recording the present rent there is a word which the learned Subordinate Judge felt considerable difficulty in reading. According to him, it may be read as binakar nishkar or ninakar though the last word is not one that is to be found in the dictionary. The learned Judge also says that the word may as well be read nankar or service tenure as was suggested on behalf of the plaintiff. From the plaint, however, it appears that the plaintiff's case was that the tenancy was a binakar chakran tenancy, that is to say, a chakran tenancy held without payment of rent. In the column in which the status of the tenant has got to be recorded the words "settled raiyats" appear. The plaintiff's case was that the defendants and their predecessors were charkan tenants holding without payment of rent, that they were bound to render services to the plaintiff and that recently they had refused to render such services and consequently the plaintiff instituted the suit for declaration of title and recovery of possession. The defendants on the other hand alleged that their predecessors formerly held the land on payment of rent of 14 annas per year but that the said rent was remitted on account of certain services which their predecessors had rendered to the plain-

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tiff's predecessor. They endeavoured to support this defence of theirs by a letter dated 1849 which purported to state the fact that the defendants' predecessors were paying rent at 14 annas per year but that the said rent was remitted. This letter has been found by both the Courts below as being a fabricated document and it is not necessary to refer to it again in the course of this judgment. The Munsiff held that according to the Record-of-Rights, the defendants were settled raiyats and that inasmuch as certain other entries from the Record-of-Rights had been filed showing that the defendants were occupancy raiyats in respect of other lands in the village they were also occupancy raiyats in respect of this particular tenancy and that the incidents of this tenancy were to be governed under the provisions of S. 182, Bengal Tenancy Act, by those provisions of the Act which deal with occupancy raiyats. He held also that this presumption was not rebutted by anything which the plaintiff had produced and he therefore, dismissed the suit.

The Subordinate Judge held that the Record-of-Rights had a presumptive value but that the entry in it was vague and was proved to be incorrect. He held further that the plaintiff had succeeded in proving that the defendants held the tenancy as a chakran tenancy and not in raiyati right. On these findings the learned Subordinate Judge decreed the suit. The defendants then preferred a second appeal to this Court which was dealt with by my learned brother Cammiade, J. He held that the Subordinate Judge had not properly dealt with the Record-of-Rights and had omitted to take into consideration its exact import and significance and that he had not appreciated the true position which was to the effect that the defendants were according to the Record-of-Rights, raiyats and not merely settled raiyats of the village. He held further that the evidence which the plaintiff had adduced for the purpose of rebutting the Record-of-Rights was more or less inadmissible being statement of the opinion of the witnesses who were examined in the case and that the said evidence was not sufficient to rebut the presumption. In this view of the matter Cammiade, J. allowed the appeal, set aside the decision of the learned Subordinate Judge and restored the decision of the Munsiff. The plaintiff has preferred this Letters Patent appeal.

The substantial contention that has been urged in support of the appeal is to the effect that inasmuch as the learned Subordinate Judge held that the presumption arising from the entry in the Record-of-Rights had been rebutted this finding amounted to a finding of fact which should not in view of the circumstances of the case have been interfered with by this Court in second appeal. On reading the judgment of the Subordinate Judge, it seems to me that both in his appreciation of the effect of the presumption and in his treatment of the evidence that was adduced for the purpose of rebutting the same the learned Judge was in error.

As regards the presumption its effect according to the learned Subordinate Judge was considerably minimised by reason of the fact which he referred to in his judgment in the following words:

> "Defendant 2 had a relative in the settlement office. He was his uncle-in-law, Kamal. Plaintiff's suggesfion that taking advantage of this state of confusion this entry of "settled raiyat" was secured, cannot, therefore, be brushed aside as absurd."

The learned Subordinate Judge in my judgment was entirely wrong in referring to this matter at all. The plaintiff nowhere in his plaint or even in the evidence that he adduced in support of his case made any distinct case to the effect that the entry in the Record-of-Rights was fraudulently made and barring one single statement in the deposition of one of the witnesses examined by him which was to the effect that defendant 2 had a relative named Kamal in the settlement office there is absolutely nothing to indicate that it was ever the intention of the plaintiff to make a case to the effect that the Record-of-Rights was fraudulently made. Indeed, upon a perusal of the record, it does not appear that the defendants had any notice whatsoever that any such allegation was going to be put forward on behalf of the plaintiff. This entry therefore must be regarded just as any other entry in any other Record-of-Rights. With this idea in mind that the Record-of-Rights was

somehow or other not correctly made the learned Subordinate Judge proceeded to consider whether the entry had been rebutted or not.

As regards the presumption there is also another matter to be considered. In the opinion of the learned Subordinate Judge as I have already stated in the column where the present rent has to be recorded the word that is written may be differently read. But then the plaintiff himself in his plaint clearly stated that the defendants were binakar chakran tenants and the suggestion that was put forward in the course of the trial that the word might be read in any other way, for instance, as nishkar, ninakar or nankar should not have been accepted at all by the learned Subordinate Judge. Moreover from another certified copy of the same entry that was produced before us in the course of the hearing of this appeal, there cannot be the slightest doubt whatsoever that the word should be read as binakar. The learned Subordinate Judge says that the entry is a vague one probably because of the difficulty in reading this particular word. It may also be that in the opinion of the learned Subordinate Judge the entry was not inconsistent with the tenancy being a chakran one. If that was his view then again he was not right because on the record there are a number of entries with regard to other tenancies clearly showing that those tenancies are chakran. Whether the tenancies are chakran tenancies or not they have not been so recorded in the Record-of-Rights. Therefore, there was nothing vague with regard to the entry that we have before us and if it was inconsistent with the tenancy being charkan one as in my opinion it was, then this presumption had to be regarded as any presumption with regard to any other entry. The learned Subordinate Judge in my opinion was not right in appreciating the effect of the presumption which arises upon the entry in this particular case.

Now, as regards the evidence that was adduced for the purpose of rebutting this presumption the learned Subordinate Judge has dealt with it in a passage in his judgment which to my mind seems to be extremely unsatisfactory. He says this :

"I see no reason to disbelieve the evidence of a number of respectable persons that the defendants held the land as charkan and did render begar service to the plaintiff on ceremonial occasions for the privilege of living in the homestead."

This is all that the learned Subordinate Judge has said with regard to the oral evidence that was adduced on behalf of the plaintiff. Now, both my Lord the Chief Justice and myself have looked into the evidence carefully and the opinion which we have formed of it is this that the evidence falls far short of establishing that there was a chakran tenancy with regard to this land. The learned Munsiff analysed this evidence and found that much of it was irrelevant and part of it was inadmissible and what little was left was not sufficient to establish a chakran tenancy. Although I am not prepared to go so far as to agree with my learned brother Cammiade, J., in holding that the whole of it is inadmissible I am clearly of opinion that leaving aside the inadmissible portion of the evidence the rest does not in any way rebut the presumption which arises in favour of the defendants upon the entry in the Record-of-Rights. In this view of the matter I am of opinion that the decision of Cammiade J. is right that the learned Subordinate Judge's judgment should be set aside and that of the Munsiff should be restored.

There remains to consider one other matter and that is the contention that was put forward on behalf of the appellant that we are not entitled to look into the reasons given by the learned Subordinate Judge other than those that have been referred to by Cammiade., J., because O. 41, R. 20, Civil P. C., does not apply to the case of a Letters Patent appeal. What the respondents have done in the present case is to put before us those facts and circumstances which appear upon the judgment of the learned Subordinate Judge and which must have greatly weighed with my learned brother Cammiade, J., although he has not thought fit to embody them in his judgment in arriving at his conclusion. I am of opinion that the respondents were perfectly justified in referring to and relying upon those facts and circumstances. There is no doubt a body of authorities which support to a certain extent

the proposition which is sought to be propounded on behalf of the appellant but in view of the decision of the Judicial Committee in the case of *Sabitri Thakurani* v. *Savi* (1) it may be necessary in a proper case when the question arises to consider whether this proposition should not be further considered. The result is that the appeal fails and must be dismissed with costs.

Rankin, C. J.—I agree.

V.B./R.K. *Appeal dismissed.*

(1) A. I. R. 1921 P. C. 80=43 Cal. 481=48 I. A. 76 (P. C.).

A. I. R. 1930 Calcutta 324

LORT-WILLIAMS, J.

Gowal Das Sidany—Plaintiff.

v.

Luchmi Chand Jhawar — Auction-purchaser.

Original Civil Suit No. 318 of 1926, Decided on 22nd February 1929.

(a) Civil P. C., O. 21, R. 86—O. 21, R. 86 does not apply where High Court has made rules in exercise of original civil jurisdiction—Calcutta High Court, Original Side Rules, Chap. 27.

The provisions of O. 21, R. 86, do not apply where a High Court has made rules regulating its own procedure in the exercise of its original civil jurisdiction which are not inconsistent with the Letters Patent. Rules for the conduct of sales by Registrar are contained in Chap. 27, Calcutta High Court Rules. O. 21, R. 86 does not therefore apply to such sales. *A.I.R.* 1921 *Cal.* 169, *Dist.*[P 324 C 2, P 325 C1]

(b) Calcutta High Court Original Side Rules, Chap. 27 — Conditions in sale by Registrar are same as those in ordinary contract by vendor and purchaser for sale of land—Decree-holder choosing to rescind the contract on failure by purchaser to pay balance is entitled to forfeit deposit—Contract Act, S. 78—Specific Relief Act, S. 18.

The conditions in a Registrar's sale with regard to deposit and resale are conditions which are usually found in an ordinary vendor and purchaser's contract for sale of land and in such case ordinary rules of English Law followed in India should be applied.

If the vendor on default by the purchaser chooses to treat the contract as rescinded, the deposit is forfeited. If he chooses to treat it as subsisting he must give credit for the deposit in case of deficiency in resale.

A decree was passed in a suit for recovery of money in a deed of charge and the property was put to sale by the Registrar. The highest bidder deposited a sum in terms of the conditions of the sale but subsequently failed to pay the balance of the purchase money. The decree-holder made an application for an order that the deposit be forfeited stating that he had decided to rescind the contract.

Held; that the decree-holder having decided to treat the contract as rescinded was entitled to forfeit the deposit. 33 *Mad.* 178; 38 *Mad.* 801 and *English Cases Ref.* [P 326 C 1, 2]

J. C. Hazra—for Plaintiff.

S. N. Banerjee — for Auction-purchaser.

Judgment.—In this case, the petitioner instituted a suit for the recovery of a sum of money due under a deed of charge and obtained a decree, under which the property charged was put up for sale by the Registrar and one Khagendranath Sen was declared the highest bidder and purchaser and paid Rs. 7,500 as deposit under the conditions of sale. Subsequently, he failed to pay the balance of the purchase-money. The petitioner now asks that the deposit of Rs. 7,500 be declared forfeited. He states that he decided to treat the contract as rescinded and does not, therefore, ask for an order against the purchaser to pay any deficiency arising on a resale.

My attention has been drawn to O. 21, R. 86, Civil P. C., which provides that in sales of immovable property by the Court, any deposit made under R. 84 may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to Government and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold. But S. 129 of the Code provides that, notwithstanding anything in the Code, the High Court may make such rules not inconsistent with the Letters Patent to regulate its own procedure in the exercise of its original civil jurisdiction. Reading that rule and the section together, I am of opinion that the rule does not apply when a High Court has made rules regulating its own procedure in the exercise of its original civil jurisdiction which are not inconsistent with the Letters Patent. In coming to this conclusion, I am not in any way disagreeing with the judgment of Mookerjee Ag. C. J., in *Virjiban Dass Moolji* v. *Biseswarlal Hargovind* (1). That case dealt with R. 89 and it was held that that rule applied to sales under a mortgage decree on the original side of the High Court. The rules of the High Court did not provide for the matters contained in R. 89 and, as the Code itself, except for specific sections, applied to all the Courts of British India, obvi-

(1) A. I. R. 1921 Cal. 169=48 Cal. 69.

ously R. 89 applied. The position as to R. 86 is different, because provision has been made in rules, which are not inconsistent with the Letters Patent, for the conduct of sales by the Registrar. Those rules are contained in Chap. 27, of the rules of this Court. Under those rules the mortgagee has the carriage of the proceedings relating to the sale which is regulated by conditions in writing, under which the purchaser must make a deposit of 25 per cent. of the purchase-money with the Registrar at the time of the sale. R. 19 provides that the attorney of the party having the carriage of the proceedings shall be present at the sale, and under R. 23, if the deposit, to which I have referred, is not made, the bid of the purchaser shall be rejected and the property again immediately put up for sale unless the party having the carriage of the proceedings decides that the bid shall be accepted and time allowed to the purchaser to pay the amount payable by him. R. 37 specifically provides that, where a sale is set aside, owing to defect in title or other similar cause, the purchaser shall receive back his deposit. Under R. 38, the purchaser may apply for leave to pay the balance of his purchase-money into Court i. e., to pay the difference between the amount of his deposit and the total amount of his bid.

Under R. 39, any party interested may apply to compel the purchaser to pay his purchase-money and comply with the conditions of sale, and R. 65 provides the form which must be used under this chapter. That form is contained in Appendix J, which sets out the conditions of sale. Condition 5 provides for the deposit of 25 per cent. Condition 8 provides for the payment of the purchase-money after deducting the amount paid as a deposit. Condition 13 provides that, where the purchaser makes default in paying the balance of his purchase-money, an order may be made by a Judge in Chambers for the resale of the property and for payment by the purchaser of the amount of the deficieney, if any, in the price which may be obtained upon such resale and all costs and expenses occasioned by such default. Presumably "deficiency" means the difference between the amount of the original bid and the amount paid on the resale. The condition is silent as to whether in calculating that deficiency credit for the amount of the deposit must be allowed.

Condition 14 provides that where such a resale is directed, if for want of bidders the property cannot be resold, the purchaser at the former sale shall pay the whole amount of his purchase-money into Court and where the property is resold and the price obtained at the resale is less than the purchase-money payable by the original purchaser he shall pay the amouut of the deficiency and the costs occasioned by the default. Thus under the first part of condition 14, in the event of inability to resell the property, the purchaser must pay the whole of the purchase-money without any allowance for the deposit which he has already made, but where there is a resale he shall pay only the amount of the deficiency. It will be seen that under these conditions there is no definite rule providing for forfeiture of the deposit and whether my decision on this matter be right or wrong I think it would be much better if a definite statement were made in the conditions of sale about what is to happen to the deposit in case of default by the original purchaser.

In sales by the Sheriff, which are dealt with in Chap. 25 of the rules, this question about the deposit is specifically provided for. Under R. 7, the second condition is that a deposit of 25 per cent of the amount of the bid must be made. Under Condition 3 the balance of the purchase-money shall be paid within a certain time and, in default of payment within such time, the deposit, after defraying expenses of the sale, may be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may subsequently be sold and where the proceeds of the resale are less than the price bid by such defaulting purchaser the difference shall be leviable from him. It will be noted that the word used in the latter part of this condition is "difference" and not "deficiency," i. e., upon such resale the purchaser is liable for a sum equal to the difference between the price obtained on the resale and the price which he originally bid, thus disregard-

ing altogether any question of the deposit or its forfeiture.

The conditions in a Registrar's sale, with regard to the deposit and resale, are conditions which are usually found in an ordinary vendor and purchaser contract for sale of land and, in my opinion, the ordinary rules of English Law which apply to such contracts must be applied in the present case, and that they have been so applied in India is clear upon reference to the cases mentioned under the heading "Earnest" in the notes to S. 78, Contract Act, in Pollock and Mulla's Text Book (5th Edn., p. 454), and to the notes under "Return of Deposit" (and cases therein mentioned) to S. 18, Specific Relief Act, in the same book at p. 858, where the English and Indian Cases are discussed. Moreover, in the case of *Natesa Aiyar* v. *Appavu Padayachi* (2), it was held, by a majority of the Court, that the law of India on this subject does not differ from the English Law.

Thus, to put it shortly, if the vendor, on default by the purchaser, chooses to treat the contract as rescinded, the deposit is forfeited. If, on the other hand, he chooses to treat the contract as subsisting, in order that he may proceed under the condition as to resale, then, in calculating deficiency which may arise thereunder, he must give credit for the amount of the deposit. A deposit paid under a contract of sale serves two purposes. If the sale is carried out, it goes against the purchase money, but primarily it is a security for the performance of the contract. Often it is expressly provided in the contract that, in the event of default, the deposit shall be forfeited, but such express provision is not, in my opinion, necessary and unless the contract read as a whole shows an intention to exclude forfeiture, the vendor is entitled to retain it as forfeited. The position is the same if the deposit has been paid to a stake-holder or as in this case to the Registrar.

The authorities for this proposition are *Ex parte Barrell*, *In re Parnell*, (3); *Howe* v. *Smith* (4); *Collins* v. *Stimson* (5); *Depree* v. *Bedborough* (6); *Hall* v. *Burnell* (7). If the vendor chooses to treat the contract as rescinded, he cannot, of course, take advantage of the condition which gives him a right to any deficiency arising on a resale, nor can he recover damages for breach of the contract, but he can retain the deposit as forfeited. If subsequently he resells the property, he does so as absolute owner and has no further recourse against the defaulting purchaser. The vendor can treat the contract as rescinded if the purchaser has expressly repudiated it, or if there has been implied repudiation, such as failure to complete on the due date : *Howe* v. *Smith* (4). If the vendor decides not to treat the contract as rescinded but to enforce it by resale and, by having recourse to the defaulting purchaser for any deficiency upon resale, then, in calculating that deficiency, he must give credit for the amount of the deposit : *Ockenden* v. *Henley* (8); *Howe* v. *Smith* (4); *Shuttleworth* v. *Clews* (9); *Vellore Taluk Board* v. *Gopalasami Naidu* (10). That being, in my opinion, the legal position as to the deposit in this case and, in view of the fact that the mortgagee who had the carriage of the proceedings decided to treat the contract as rescinded, he is entitled to forfeit the deposit, and to take it in part payment of the mortgage debt. I make an order against the mortgagor for resale of the mortgaged properties. The mortgagee is entitled to the costs of this application to be paid by the purchaser.

R.M./R.K. *Order accordingly.*

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(2) [1913] 38 Mad. 178=24 M. L. J. 483=19 I. C. 462=(1913) M. W. N. 341.

(3) [1875] 10 Ch. 512=23 W. R. 846=33 L. T. 115.

(4) [1884] 27 Ch. D. 89=53 L. J. Ch. 1055=48 J. P. 773=32 W. R. 802=50 L. T. 573.

(5) [1883] 11 Q. B. D. 142=52 L. J. Q. B. 440=48 L. T. 828.

(6) [1863] 33 L. J. Ch. 134=3 N. R. 187=9 L. T. 533=12 W. R. 191.

(7) [1911] 2 Ch. 551=81 L. J. Ch. 46=55 S. J. 737=105 L. T. 409.

(8) [1858] E. B. & E. 485=4 Jur. (n. s.) 999=27 L. J. Q. B. 361.

(9) [1910] 1 Ch. 176=79 L. J. Ch. 121=101 L. T. 708.

(10) [1914] 38 Mad. 801=26 I. C. 226=17 M. L. T. 84 (F. B.).

* A. I. R. 1930 Calcutta 327

B. B. GHOSE AND S. K. GHOSE, JJ.

Hari Bandhu Pal and *others*—Plaintiffs—Appellants.

v.

Hari Mohan and *others*—Defendants—Respondents.

Appeal No. 389 of 1928, Decided on 12th August 1929 from original order of First Sub-Judge, Dacca, D/- 17th July 1928.

*** (a) Civil P. C., O. 30, R. 10—Person carrying on business in firm's name dying during pendency of suit—His legal representative should be brought on record—Civil P. C., O. 22, R. 6.**

If a person, carrying on business in the name of a firm, dies during the pendency of the suit instituted as against the firm, it is necessary to bring his legal representative on the record to have a proper decree made in the suit. If it is not so done, then the decree is made against a dead man, having a different name, and in that case the decree becomes an absolute nullity. [P 328 C 1]

(b) Civil P. C., O. 30, R. 10—Person carrying on business in firm's name—Suit can be brought in his name,

The position of a person carrying on business in a firm's name is only that of a person who has got an alias, and a person desiring to sue him can sue him in his other name. [P 328 C 1]

(c) Execution — Decree binding — Person carrying on business in firm's-name—Death during pendency of suit—Executing Court can enquire whether decree is nullity.

Where a person, carrying on business in firm's-name, dies during the pendency of a suit framed against the firm's-name, and a decree is passed, the executing Court has jurisdiction to enquire into the question whether the decree is a nullity or not. [P 328 C 2]

*** (d) Civil P. C., O. 21, R. 61—Person trading in firm's name—Property of firm attached before his death—Legal representative cannot contend that property is personal.**

Where a person trading in a firm's-name does not object to the properties being attached before judgment in a suit against the firm, the legal representatives of that person cannot contend that the properties are his personal properties and not of the firm. [P 329 C 1]

Naresh Chandra Sen Gupta, Urukramdas Chuckerbutty and *Bama Prosanna Sen Gupta*—for Appellants.

Sarat Chandra Roy Choudhury and *Bhagirath Chandra Das*—for Respondents.

B. B. Ghose, J.—This is an appeal by the judgment-debtors who claimed to be the representatives of one Dinabandhu Pal against an order of the Subordinate Judge refusing their application to the effect that a decree obtained by the defendant-firm cannot be executed against certain properties which were being sought to be sold in execution of the decree. The decree was obtained by the respondent-firm against a firm named Bonamali-Dinabandhu Pal. Certain properties were attached before judgment and the decree-holders now seek to enforce their decree by the sale of those properties. The firm of Bonamali-Dinabandhu Pal carried on business as dealers in piece goods at Dhamari Bazar in the district of Dacca. The objections raised by the appellants in the Courts below were twofold. The first was that the firm of Bonamali-Dinabandhu Pal was a one-man firm the owner of which was Dinabandhu Pal alone. When the suit was pending in the High Court, Dinabandhu died and a decree was made against the firm Bonamali-Dinabandhu Pal after the death of the sole proprietor of the firm Dinabandhu Pal. The decree made by the High Court was, therefore, void. Although it purported to be a decree against the firm, it was really a decree against Dinabandhu Pal deceased and as no decree could have been passed against the dead man, the decree is void as having been made without substituting his heirs and it cannot, therefore, be executed. The second objection was that the properties against which execution is sought to be levied were not properties belonging to the firm and, therefore, execution cannot proceed as against those. The learned Subordinate Judge has rejected both the objections raised by the appellants before him. He had the plaint in the suit filed in the High Court before him and he held that the decree was against the firm of Bonamali-Dinabandhu Pal. As an executing Court he could not go behind the decree and he relied for that proposition on the case of *Gorachand Haldar* v. *Profulla Kumar Roy* (1). With regard to the second point he was of opinion that under O. 21, R. 50, the plaintiff firm is entitled to execute their decree against the properties which were attached before judgment during the lifetime of Dinabandhu Pal who raised no objection whatsoever to the attachment whether these properties were of the defendant firm or the personal properties of Dinabandhu Pal.

The learned advocate for the appellants contends that the appellants are entitled to succeed in their appeal on

(1) A.I.R. 1925 Cal. 907=53 Cal. 163 (F.B.).

either of the two grounds. The first ground that he urged was that the decree was void as having been passed against a dead man. It is hardly necessary to repeat that the rule allowing a person to sue a firm in the name of the firm is only a short way of describing the defendants. The suit is really brought against the members of the firm. There are certain other provisions in O. 30, Civil P. C., relieving the plaintiffs from taking certain steps with regard to service of notice or the substitution of the heirs of a partner if he happens to die during the pendency of the suit. The relevant rule that we need refer to at present is R. (4), O. 30. That rule, however, applies in terms where the members of a firm consist of two or more persons. The question is what rule should apply if a firm consists of only one person, or in other words, if one person carries on business in the name or style other than his own name. This is covered by R. 10, O. 30 which provides that

"any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm-name; and so far as the nature of the case will permit, all rules under this order shall apply."

The question is what would happen if a person carrying on business in the name of a firm dies during the pendency of the suit. It cannot be disputed that if a man dies before any suit is instituted against him, the suit would be infructuous as having been brought against the dead man who used to carry on business under an alias. As I understand it, the position of a person carrying on business in a firm-name is only that of a person who has got an alias and a plaintiff desiring to sue him can sue him in his other name. If during the continuance of the suit that person dies, it is necessary, in my opinion, to bring his legal representatives on the record to have a proper decree made in the suit. If the plaintiff fails to do so, then the decree is made against a dead man, having a different name from his own proper name, and in that case the decree would be an absolute nullity. The point raised in this case is free from authority and Dr. Sen Gupta says that after his research he has not been able to find any case actually governing the position. It appears, however, that there is a cognate rule under the Rules of the Supreme Court in England which is O. 48-A, R. 11. No decided case has been cited in the last edition of the Annual Practice of 1929 on the question as to what would happen on the death of a person carrying on business in a firm-name. The learned Editors give the following note at p. 862:

"After the death of a person carrying on business in a name other than his own, no action can be brought against the firm e. g., a firm's debt eo nomine. Proceedings would have to be instituted against the executors."

This confirms me in the view already indicated that the suit would be really against the person not in his proper name but in the assumed name or an alias.

The learned advocate for the respondent, Mr. Roy Choudhury refers to R. (4), O. 30 and .contends that where on the face of it the decree is against a firm and it was not brought to the notice of the High Court that it was a one man firm then R. (4) would apply and the decree should be considered as a valid decree; and he further contends, as the learned Subordinate Judge appears to have held, that the matter whether the decree is a valid decree or a void decree, having been passed against a dead man, cannot be enquired into by the executing Court under the authority of the Full Bench case referred to by the Subordinate Judge. In my judgment, the Full Bench case lays down the exact proposition that where the decree is a nullity on the ground that the Court had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person to make the decree, the executing Court is entitled to refuse to execute the decree on the ground that it was made without jurisdiction. In this case if the person against whom the decree was made was already dead at the time of the decree it can hardly be said that the Court had any jurisdiction in respect of the defendant's person. In that case the decree would undoubtedly be a decree made without jurisdiction and would be a nullity and, in my opinion, the executing Court can enquire into the question whether the decree would be a nullity or not. In this case, the appellant alleged in the Court below that Dinabandhu had died during the pendency of the suit in the,

High Court and that he was the sole proprietor of the firm. The respondents decree-holders, on the other hand, alleged that the firm was not a one man firm but that there were two partners, Dinabandhu and his brother Jagabandhu Pal. If the fact is established that the firm Bonamali-Dinabandhu Pal consisted of two or more members, then it cannot be disputed that O. 30, R. 4, will come to the assistance of the plaintiff firm, assuming that Dinabandhu died during the pendency of the suit before the decree. This question, however, has not been investigated by the learned Subordinate Judge. Before the matter can finally be decided, this question should be gone into and as the respondent did not admit that Dinabandhu actually died before the decree was made, that question will also be enquired into.

The next contention that is raised on behalf of the appellants that these properties were the personal properties of Dinabandhu and not the assets of the firm really contradicts the first point that has been raised by Dr. Sen Gupta, because if it is a one man firm, the creditors may proceed against the properties whether it was personal property or the firm's property.

There is, however, another point on which the appellants must fail with regard to this claim of theirs. The properties against which the decree-holders want to proceed in execution were attached before judgment when Dinabandhu Pal was admittedly alive. He never raised any objection that the property could not be attached for the debt of the firm. What Dr. Sen Gupta seems to urge was that there were documents which showed that these properties were purchased by some ancestor of Dinabandhu and, therefore, were not the assets of the firm. Even assuming that the properties were so purchased, there can hardly be any question that Dinabandhu treated them as the assets of the firm and that the properties became the assets of the firm by reason of the fact that he did not raise any objection to these properties being liable for the debts of the plaintiff firm. The appellants who appeared as legal representatives of Dinabandhu can hardly raise this question against the decree-holders proceeding in execution against these properties.

It is necessary to mention one other point. It was argued by the respondent that the present question does not fall within S. 47 of the Code. His contention was that the appellants did not come as legal representatives of the firm of Bonamali-Dinabandhu Pal but that they came as legal representatives of Dinabandhu Pal alone. That point is well answered by the appellants by saying that although the suit was in the firm name of Bonamali-Dinabandhu Pal, it was really against Dinabandhu Pal by his second name and, as a matter of fact, they came before the Court as legal representatives of Dinabandhu Pal and, therefore, they could raise this question under S. 47.

The result is that the order of the Subordinate Judge is set aside and the case sent back to him for taking evidence on both sides on the question as to whether the firm of Bonamali-Dinabandhu Pal had two or more partners at the time when the suit of the plaintiff firm was brought against it and secondly, whether Dinabandhu Pal died after the suit and before the decree made by the High Court. The lower Court will then proceed with the matter as indicated after coming to findings on the points stated above.

Costs in this appeal will abide the result the hearing fee being assessed at five gold mohurs.

S. K. Ghose, J.—I agree.

V.S./R.K. *Case remanded.*

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* A. I. R. 1930 Calcutta 329

B. B. GHOSE AND S. K. GHOSE, JJ.

Akshoy Kumar Roy Choudhry—Decree-holder—Appellant.

v.

Abdul Kader Khan and *another*—Judgment-debtors—Respondents.

Appeal No. 128 of 1929, Decided on 6th August 1929, from appellate order of Dist. Judge, Khulna, D/- 15th November 1928.

*** Limitation Act, Art. 181—Application for reviving execution proceeding is governed by Art. 181 unless decree-holder is prevented from taking action in pursuance of his rights.**

An application for reviving execution proceedings is governed by Art. 181. The general principle of suspension of limitation can be applied in cases where a decree-holder is pre-

vented under circumstances from taking action in pursuance of his rights. [P 332 C 1; P 331 C2]

An application for execution was made by a decree-holder on 9th December 1921 and the properties of the judgment-debtor were sold in execution of the decree on 23rd February 1922 when a third person became the auction-purchaser. The judgment-debtor having objected the sale was set aside on 5th July 1923. The auction-purchaser appealed against the order which was confirmed on appeal on 27th March 1924. The decree-holder filed a fresh application for execution of the decree on 15th December 1926.

Held : that the time for reviving the execution proceedings accrued on 5th July 1923 when the execution proceedings were at an end, the sale being set aside. The present application being made on 15th December 1926 more than three years after the right to apply accrued, was barred. The decree-holder could not take advantage of the appeal by the auction-purchaser and count the period from the date of order of appellate Court. The appeal by a third party could not prevent the decree-holder from making a fresh application for execution of his decree: 12 *M.I.A.* 244 (*P. C.*); *A. I. R.* 1921 *P. C.* 31; 38 *All.* 21, *Ref.*; 27 *All.* 334 (*P. C.*) and *A. I. R.* 1921 *Cal.* 594, *Dist.*[P 332 C 1, 2]

Sarat Chandra Roy Chowdhury, *Rajendra Bhusan Baksi* and *Nirode Bandhu Roy*—for Appellant.

Hemendra Chandra Sen—for Respondents.

B. B. Ghose, J.—This is an appeal by the decree-holder against an order of the learned District Judge of Khulna dismissing an application for execution preferred by him and reversing the order of the Munsiff of Bagerhat. The facts of the case are rather complicated and they have been stated elaborately in the judgment of the learned Judge. There were various proceedings between the decree-holder and the judgment-debtor which I do not think is necessary to relate for the purpose of this appeal, as in my judgment this appeal may be disposed of on one of the grounds dealt with by the learned District Judge. The facts relevant for understanding that point will only be stated by me. A consent decree was obtained by the appellant as against the respondent on 8th March 1915. The decretal amount was payable in 12 instalments and there was the usual provision that in default of payment of one instalment the whole amount would be due. The judgment-debtor made payments till 1920, the last payment being on 7th May 1920. It is not necessary to relate for the purposes of this judgment the intermediate proceedings which took place between the parties as regards the decree being made final as the original decree was a decree on a mortgage. On 9th December 1921 an application for execution was made by the appellant. The properties belonging to the judgment-debtor were sold on 23rd February 1922 and a third person became the auction-purchaser at the sale. The judgment-debtor applied for setting aside the sale and it was set aside on 5th July 1923. The auction-purchaser preferred an appeal against that order which was confirmed by the appellate Court on 29th March 1924. The present application out of which this appeal arises was made for execution by the appellant on 15h December 1926. The learned Judge has held that this application was barred on these facts. It is only necessary to state that the learned District Judge held that the application was unsustainable on other points; but it is not necessary for me to state them now as, in my view, the case can be disposed of on this short point.

On behalf of the appellant Mr. Roy Chowdhury has argued that the learned Judge was in error in holding that the application was barred by limitation and in support of his contention he relies mainly upon two cases which are relevant to the point, the first of them being the case of *Sheikh Kamaruddin Ahmad* v. *Jawahir Lal* (1). I do not think that upon the facts of that case the principle laid down there can be said to apply to the present case. What happened in that case was this: The decree-holder applied for execution of his decree and notwithstanding the objections by the judgment-debtor, an order was made on 18th December 1888, that the execution should proceed. Certain orders were made as regards the execution which, according to the procedure in the North-Western Provinces, could be carried on only by the Collector. While those execution proceedings were pending and at an early stage of their progress, on 15th February 1889 an appeal was brought in the High Court against the original order of 18th December 1888 under which the execution proceeded. The High Court on 7th January 1890 allowed that appeal on grounds which is unnecessary to relate. On a further appeal to Her late Majesty in Council that de-

(1) [1905] 27 All. 334=32 I.A. 102=8 Sar. 810 (P.C.).

cision of the High Court was reversed, the judgment of the Board being delivered on 24th November 1894, and embodied in an order in Council of 12th December 1894. Then an application was made by the decree-holder to proceed with the execution of his decree on 23rd November 1897, and the application asked by its terms that the execution case instituted in August 1888 which was sent to the Collector's Court on 23rd December 1888 may be revived. The objection of the judgment-debtor was that the application was barred by limitation. The High Court held that it was not a fresh application but one praying the Court to revive the suspended order and permit it to be pushed through to completion. The judgment-debtor appealed to the Privy Council and their Lordships held that the application was not barred. Their Lordships observed as follows:

"If the appeal to the High Court against those proceedings and the judgment of that Court, and the appeal to Her Majesty in Council rendered necessary by that judgment, had not intervened to interrupt the course of the execution, there was nothing in the terms of the order to preclude the decree-holder from coming again to the Court, satisfying the conditions indicated in the order, and obtaining the transmission of the case to the Collector's Court."

What their Lordships said referred to the fact that on appeal by the judgment-debtor the High Court held that the decree could not be executed. When that order stood, the decree-holder could take no steps in execution and it was only by an appeal to the Privy Council which reversed the decision of the High Court that the decree-holder was able to proceed with the execution and, therefore, under these circumstances, their Lordships observed that these orders had intervened to interrupt the course of the execution. In the present case, there is nothing to interrupt the course of the execution after the sale was set aside on 5th July 1923. It is argued by the learned advocate that because the auction-purchaser appealed against the order of 5th July, the whole thing was let loose and the execution proceedings were continuing and, therefore, the decree-holder was prevented from making the application. I do not think that that argument is sound. R. 5, O. 41, Civil P. C., provides that an appeal shall not operate as a stay of proceedings and an appeal by a third party cannot, in my opinion, prevent the decree-holder from making a fresh application for execution of his decree. The learned advocate next referred to the case of *Jira Bibi* v. *Majiruddin* (2). There, a sale was held on the application of the decree-holder on 3rd May 1909 when the decree-holder himself became the purchaser. The usual application by the judgment-debtor for setting aside the sale was made and the sale was set aside on 14th February 1911. The learned Judges said that the position then was that no proceedings in execution could be taken so long as the sale was in operation from 3rd May 1909 to 14th February 1911. There cannot be any question that when the sale was in operation in execution of the decree of the decree-holder, he cannot prefer a fresh application for execution of his decree.

It is only when the sale is set aside and nothing to prevent the execution of the decree that the decree-holder can take fresh proceedings. In that case the learned Judges cited a large number of cases in support of the proposition they laid down and there cannot be any question with regard to the correctness of the proposition. The whole difficulty is with regard to the contention that when there is an appeal against an order setting aside the sale by an auction-purchaser, the decree-holder should be considered to be prevented from making a fresh application for execution of his decree. There is no provision in the Limitation Act which would extend the period of limitation in such a case. The general principles of suspension of limitation might be applied in cases where a plaintiff or a decree-holder is prevented under the circumstances from taking action in pursuance of his rights. The principal case as regards suspension of limitation or rather of the cause of action arising after certain previous proceedings had terminated is that of *Ranee Surnomoyee* v. *Shooshee Mokhee Burmania* (3). A case with regard to the right of a decree-holder to apply for execution of the decree accruing several years after the decree was made will be found in *Rameshwar Singh* v. *Home-*

(2) A. I. R. 1921 Cal. 594.
(3) [1867-69] 12 M. I. A. 244=11 W. R. 5=2 Suther 173=2 Sar. 424 (P. C.).

shvar Singh (4). But those principles cannot, in my opinion, be applied in the present case. It is well known and it is conceded that an application for reviving execution proceedings is governed by Art. 181, Lim. Act and the time from which the period begins to run is when the right to apply accrues and it it settled that the time runs from the date the right to apply first accrues. As an illustration the case of *Madho Ram* v. *Nihal Singh* (5) may be referred to. That was a case in which a mortgagee applied for making a final decree more than three years after the preliminary decree was passed and more than three years after the period allowed to the judgment-debtor to pay the amount of the decree. The right to apply first accrued after the expiry of what is called the "period of grace." But the mortgagor preferred an appeal against the preliminary decree and on appeal and a second appeal the preliminary decree was sustained by both the Courts. After the decision of the second appeal the mortgagee applied for making a final decree. The learned Judges held that the application which was governed by Art. 181, Lim. Act, was barred by limitation. They observed that limitation should be computed from the time when the right to apply first accrued. It should be noted that the time for payment of the money by the judgment-debtor was not extended by the appellate Court. Under these circumstances, it seems to me that the learned Judge was quite right in holding that the time for reviving the execution proceedings which terminated by the sale being set aside on 5th July 1923, accrued on that date and as the present application was made on 15th December 1926, it was barred being made more than three years after the right to apply accrued. The decree-holder cannot take advantage of the appeal by the auction-purchaser and count the period from the date of the order of the appellate Court affirming the order of the trial Court on 29th March 1923.

It is, however, contended on behalf of the appellant that it would be extremely inconvenient to allow the decree-holder to present a fresh application for selling the very mortgaged property which had been sold in the previous execution proceedings during the pendency of the appeal by the auction-purchaser. He argues that if on appeal by the auction-purchaser the order of the trial Court had been set aside, various complications would arise if the decree-holder in the meantime was allowed to sell the property over again and it was purchased by another auction-purchaser. It is true that complications would arise in such a case, because if the order of the trial Court was set aside on appeal, the first auction-purchaser would get the property from the date of his purchase and the second auction-purchaser would get nothing. But that is a matter which I think we need not take into consideration in deciding the question whether the application of the decree-holder was barred by limitation or not. We cannot extend the rule of suspension of limitation by referring to inconveniences which might occur if the decree-holder was permitted to present a fresh application. If the decree-holder had presented an application within the period of limitation from 5th July 1923, the Court might on the application of any interested party stay proceedings. That might have saved any complications which might possibly arise by there being two concurrent proceedings. In this case I do not propose to say anything with regard to the question as to what would have happened if the decree-holder had appealed against the order setting aside the sale on 5th July 1923. In my opinion, there is no reasonable doubt that the decree-holder cannot take advantage of an appeal preferred by the auction-purchaser against that order. The appeal, therefore, fails and must stand dismissed with costs. Hearing fee, three gold mohurs.

S. K. Ghose, J.—I agree.

R.M./R.K. *Appeal dismissed.*

(4) A. I. R. 1921 P. C. 31=48 I. A. 17 (P. C.).
(5) [1916] 38 All. 21 = 30 I. C. 494 = 13 A. L. J. 985.

A. I. R. 1930 Calcutta 332

LORT-WILLIAMS, J.

Shamsul Huq—Plaintiff.

v.

Secy. of State—Defendant.

Small Cause Court Suit No. 21621 of 1928, Decided on 16th January 1930.

(a) Tort— Conversion — Railway refusing to make delivery of goods to which con-

signee is lawfully entitled is guilty of detention and conversion of goods—Notice to Commercial Chief Manager is sufficient notice where there is no official as "Manager"—S. 77 refers to destruction or deterioration of goods and is applicable to cases of conversion—Railways Act, S. 77.

P despatched to himself as consignee some bundles of goat skin from *C* to *H*. Later on he went to *H* and having paid the freight demanded the goods. The railway officers refused to hand them over on the ground that one of the bundles appeared to be different from the one despatched and was 30 seers short in weight. Thereupon *P's* pleader wrote to the Commercial Chief Manager at *H* setting out the facts, drawing attention to the falling market and to the fact that the skins were getting damaged and worthless in the goods office and demanding price. The Manager replied that the consignment had been handed over to Government Railway Police asking *P* to communicate with the Sub-Divisional Officer.

Held: that the railway authorities not only broke their contract of carriage and committed the tort of detinue but were guilty of conversion of *P's* goods. The orders of the police were no excuse for the torts committed. [P 334 C 1]

(b) Railways Act, S. 77—In railways administered by Government, notice to Chief Commercial Manager is sufficient.

In the case of a railway administered by Government there being no such official called as the Manager, a notice sent to the Chief Commercial Manager is sufficient and fulfils the requirements of S. 77. [P 334 C 2]

(c) Railways Act, S. 77—S. 77 is inapplicable to conversion of goods.

Section 77 refers only to loss, destruction or deterioration of goods and has nothing to do with detention or conversion of goods: *A. I. R.* 1923 *Cal.* 397, *Rel. on.* [P 334 C 2]

(d) Railways Act, S. 77—Object of S. 77 is to prevent stale and dishonest claims—It is intended as weapon of defence against fraud and not as means to enable railway authorities to deprive customer of just dues.

The object of S. 77 is to prevent stale and possibly dishonest claims for loss, when owing to delay it might be impossible to trace the transaction or check the allegations made, and when the evidence necessary to rebut a dishonest claim might no longer be available. It is intended as a weapon of defence against fraud not as a means to enable the railway authorities to deprive their customers of their just dues. [P 335 C 1]

J. C. Hazra—for Plaintiff.

Westmacott—for Defendant.

Judgment.—On the second day of July 1927 the petitioner despatched to himself as consignee three bundles of goat skins from Chatra railway station to Howrah over the E. I. Railway. On 12th July he went to Howrah goods shed, paid the railway freight and demanded the goods. The railway officials refused to hand them over on the ground that one of the bundles appeared to be different from the one despatched, and was 30 seers short in weight. The petitioner pressed them for delivery under short receipt to avoid loss and depreciation in market value, but this was refused.

On 26th September the petitioner's pleader Satya wrote to the Commercial Chief Manager, Howrah, setting out the above facts, drawing attention to the falling market and to the fact that the skins were getting damaged and worthless in the goods office, and demanding the price.

To this letter the Chief Commercial Manager replied sending a copy of his office letter dated 2nd August which had been written to the petitioner's pleader Provash Chandra Biswas in which it was stated that the consignment had been made over to the Government Railway Police, Howrah, under orders of the Sub-Divisional Officer, Rampurhat, and asking the petitioner to communiciate with the Sub-Divisional Officer.

On 7th May 1928 the petitioner's pleader S. R. Banerjee wrote a letter to the Agent, E. I. Railway, Calcutta, again setting out the facts, saying further that it was no part of his client's business to communicate with the Sub-Divisional Officer and again demanding the price.

To which he received a reply from the Manager stating that the consignment had been made over to the Government Railway Police, Howrah, under orders of the Sub-Divisional Officer, Rampurhat, and since forwarded to Rampurhat under his orders where he could prove his claim to the goods and take delivery, further stating that the railway could admit no liability inasmuch as they merely carried out the orders of the Sub-Divisional Officer.

Subsequently the petitioner received a letter dated 22nd August 1928 saying that the consignment would be available for delivery at Howrah goods office within a day or two.

The petitioner went to take delivery but found that the skins were so deteriorated that they were only fit to be thrown away, and very naturally he declined to take delivery.

On 28th November 1928 he filed a suit in the Small Cause Court against the Secretary of State claiming the price of the goods as compensation for

the refusal to deliver. The defendant pleaded absence of notice under S. 77, Railways Act and on 28th May 1929 the Judge declined to take evidence and summarily dismissed the suit on this plea.

On 4th June 1929 the petitioner applied for a new trial and this application was dismissed by the Full Bench on 18th July. Thereupon the petitioner moved this Court under S. 115, Civil P. C., to set aside the orders of 28th May and 18th July and ordered the suit to be reheard on the merits.

The defendant did not appear to show cause, and the rule was made absolute. Subsequently the defendant asked for a review which was granted.

I confess that I do not know whether I am the most astonished by the course taken by the railway authorities or by those who advise the Secretary of State, or by the learned Judges of the Small Cause Court. The railway authorities not only broke their contract of carriage and committed the tort of detinue, but were guilty of conversion of the petitioner's goods.

The goods belonged to the petitioner and when he had paid the freight, and demanded them he was entitled to have them handed over to him immediately. The railway authorities had no right either to hand them over to the police or to refuse to give them to the petitioner. The orders of the police are no excuse for the torts which they have committed.

The fact that some of the goods were missing made no difference. The railway authorities should have handed over the goods to the petitioner on short receipt, as requested and left him to take whatever action he thought fit with regard to the missing skins.

Every step taken by the railway officials was as improper and as illegal as it could be. But far from being apologetic for their irregular and high handed behaviour, they have sought to escape from their just liabilities by raising the plea that they have not received the notice of claim, required by S. 77, Railways Act and this plea has been accepted by a Judge, and a Full Bench of the Small Cause Court.

In the first place the notice given was ample to fulfil the requirements of the section. The letter of the 26th September 1927 was addressed to the Commercial Chief Manager, Howrah. The section requires the claim to be preferred in writing to the railway administration. Railway administration is defined by the Act to mean the Manager of the railway in the case of a railway administered by the Government such as the E. I. Railway and S. 140 provides that any notice required to be served on a railway administration may be served in the case of a railway administered by the Government, on the Manager, and in the case of a railway administered by a railway company on the Agent. The word "may" has been held to mean "must" but with these decisions I do not agree.

On the E. I. Railway there is not any official called the "Manager." The Chief Official is called the "Agent." But there is an official called the Chief Commercial Manager.

I have no doubt, even upon the facts now before me that in the circumstances of this case the petitioner's was a sufficient notice within the meaning of the Act. But the Small Cause Court refused to take any evidence on that point or on any other. It may well be that the Chief Commercial Manager is the person appointed by the E. I. Railway to receive notice of claims, or that the notice was communicated by him to the Agent. And it may well be argued that where in the case of a railway administered by Government, there does not happen to be an official called the "Manager" a notice sent to the Chief Commercial Manager will be sufficient.

Apart from these considerations, I am of opinion that there is clear evidence in the letters to which I have referred, of waiver of any such requirement by the railway administration. And if this were not enough the railway administration by such letters led the petitioner to believe that no further or other notice was necessary or required. These matters have not even been considered by the Judges of the Small Cause Court.

However, all these considerations are really irrelevent, because, in my opinion no notice was required and S. 77 has no application to the facts of this case.

The section refers only to loss, destruction, or deterioration of goods. It has nothing whatever to do with either

detention or conversion, of which the petitioner complains, and for which he claims compensation. This distinction has been appreciated clearly by Richardson and Ghose, JJ., in *Assam Bengal Ry. Co. Ltd.* v. *Radhica Mohan Nath* (1). The main damage herein arises owing to the detention and conversion of the petitioner's goods. The bulk of the goods were not lost, they were lying in Howrah goods shed when the petitioner demanded them.

It is true that the petitioner may have a claim also for the loss of part of the consignment for which notice would be necessary but that is not his chief complaint, and even so, as I have shown already, such notice has been given.

I repeat that I am surprised at the attitude adopted by those who have advised the Secretary of State that great disservice is done to the Government by involving them in conduct such as has been disclosed in this case.

It is admitted that the petitioner has a just claim. He delivered his goods to the railway administration for carriage. He paid the freight. It is not suggested that he has been at fault in any way. His goods have been rendered worthless owing to the conduct of the railway officials acting as they suggest, under the orders of the police. The object of S. 77 is to prevent stale and possibly dishonest claims for loss, when owing to delay it might be impossible to trace the transaction or check the allegations made, and when the evidence necessary to rebut a dishonest claim might no longer be available. It is intended as a weapon of defence against fraud not as a means to enable the railway authorities to deprive their customers of their just dues.

Owing to what the railway administration and the Government must now realise, was a series of blunders, and illegal acts on the part of their own officers, the petitioner has lost both his goods, and his money. The loss is admitted.

In these circumstances I should have thought that the most urgent desire of those in authority would have been to make amends and not to shelter themselves behind technical pleas in their endeavour to escape from liability.

(1) A. I. R. 1923 Cal. 397.

The order I make is that the orders of the Small Cause Court be set aside and that the suit be reheard on the merits and that the costs of this application be paid by the defendant to the plaintiff.

R.M./R.K. *Order accordingly.*

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* A. I. R. 1930 Calcutta 335

B. B. GHOSE AND PANTON, JJ.

Mangtulal Bagaria—Appellant.

v.

Upendra Mohan Pal Chaudhuri—Respondent.

Appeal No. 369 of 1928, Decided on 26th February 1929, against original decree of Sub-Judge, 24-Parganas, D/- 12th May 1928.

(a) Transfer of Property Act, S. 101—Mortgagee purchasing equity of redemption even by private treaty does not effect merger if it is against his interest.

It is not a sound proposition that, because the mortgagee purchased the equity of redemption, it may be by what amounts to a private treaty, it necessarily causes a merger of the mortgagee's interest. The mortgagee is entitled to assert his right as such mortgagee against a lessee of the properties and may claim that his mortgage interest has been kept alive notwithstanding his purchase of the equity of redemption, as this was for his benefit : (*Cases Referred*). [P 337 C 2]

*** (b) Transfer of Property Act, S. 58(e)—Lease by mortgagor under English mortgage not in ordinary course of management does not bind mortgagee—Transfer of Property Act, S. 66.**

Whatever may be the rights of a mortgagor under a simple mortgage to grant leases in the usual course of management, there is considerable difficulty on the part of a mortgagor, who has created an English mortgage, to grant a lease for twenty years, renewable afterwards which is not in the ordinary course of management. Such a mortgagor can only act as agent on behalf of the mortgagee and without the concurrence of the mortgagee such a lease cannot be binding on the mortgagee. [P 338 C2]

Susil C. Sen Sanatkumar Chatterji and *Panchanan Ghoshal*—for Appellant.

Surendramadhab Mallik, Sanatkumar Pal and *Prabodhchandra Mallik* — for Respondent.

B. B. Ghose, J.—This is an appeal on behalf of the defendant against the decree of the Subordinate Judge, 24-Parganas, dated 12th May 1928. The facts giving rise to the suit, out of which this appeal arises, may be shortly stated thus : One Ashokenath Mitra mortgaged certain properties to Mrs. Janaki Agnes Penelope Majumdar by an indenture dated 18th August 1916. The mortgage was in the form of an English

mortgage. After that date and before 1919, which date would be relevant with regard to the appellant's title, the mortgagor executed several other mortgages with respect to those very properties which were mortgaged to Mrs. Majumdar. The mortgagor, however, was allowed to remain in possession of the mortgaged properties. On 9th August 1918, the plaintiff obtained an assignment from Mrs. Majumdar of her first mortgage. Subsequent to that date, the plaintiff advanced further sums to the mortgagor and took two other mortgages from him. Nothing, however, depends upon that fact. One Nalinimohan Das Gupta obtained an assignment of some of the mesne mortgages from the mortgagees by a document dated 25th January 1920, and he brought a suit on the original side of this Court on his mortgage in 1921. In that suit, all the other mortgagees, including the first mortgagee, were made parties and, by a consent decree, it was directed that all the properties would be sold and the mortgagees paid off out of the sale proceeds. The sums due to each of the mortgagees were mentioned in the consent decree. Directions were given for the sale of the properties by the Registrar, and it was directed that the properties would be sold free from all incumbrances in favour of the mortgagees, who were parties to the suit. The property, in question, in this suit is No. 10, Elgin Road, and the direction with regard to that property in the consent decree was that the sale proceeds of that property should be first applied in payment of the amount due to the plaintiff under the mortgage of Mrs. Majumdar and certain other directions were given which it is not necessary here to mention.

Before that suit was brought, the mortgagor, Ashoke, granted a lease of flats Nos. 4 to 9 in the premises No. 10, Elgin Road, on 3rd April 1919, in favour of a gentleman named Rajdeo at a rent of Rs. 400 per month for 20 years with an option of renewal for 5 years after the expiry of the term. Rajdeo died before the present suit was brought and his interest is represented by the present appellant, who has been appointed administrator of the estate left by him. Defendants 1, 2 and 3 are his heirs. Neither Rajdeo nor any person representing Rajdeo's estate was a party to the consent decree or in the suit of 1921. This consent decree was dated 6th March, 1922. In execution of that decree, the property No. 10, Elgin Road, was sold and purchased by the plaintiff. The plaintiff brings this suit with several prayers, the most important of which is that the defendants representing Rajdeo's estate should be required to redeem him with regard to his interest under the assignment of the mortgage of Mrs. Majumdar dated 18th August, 1916 : and, on their failure to do so, the property might be sold free from the lease hold interest. There were certain other prayers which are unnecessary for me now to state, because the decree as made by the Subordinate Judge has not been questioned by any cross-objection on the part of the plaintiff. The defendant, by which expression I mean the representative-in-interest of Rajdeo, raised several questions in defence. The other defendants were the several other mortgagees or their representatives, who have no concern with the matter now in issue. The principal contentions of the parties in the Court below are covered by issues 5 to 8, and the questions raised before us fall within those issues.

The Subordinate Judge has made a decree to this effect, that the lease of 3rd April 1919, in favour of Rajdeo is operative against the prior mortgagees as a lease from month to month and that defendants 1 to 3 and defendant 21, who is the appellant before us, have the right to redeem the mortgage of the plaintiff, and they were allowed 30 days for redeeming the plaintiff ; in default, the property was to be sold free of the lease and the sale proceeds applied as prayed for by the plaintiff. In appeal on behalf of defendant 21, who, as I have already stated, now represents the estate of Rajdeo, several points have been taken. The first point that has been argued is that the mortgage decree passed on consent, in execution of which the plaintiff purchased the property, cannot be considered as a mortgage decree which would entitle the plaintiff to enforce all the rights of a purchaser under a mortgage decree. In other words, the purchase by the plaintiff amounts to a purchase by private treaty. That being so, as the

plaintiff, who was the first mortgagee, has purchased the equity of redemption with notice of the lease in favour of Rajdeo, the lease is binding upon him and he cannot seek to enforce the mortgage as against Rajdeo or his representative, as the mortgage has become extinguished, the two interests having been united in the same person. In support of this contention the learned advocate on behalf of the defendant relies on the case of *Smith* v. *Phillips* (1). In that case, the Master of the Rolls held that the mortgagee, who was the defendant in the case, by becoming the purchaser of the equity of redemption, had united the interests of the equitable mortgage and the equity of redemption and these two interests having been united could not be separated and, therefore, the plaintiff who had an agreement for lease from the mortgagor was entitled to have his equitable charge satisfied out of the united interests which constituted the equity of redemption. In other words, that case proceeded upon the principle enunciated in *Toulmin* v. *Steere* (2). It is hardly necessary to point out that the principle laid down in *Toulmin* v. *Steere* (2) has never been followed in this country and it has been adversely commented on in several cases, even in the House of Lords. Although in the latest case of *Whiteley* v. *Delaney* (3), the House of Lords refrained from expressing any opinion as to whether *Toulmin* v. *Steere* (2) was correctly decided, it being unnecessary to do so, as on the facts it was found that there was no merger the observations of Parker, J., as he then was, in the trial Court, reported in *Manks* v. *Whiteley* (4), are instructive with regard to the question. It is, however, unnecessary to pursue the matter further, as in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (5), their Lordships of the Judicial Committee observed that the doctrine of *Toulmin* v. *Steere* (2) is not applicable to Indian transactions, except as the law of justice, equity and good conscience, and their Lordships did not apply the doctrine to that case : see also the cases of *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi* (6) and *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh* (7). A mortgage is not necessarily destroyed where the incumbrancer buys the property which is subject to his charge, though he takes no distinct steps to keep it alive. The cases of *Liquidation Estates Purchase Co. Ltd.* v. *Willoughby* (8) and *Crosbie-Hill* v. *Sayer* (9) may be referred to in support of this proposition. It is not, therefore, a sound proposition that, because the mortgagee purchased the equity of redemption, it may be by what amounts to a private treaty, it necessarily causes a merger of the mortgagee's interest. The plaintiff as mortgagee, therefore, is entitled to assert his right as such mortgagee against the defendant and may claim that his mortgage interest has been kept alive notwithstanding his purchase of the equity of redemption, as this was for his benefit : see S. 101, T. P. Act. The only thing that the defendant may say is that he is not bound by any of the terms of the consent decree, that is, as regards the validity of the mortgage or as regards the amount due under the mortgage and so forth. Those matters, however, are not in dispute. Not being a party to the suit, his right of redemption is kept alive and the lower Court has made a decree allowing him to redeem the mortgage. The appellant's contention, therefore, that the plaintiff has no right to enforce the mortgage in this suit must fail.

The next point urged is that, by reason of the conditions of sale, the plaintiff is bound by the lease. The conditions of sale with regard to this property are set forth in para. 21, Ex. B. The learned Subordinate Judge seems to me to be quite right in his view that the conditions only give notice to any person who would purchase premises No. 10, Elgin Road, about the existence of the tenancy and that it was for a term of 20 years with a further covenant for renewal for five years. The learned advocate

(1) [1837] 1 Keen 694=6 L. J. Ch. 253.
(2) [1817] 3 Mer. 210=17 R. R. 67.
(3) [1914] A. C. 132 = 83 L. J. Ch. 349 = 58 S. J. 218=110 L. T. 434.
(4) [1911] 2 Ch. 448.
(5) [1884] 10 Cal. 1035 = 11 I. A. 126 = 4 Sar. 543 (P.C.).
(6) [1910] 29 Cal. 154=29 I. A. 9=6 C. W. N. 209 (P.C.).
(7) [1912] 39 Cal. 527=14 I.C. 496=39 I.A. 68 (P.C.).
(8) [1898] A.C. 321=67 L.J. Ch. 251=14 T.L. R. 295=78 L.T. 329.
(9) [1908] 1 Ch. 866=77 L.J. Ch. 466=24 T. L.R. 442=99 L.T. 267.

for the appellant relies upon the closing sentence of that clause which runs thus (that the purchaser)

"shall not be entitled to raise any objection on that score nor will be entitled to ask for vacant possession."

It is contended that the person purchasing the property will be bound by the terms of the lease and, as the plaintiff purchased the property, he is bound by all the provisions of the lease. There are two answers to this contention. The first is, as stated by the learned Subordinate Judge, that the purchaser would not be entitled either to repudiate the sale, because he does not get vacant possession, nor would he be entitled to ask for any relief against any party to the suit, for not being able to get vacant possession of the property purchased. The next answer is that the plaintiff, as purchaser of the equity of redemption, may not repudiate the lease created by the mortgagor ; but, as the mortgagee's interest in the plaintiff is alive, he may, as such mortgagee, enforce his mortgage, as against the lessee and that is the relief that has been given to him by the lower Court. Nothing can be said against that right of the plaintiff as mortgagee by reason of the conditions of sale.

Another point was urged, which does not appear to have been taken in the Court below, either in the written statement or in the issues, that, by asking for rent from the lessee, the mortgagee has affirmed the lease and is, therefore, precluded from repudiating it. This demand is contained in a letter dated 24th November 1925, addressed to the Official Receiver, who was then acting as the manager of the estate left by Rajdeo. A copy of the plaint in this suit was annexed to that letter and the manager was asked to surrender the lease and give possession of the premises and to pay rent to the purchaser from the date of his purchase. It is contended on behalf of the respondents that this letter was addressed with the object of bringing about a compromise. If action had been taken according to that letter, the suit would not have been brought. It is not a demand for rent acknowledging the validity of the lease. That seems to be so, because, although no rent was paid for more than a year after the purchase of the equity of redemption by the plaintiff, there was no previous demand for rent. But the decree that has been made by the Court below affirms the existence of the lease, although it has been stated that it is operative only as a lease from month to month. The question as regards the nature of the lease would have been material, only if there had been no order for sale of the property in default of redemption but a decree had been made for possession if the defendant failed to redeem.

It seems to me that the question as regards the validity of the lease, according to the terms on which it was granted, is only academical, having regard to the form of the decree made by the lower Court. It is, however, necessary to state that the Subordinate Judge is quite right in his view that the mortgagor had no right to create such a lease as he did in favour of Rajdeo. The Subordinate Judge points out that there was no evidence adduced by the defendant to show that residential houses, or rather flats in Calcutta, are ordinarily let out for such a long time as 20 years with a right of renewal. It seems that this lease was not granted in the usual course of management. Whatever may be the rights of a mortgagor under a simple mortgage to grant leases in the usual course of management, there is considerable difficulty on the part of a mortgagor, who has created an English mortgage, to grant such a lease as this. Such a mortgagor can only act as agent on behalf of the mortgagee, and without the concurrence of the mortgagee such a lease cannot be binding on the mortgagee. But, as I have already stated, there is no decree in ejectment on the ground that the lease is not binding on the mortgagee. There has been a decree for sale of the property on failure of the defendant to redeem and the extent of his interest seems to me to be a purely academical question. On all these grounds, this appeal mustst and dismissed with costs. In assessing the costs, the costs of preparing Exs. 11 and 12 of the respondents' portion of the paper-book must be excluded, as they have already been printed by the plaintiff. The property will be now sold in terms of the decree of the lower Court. Let the records be sent down without delay.

Panton, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A I. R. 1930 Calcutta 339

MUKERJI AND MALLIK, JJ.

Satya Prosanna Ghose and *others*—Plaintiffs—Appellants.

v.

Kali Prosanna Das and *others*—Defendants—Respondents.

Appeal No. 869 of 1927, Decided on 26th April 1929, from appellate decree of First Addl. Dist. Judge, Bakarganj, D/- 13th September 1926.

(a) Adverse possession — Possession in limited interest which would not call for protest from owners does not amount to adverse possession.

P purchased a portion of a share in a zamindari. The owners of remaining share granted a sikmi taluki interest of their share of the land of a mouza falling within the share in zamindari to predecessors of *D* who, however, came to possess all the lands of the mouza and got themselves recorded in the Record-of Rights in taluk howla, or osat howla right in respect of *P's* share of land as well. *P* sued for assessment of rent and in the alternative for recovery of damages for occupation and use.

Held, that *D's* predecessors having come into possession under the osat howla right created by the howladars, any adverse possession of a limited interest which *D* or their predecessors had, commenced at the creation of the osat howla and during the continuance of that interest no amount of assertion of taluki right would call for protest from *P* or require him to take steps for recovering khas possession. D's possession therefore was not adverse.

[P 341 C 1]

(b) Landlord and Tenant—Landlord can recover fair and equitable rent unless precluded by statute or contract.

The landlord is always entitled to have from his tenant such rents as are fair and equitable unless the tenant can show that the landlord is precluded from having them by reason of any statute or contract.

[P 341 C 2]

Brojo Lal Chakravarty and *Subodh Chandra Roy Choudhuri* — for Appellants.

Gunada Charan Sen, *Atul Chandra Gupta* and *Biraj Mohan Roy* — for Respondents.

Judgment.—The appeal arises out of a suit for assessment of rent and for recovery of rent for three years and in the alternative for recovery of damages for use and occupation.

The plaintiff's case was as follows: In Touzi No. 5191 in zamindari right there were 3 shares,—7 annas, 7 annas and 2 annas. One of these two 7 annas was originally held and stood in the name of Ram Raja Das Choudhuri. The plaintiffs purchased 2 annas 2 gandas share out of this 7 annas zamindari right and got their names registered under Act 7 of 1876. Mouzah Chittabadi falls within this 7 annas zamindari. At present the plaintiffs own the said 2 annas 2 gandas share, and the remaining 4 annas 18 gandas share belongs to the plaintiffs and the pro forma defendants. These shares have been separately recorded in two Khewats, Nos. 1 and 2. The owners of the 4 annas 18 gandas share granted a sikmi taluki interest of their share of the lands of mouzah Chittabadi to two persons Ram Gopal Sarkhel and Ram Prosad Nandi Bera. This interest eventually passed on to one Bhagaban Chandra Guha. In 1267 a confirmatory lease with regard to the said sikmi taluk to the extent of the 4 annas 18 gandas was granted by the then owners of that interest namely Kirti Chandra Das, Jugal Chandra Das and Ram Kumar Das. The defendants taking advantage of their sikmi interest in the said 4 annas 18 gandas shares have been possessing all the lands of mouzah Chittabadi and have got themselves recorded in the Record-of-Rights in taluk howla or osat howla right in respect of the plaintiffs' share of the lands as well. The plaintiffs therefore prayed for assessment of rent and recovery of arrears on the footing of the defendants being their tenants, and, in the alternative, for damages for use and occupation on the footing of their being trespassers.

The contesting defendants alleged inter alia that they are not trespassers but that they hold the lands in taluka howla and osat howla right under the 7 annas share of the zamindari and have done so far over 100 years and that the plaintiffs are entitled to get rent on the basis of the patta by which the sikmi taluk was originally created.

Both the Courts below have held that the defendants are not trespassers but have acquired the right to hold as tenants under the plaintiffs. This question need not be considered any further. The Subordinate Judge held that the defendants originally entered into possession in osat howla right under a osat howla patta, Ex. C, dated 1227 B.S. and that they subsequently acquired the howla and taluka right in the 4 annas 18 gandas share, and as the only material on which fair and equitable rent might be assessed was that afforded by the osat howla patta, Ex.

C, the rates mentioned therein were to be taken as the fair and equitable rates. Proceeding on that basis the Subordinate Judge assessed the rent at the rate of 15 annas per kani with cesses at Rs 66-11-1 per annum and damages at 25 per cent. The Additional District Judge on appeals preferred by both sides held that it is true that the defendants originally came in on the strength of the osat howla patta aforesaid of 1227 B. S., but that subsequently they obtained the taluki right, by the sikmi taluki patta Ex. C 2 dated 1231 B. S. He held that this grant though made by only two persons namely two out of the five sons of Ram Raja Das Choudhuri should be taken, in view of the confirmatory patta Ex. C 11 of 1267 and of the other facts and circumstances, to have been made on behalf of all the sons, and that therefore the defendants were liable to pay at the rate of Rs. 8,8 annas 10 gandas 2 karas 2 krantis per drone as mentioned in that patta with the same cesses and damages as the Subordinate Judges had given.

The plaintiffs have then preferred this appeal. They contend: (1) that neither the osat howla grant of 1227 nor the sikmi taluka grant of 1231 is binding on them, and that therefore the prevailing rate should be ascertained and assessment should be made on the principle analogous to what is enunciated in S. 7, Ben. Ten. Act; (2) that the question whether the grant of 1231, though made by two of the sons of Ram Raja Das Choudhuri was made by them for themselves as well as on behalf of the other sons with their authority express or implied, was one which was never raised in the written statement and that the appellants have been seriously prejudiced by reason of the Additional District Judge having gone into and decided that question; (3) that in any event the materials on the record are not sufficient to justify the conclusion, at which the Additional District Judge has arrived, that the grant of 1231 was made on behalf of the entire body of the 7 annas zamindars; and (4) that, in any case, the plaintiffs are entitled to get rent on the basis of the osat howla grant of 1227 under which they first came in.

The history of the tenures, such as has been established upon the evidence adduced in the case, seems to be as follows: At first a howla tenure was created under the 7 annas interest by two persons Ram Chandra and Ramdulal, who were two out of the five sons of Ram Raja, the other three sons being Chandra Dulal, Krishna Dulal and Ishan; and Ram Raja having been admittedly the proprietor of the said 7 annas interest. This howla tenure was created in 1214 B. S. In 1227 B. S., the howladars created an osat howla tenure in respect of the entire tenure in favour of the grandfather of defendant 1 and the predecessors of the present defendants came into possession of the lands on the strength of this osat howla right. The defendants' predecessors have in a series of litigations to which reference is unnecessary been asserting their title as osat howladars and in no view can the defendants be treated as trespassers. In 1231 B. S., the said Ram Chandra and Ram Dulal created the sikmi taluk intermediate between the zamindari and the howla and though the defendants' predecessors originally came into possession under the osat howla right, in 1272 B. S., they also acquired the taluki and howla rights by purchase.

The District Judge has held that though the taluk was created by only two out of the five sons of Ram Raja, it was really created by them for themselves and also on behalf of all the other cosharers. He has arrived at this conclusion as a matter of inference from certain circumstances which critically examined resolve themselves into the following heads: (a) recitals in the various documents by which the tenures were created or confirmed; (b) the assertion of the taluka right under the entire 7 annas by the defendants or their predecessor in litigations inter partes and as a result of which the said right was recorded in the khewat in 1907; (c) an intrepretation of Ex. C. 11 the patta of 1267 B. S.

We have carefully examined these materials from which the aforesaid inference has been drawn by the learned District Judge. As regards (a) the recitals, even if they be taken to be explicit which they are not, cannot confer a right which was never properly or legally created. As regards (b)., we are not satisfied that taluk right under the

entire 7 annas was, in fact, pleaded or asserted, and all we find is that the documents in which the existence of the right may be said to be recited were among the decuments that were filed in support of the claim or the defence of the defendants or their predecessors; the litigations moreover were not concerned with the 2 annas 2 gandas share which is involved in the present suit. The District Judge was of opinion that this assertion of right resulted in the record of the right being made in the khewat which was published in 1907 i. e. more than 12 years ago, and inasmuch as the plaintiffs have not in the meantime taken no steps to recover khas possession, the defendants have acquired limited interest of that right by asserting adverse possession of that right for over 12 years to the knowledge of the plaintiffs. This view, in our opinion, is clearly wrong for the defendants' predecessors having come into possession under the osat howla right created by the howladars in 1227 B. S., any adverse possession of a limited interest that the defendants or their predecessors had commenced then and during the continuance of that interest, no amount of assertion of the taluka right would legitimately call for a protest from the plaintiffs or require them to take steps for recovering khas possession. As regards (c) the learned District Judge has expressed himself in these words:

"Had the original grantors Ram Chandra and Ram Dulal no authority to grant the lease in respect of the entire 7 annas share or had not the other cosharers acquiesced to the grant, Ex. C. 11 confirmatory patta would not have been granted creating separate tenancy recording the 4 annas 18 gandas share on the basis of the old patta Ex. C. 2."

The true effect of Exs. C-11 and C-12 in our opinion is very different. There was a transfer in the meantime and the then owners of the 4 annas 18 gandas interest confirmed the terms as regards that interest, ascertained the lands that had been reclaimed, and assessed the rent in accordance with the terms of the taluki patta Ex. C-2 of 1231 B. S None of the documents aforesaid in any way affected the share to which the plaintiff's claim in the present suit relates.

The proper way to look at the matter, in our opinion, is to start with the principle that the landlord is always entitled to have from his tenant such rents as are fair and equitable, unless the tenant can show that the landlord is precluded from having them by reason of any statute or contract. That there is no law that would stand in the plaintiffs' way is more than clear. As regards contract, none has been proved, either express or implied. The plaintiffs therefore must succeed.

As regards the materials on which fair and equitable rents may be assessed, the plaintiffs, whose duty it was to adduce them, have been in default. In the absence of any materials indicating what rents are paid for similar lands in the village or the neighbouring villages they are not entitled to anything more than what the defendants or their predecessors originally paid to the howladars under the osat howla patta on the basis of which the latter came into possession. This, of course, is not a logical standard, but it is the least that the plaintiffs are entitled to.

We are therefore of opinion that the appeal should succeed. We accordingly reverse the decree of the District Judge and restore that of the Subordinate Judge with costs in this Court and in the Court of appeal below, subject to the modification that instead of 15 as. per kani the rate should be Re. 1 per kani as the rate of 15 as. mentioned in the patta of 1227 B. S. was in sicca coin.

R.M./R.K. *Appeal allowed.*

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* A. I. R. 1930 Calcutta 341

MUKERJI AND MALLIK, JJ.

Akshay Kumar Shaha — Plaintiff—Appellant.

v.

Bhajagobinda Shaha and *others* — Defendants—Respondents.

Appeal No. 2216 of 1926, Decided on 27th February 1929, against appellate decree of Dist. Judge, Mymensingh, D/- 8th July 1926.

*** Cosharers — Injunction — Erection of permanent building by cosharer—Injunction should not be granted unless there is ouster or other substantial injury.**

There is no such broad proposition that one co-owner is entitled to an injunction restraining other co-owner from exceeding his rights absolutely and without reference to the amount of damage to be sustained by one side or the other from the granting or withholding of the injunction. [P 343 C 1]

In the matter of injunctions there is a considerable difference between a case in which the other cosharers, acting with diligent watchfulness of their right, seek, by injunction, to prevent the erection of a permanent building and a case after a permanent building has been erected at a considerable expense, they seek to have it removed. Even though a case falls within the former category, unless there is ouster or other substantial injury, no restraint should be put and no injunction should be granted. Sole occupation by itself is not ouster unless it is attended by an assertion of a hostile title : 14 *Cal.* 189 ; 14 *Cal.* 236 ; 30 *Cal.* 901 ; 18 *Cal.* 10 ; 19 *Cal.* 253; 8 *Cal.* 708 ; 30 *Cal.* 901 and 18 *C. W. N.* 328, *Ref.* ; 29 *Cal.* 500 and 19 *C. W. N.* 442, *Dist.* ; 18 *All.* 115 and 12 *All.* 436, *Diss. from.*

[P 343 C 2]

B. C. Mitter, *Bijankumar Mukherji*, *Satyendra Kishore Ghosh* and *Pashupati Ghosh*—for Appellant.

H. D. Bose and *Pareshchandra Mitra*—for Respondent.

Judgment.—This appeal arises out of a suit, which was instituted by the plaintiff, for a declaration that the defendants had no right to erect a permanent structure on the land in suit, for a mandatory injunction directing the demolition of the structure to the extent that it had been erected and for other reliefs. During the pendency of the suit, a temporary injunction was issued against the defendants, restraining them from proceeding with the erection of the structure, but it was eventually withdrawn, it being ordered that the defendants were at liberty to erect the building at their own risk.

The land in suit is a part of C. S. dag No. 869, which appertains to a four annas hisya of kismat Babnaparha diha. The kismat lies in four touzis, Nos. 11, 5151, 5152 and 5153. The plaintiff has taken a patni of touzi No. 5151, and has thus acquired a four annas share of the four annas hisya of the kismat. His case was that the defendants are in occupation of the said C. S. dag No. 869 as tenants-at-will.

The defendants resisted the claim upon three main grounds: They alleged that they hold a permanent tenancy under the plaintiff and the other cosharers patnidars in respect of the said C. S. dag No. 869 and also several other plots, and that they had as such tenants erected permanent and semi-permanent structures without any protest from their landlords, which had been in existence from a long time, and that the present structure was but in replacement of an old one. Nextly, they alleged that in 1298 B. S. their predecessors obtained a mirash taluk to the extent of three annas four gandas share from the zamindars of touzi No. 5152, and that C.S. dag No. 869 is one of the plots specifically allotted to them in that share ; and also that in 1327 B. S., they obtained a patni settlement of five annas odd share from the zamindars of touzi Nos. 11 and 5153; and that they are thus cosharers with the plaintiff to the extent of nine annas and odd share. Thirdly, they say that they are settled raiyats in the village and in that capacity too they are entitled to erect permanent structures.

The Courts below have dismissed the suit. Hence this appeal by the plaintiffs.

To take, first, the defence of the defendants on the footing of their being cosharers of the plaintiff. The Courts below have concurrently found that the defendants are in actual possession of far less land than they would be entitled to if the property were partitioned. The appellant has challenged this finding on the ground that the learned District Judge has given no reasons in support of it, and also on the ground that the trial Court proceeded on the assumption, which is said to be erroneous, that the predecessors of the defendants acquired three annas four gandas share in the entire touzi No. 5152, while the fact is that they acquired such share in only eight pakhis of land. Now the plaintiff's case in the plaint was that C. S. dag No. 869 consists of 1·3 acres, of which the defendents have taken exclusive possession of ·68 acres. The Subordinate Judge found that the entire quantity of land in the four touzis is 141·94 acres, of which the defendants are entitled to have 48 acres, and the quantity of land in C. S. dag No. 869 is 1·3 acres, of which the defendants are entitled to ·60 acres, and the plaintiff to ·26 acres. He also found that the defendants were in fact in possession of only 22 acres in the entire block and that the building in question occupies much less than ·60 acres. The dimensions of the building have been proved in the evidence, and from that the learned Subordinate Judge came to the above conclusion. These conclusions were not challenged by the plaintiff in his appeal to the District Judge: not only has the learned District Judge not noticed any such contention

in his jndgment, but there was even no ground to that effect in the plaintiff's memorandum of appeal to the lower appellate Court. Our attention has been drawn to ground 35, as being one, which was intended to raise this contention, but that ground, in our opinion, was taken for quite a different purpose. These conclusions are conclusions of fact and we think we are in the circumstances bound by them.

The question then arises, whether, taking the conclusions as correct, the plaintiff is entitled to the reliefs that he has asked for. Now, the view of the Allahabad High Court that one of several joint owners of land is not entitled to erect a building upon the joint property without the consent of the other joint owners, notwithstanding that the erection of such building may cause no direct loss to the other joint owners: *Najju Khan* v. *Imtiazuddin* (1) and *Shadi* v. *Anup Singh* (2), has been expressly dissented from in this Court in the case of *Fazilatunnessa* v. *Ijaz Hassan* (3), as not being consistent with the line of decisions by this Court. In this Court, it has been held that there is no such broad proposition that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction: *Shamnugger Jute Factory Co., Ltd.* v. *Ram Narain Chatterjee* (4). This principle has been consistently recognized in later decisions : *Joy Chunder Rukhit* v. *Bippro Churn Rukhit* (5) and *Fazilatunnessa* v. *Ijaz Hassan* (3). In the case of *Watson & Co.* v. *Ramchund Dutt* (6), their Lordships of the Judicial Committee observed :

"In Bengal the Court of justice, in cases where no specific rule exists, are to act according to justice, equity, and good conscience, and if, in a case of shareholders holding lands in common, it should be found that one cosharer is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labours or capital."

Quoting this passage, their Lordships in their later decision in *Lachmeswar Singh* v. *Manowar Hossein* (7), observed that :

"the Courts should be very cautious of interfering with the enjoyment of the joint estates as between their co-owners, though they will do so in proper case."

In the matter of injunctions there is a considerable distinction between a case in which the other cosharers, acting with diligent watchfulness of their rights, seek, by an injunction, to prevent the erection of a permanent building, and a case, in which, after a permanent building has been erected at a considerable expense, they seek to have it removed : *Nocury Lall Chuckerbutty* v. *Bindabun Chunder Chuckerbutty* (8). In view of the proceedings and order relatlating to the temporary injunction the present case, no doubt, falls within the former category. Even then, unless there is ouster or other substantial injury, no restraint should be put and no injunction should be granted. Sole occupation by itself is not ouster, unless it is attended by an assertion of a hostile title: *Basanta Kumari Dassya* v. *Mohesh Chandra Shaha* (9). Here, in the present case, there is no such question of the defendant's sole occupation depriving the plaintiff's enjoyment of an existing actual user of the land, as was the case: *Soshi Bhusan Ghose* v. *Gonesh Chunder Ghose* (10). Nor has the present case any analogy to a case in which, on the eve of or after institution of a suit for partition, a costly building is about to be put up by a cosharer with the evident object of forcing the hands of the Court to allot to his share the land of its site, as was the case in *Hemanta Kumar Roy* v. *Baranagore Jute Factory Co.* (11). As regards injury, it is singular that the plaint does not specify any. All that the plaintiff says, in his deposition, is that the land is near the bazar, the hospital and the school, and he desires to remove to the place and erect a homestead there. The advantages referred to

(1) [1895] 18 All. 115=(1895) A. W. N. 243.
(2) [1890] 12 All. 486=(1890) A. W. N. 95 (F.B.).
(3) [1903] 30 Cal. 901.
(4) [1886] 14 Cal. 189.
(5) [1886] 14 Cal. 286.
(6) [1890] 19 Cal. 10=17 I. A. 110=5 Sar. 595 (P.C.).
(7) [1891] 19 Cal. 253=19 I. A. 48=6 Sar. 133 (P.C.).
(8) [1882] 8 Cal. 708.
(9) [1913] 18 C. W. N. 828=21 I. C. 621.
(10) [1902] 29 Cal. 500.
(11) [1914] 19 C. W. N. 442=24 I. C. 812=20 C. L. J. 441.

cannot be claimed by the plaintiff alone for his own benefit, and, if they are to be taken into account, the defendants have as much right to avail of them as he ; and if the defendants have not exceeded the quantity that would fall to their share, on division of the plot, the plaintiff cannot justly complain. Moreover, there is nothing to indicate that the plaintiff, on a partition, would be able to show anything in the nature of a better right to have the portion on which the building has been erected. Nor again are there any materials suggesting that the portion built upon is better in quality than the rest of the lands of the plot. It is true that, when a partition will have to be effected, the present possession of the parties will have to be respected, but the partitioning Court will not be powerless to adjust any equities that may arise for consideration in view of the fact that the defendants have erected the building without the plaintiff's consent and in spite of his protest. That, however, is a different matter.

As what we have said is sufficient to dispose of the appeal, we do not pronounce any opinion in the other defences of the defendants.

The appeal, therefore, is dismissed : but, as the conduct of the defendants has not been too fair and has afforded legitimate ground to the plaintiff to seek the intervention of the Court, our order is that each party will bear his or their costs in this litigation throughout.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 344

SUHRAWARDY AND JACK, JJ.

Kedar Nath Mistri and *another*—Defendants—Appellants.

v.

Narayan Chandra Safui—Plaintiff—Respondent.

Appeal No. 1856 of 1927, Decided on 29th May 1929, from appellate decree of Second Addl. Sub-Judge, 24 Parganas, D/- 2nd April 1927.

Contract Act, S. 70 — Co-tenant paying decretal amount to save tenancy is entitled to contribution.

In order to bring a case under S. 70, the act must be lawfully done by a person for another, the person doing the act must not be a volunteer and the person on whose behalf the act was done must be shown to have enjoyed the benefit accruing therefrom. [P 345 C 1, 2]

A transferee from one of two co-tenants of a non-transferable occupancy holding was in possession of the land but was not recognized by the landlord. When the landlord brought the holding to sale in execution of a rent decree against the tenants, the other co-tenant paid the whole decretal amount to save the tenancy.

Held : that the co-tenant paying the decretal amount was entitled to contribution from the transferee. It made no difference if the transferrer co-tenant did not appear in the rent suit and the decree was a compromise decree consented to by the other co-tenant only : 16 *C. L. J.* 156; 19 *C. L. J.* 72; 38 *Cal.* 1; *A. I. R.* 1925 *Cal.* 1037 *Ref.* 33 *Mad.* 15, *Dist.* [P 345 C 2]

Bijan Kumar Mukherji and *Saraj Kumar Maity*—for Appellants.

Hiralal Chakrabarty — for Respondent.

Judgment.—This appeal is by the defendants in a suit for contribution.

The facts are that the plaintiff and his brother Jadu Safui held a jama of Rs. 32 under the landlords. Jadu sold his 8-annas share to the defendants who could not get their names registered in the landlord's sherishta as the tenancy was a non-transferable occupancy holding. Subsequently the landlords sued the plaintiff and his brother Jadu for arrears of rent. Jadu did not appear but the landlords' claim in the suit was settled between them and the plaintiff at Rs. 162 out of which the plaintiff paid Rs. 81 and for the balance payable by the defendants there was a decree in terms of the solehnama. The amount not having been paid, the decree was executed by the landlords and the holding in suit was sold. The plaintiff thereupon deposited the necessary amount under O. 91, R. 89, Civil P. C., and saved the tenancy. Thereafter he brought the present suit for contribution against the defendants claiming the amount due from the defendants to him out of the amount deposited in Court for setting aside the sale. Both the Courts below have found on the facts in favour of the plaintiff and have given him a modified decree.

The defendants appeal and three points have been urged before us by the learned advocate on their behalf. It is argued in the first place that the plaintiff must show before he can succeed in the suit that the payment was for the defendants and for their benefit. In order to show that the defendants enjoyed the benefit of the payment by the plaintiff he must prove

that the defendants had an opportunity of exercising an option of either rejecting or accepting the benefit and reliance for this purpose has been placed upon the case of *Jagambal* v. *Naina Pillai* (1). In that case it was held that where a person makes a payment in order to save his own interest as well as the interest of his cosharer, it is not to be presumed that such payment is made for the benefit of the cosharer. The judgment in that case has been expressed in wide terms but there is a sound principle underlying it. A payment made against the will of another person may not be a payment which would give rise to the right of contribution. A co-tenant may be unwilling to retain the tenancy which he considers onerous and allows it to be sold for arrears of rent. His co-tenant by paying the rent in order to protect his own interest cannot as a matter of course claim the benefit of S. 70, Contract Act. But such a case seldom arises and the reported cases on this point do not give indication of any such case having ever been set up. That a payment made for a certain person of which he enjoys the benefit may be presumed from circumstances until the contrary is asserted and proved. The view so broadly taken in *Jagamba* v. *Naina Pillai* (1) by the Madras High Court has not found favour in this Court : see the cases of *Jog Narani Singh* v. *Badri Das* (2) and *Punkhlati Choudhurani* v. *Nani Lal Singh* (3). The principle which should guide Courts in such cases has been authoritatively laid down in *Suchand Ghosal* v. *Balaram* (4) and elaborately discussed in a considered judgment in *Nagendra Nath Roy* v. *Jugal Kishore Roy* (5).

The net result of the numerous decisions upon this point is that three things are necessary in order to bring a case under S. 70, Contract Act : first, the act must be lawfully done by a person for another; secondly, that the person doing the act must not be a volunteer ; thirdly, that the person on whose behalf the act was ostensibly done enjoys the benefit accruing therefrom. If all these elements co-exist, the person who does the act is entitled to claim contribution from the person on whose behalf he did the act in respect of the thing so done. In this case it is found that the defendants are still in possession of the property and are in enjoyment thereof which but for the payment of the plaintiff would have been sold by the rent decree. We are accordingly of opinion that the Courts below have taken a correct view of this matter and have rightly held that the plaintiff is entitled to claim contribution from the defendants under S. 70 Contract Act.

It is next argued that the defendants were no parties to the solehnama and, therefore, the payment under it by the plaintiff was a gratuitous payment and not made on their behalf. This objection should not also prevail on the facts of this case. It is true that the defendants were no parties to the solehnama but the compromise was effected in order to protect the property in which the defendants held a share. But it is said that the plaintiff might have paid his own share of the rent and the payment of the other half on behalf of the defendants was a gratuitous payment. This objection is met by S. 69, Contract Act. The plaintiff was a person interested in making the payment because if the payment had not been made his share in the holding would also have been sold. He made the payment and if he did it on behalf of the defendants he is entitled to be reimbursed. It is pointed out that the decree against the defendant's vendor Jadu was an ex parte decree and he was not bound to make the payment. As we have said, the payment was made to protect the property not of Jadu but of the plaintiff and the defendants. He is, therefore, entitled to claim contribution.

It has been held that Ss. 69 and 70 and other sections dealing with this question lay down some rules of equity that have to be followed in doing justice between the parties. They are not exhaustive and circumstances may arise beyond the scope of any of the sections of the Contract Act, and the

(1) [1910] 33 Mad. 15=3 I.C. 110=19 M.L.J, 489.
(2) [1912] 16 C. L. J. 156=13 I. C. 144.
(3) [1914] 19 C. L. J. 72=21 I. C. 207=18 C. W. N. 778.
(4) [1910] 38 Cal. 1=12 C. L. J. 566=6 I. C. 810=14 C.W.N. 945.
(5) A. I. R. 1925 Cal. 1037.

Courts may be called upon to decide the question in controversy between the parties according to the rules of justice, equity and good conscience. On the facts of this case there is no doubt that the plaintiff is entitled in law and equity to be reimbursed by the defendants. The appeal accordingly fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 346

S. K. GHOSE, J.

Afajaddin—Plaintiff—Appellant.

v.

Jahed and *others*—Defendants—Respondents.

Appeal No. 1890 of 1927, Decided on 14th January 1930, against appellate decree of 4th Sub-Judge, Dacca, D/-25th April 1927.

Civil P. C., O, 41, R. 18—Appeal dismissed against respondent who is necessary party and order not appealed against—Whole appeal abates—Appeal being imperfectly constituted Court cannot make contradictory decrees.

A suit for possession of certain land contested by defendants 1 to 5 was dismissed by the trial Court. On appeal by plaintiff on 27th August 1926 service on defendant-respondents 4 and 5 was not proved and the appeal was dismissed as against them. Against the remaining respondents the appeal was dismissed on default on 21st January 1927. On 22nd January 1927 plaintiff made an application for restoration and mentioned all the defendants including respondents 4 and 5 as opposite parties.

Held : that on 27th August 1926 the appeal as against the absent respondents 4 and 5 had been dismissed, and hence the whole appeal stood dismissed as respondents 4 and 5 were necessary parties. There had been no appeal against order of 27th August 1926 and time for moving against the order had expired when the application for restoration was made. The application for restoration was moreover directed against the order of dismissal for default made on 21st January 1927 at which time appeal was pending against only defendants 1 to 3 and simply by making respondents 4 and 5 opposite parties in the application the plaintiff could not get round the order of dismissal dated 27th August 1926 which stood. The appeal was restored only as against defendants 1 to 3 and not as against defendants 4 and 5.

Moreover as the suit was against all the defendants and neither of them was alleged to be in possession of the specific parcel of land and the question was taken up jointly by the trial Court, respondents 4 and 5 were necessary parties. Appeal as against them being dismissed abated as a whole. The appeal being imperfectly constituted the Court could not be called upon to pass two contradictory decrees in the same litigation : 24 *C. W. N.* 44 *Rel. on* *A.I.R.* 1928 *Lah.* 572 (*F.B.*) ; *A. I. R.* 1923 *Cal.* 289, *Dist.* [P 347 C 1]

Panchanan Ghose—for Appellant.

Mrityunjoy Chatterji—for Respondents.

Romendra Mohan Mazumdar for *Biraj Mohan Mazumdar* — for Deputy Registrar.

Judgment.—The plaintiff sues to recover khas possession of the disputed land on the allegation that defendants 1 to 4 have forcibly taken possession of the suit lands by erecting tin huts thereon. The suit is contested by defendants 1 to 4 who are brothers. Their case is that they have been residing on the land from the time of their father who had taken settlement of those lands from the plaintiff's father. The trial Court dismissed the suit. An appeal was preferred by the plaintiff. It appears that on 27th August 1926 service on the absent defendant respondents 4 and 5 was not proved and the appeal was dismissed as against these defendants without costs. Thereafter the appeal continued as against the remaining respondents and on 21st January 1927 it was dismissed for default. On the following day there was an application for restoration of the appeal and in that application all the defendants respondents including respondents 4 and 5 were mentioned as opposite parties, and notices were issued on all these defendants. On 26th March 1927 the appeal was ordered to be restored. When the appeal was heard the learned Subordinate Judge took the view that as on 27th August 1926 the appeal as against the absent respondent 4 had been dismissed the whole appeal must stand dismissed because respondent 4 was a necessary party. It is contended in the first place that since the appeal was restored on 26th March 1927 it must be taken that the appeal had been restored as against respondents 4 and 5 as well. Stress is laid on the fact that these respondents were mentioned as opposite parties in the application for restoration and in the order of restoration costs were ordered to be paid to all the members of the opposite party including respondents 4 and 5. It is pointed out on the other side that there had been no appeal as against the order of 27th August 1926 dismissing the appeal as against the absent respondents and that

the time for moving against that order had already expired when the application for restoration was filed. The application for restoration, moreover, was directed as against the order of dismissal for default which was made on 21st January 1927, at which time the appeal was pending as against only defendants 1 to 3, and simply by making respondents 4 and 5 opposite parties in the application for restoration, the appellant could not get round the order of dismissal that was passed on 27th August 1926. I think that this argument is sound and it must prevail. Clearly the order of dismissal dated 27th August 1926 stood and when the appeal was restored, it was restored as against defendants 1 to 3 only and not as against defendants 4 and 5.

Then the next point is whether the learned Subordinate Judge is correct in holding that respondent 4 was a necessary party. It is contended that the appeal could proceed only as against defendants 1 to 3, because defendants 1 to 4 are brothers who came as heirs of their father, and each of them has a definite share, so that they are not joint tenants. On the other hand what the plaintiff seeks for is khas possession as against all the defendants, and it is not alleged that they are in possession of specific parcels of land. The trial Court has already made a decree with regard to all the defendants and in that Court the question with regard to those defendants were taken up jointly, there being no distinction as amongst the different defendants. The learned Subordinate Judge has followed the case of *Kali Dayal* v. *Nogendra Nath* (1). In that case it is pointed out that from the nature of the suit, the result may follow that an appeal may be imperfectly constituted when one of the parties is left out, and that the Court cannot be called upon to make two contradictory decrees in the same litigation. In that case various other cases were considered. The learned advocate for the appellant has referred me to the case of *Sant Singh* v. *Gulab Singh* [*A. I. R.* 1928, *Lahore p.* 572 (*F.B.*)] where the decision was to some extent based on a Calcutta case which is reported in *A. I. R.* 1923 *Cal.* 289 (*Sarat Kamini Dasi*, and on her death her legal representatives her sons *Jamini Mohan Sarkar* v. *Chaitanya Chandra Prokoraj*). In that case, however, it is pointed out that if the Court comes to the conclusion that the defendants are in possession of specific plots of land, in which the deceased defendant had no share, it will proceed to try the case as against other defendants. This only serves to distinguish the present case in which there is no allegation that the defendants are in possession of specific plots. I consider that the learned Subordinate Judge has taken the correct view and rightly dismissed the appeal.

This appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(1) [1920] 24 C. W. N. 44=51 I. C. 822=30 C. L. J. 217.

A. I. R. 1930 Calcutta 347

B. B. GHOSE, J.

Sitanath Bhadra—Petitioner.

v.

Jatindra Nath Sarkar — Opposite Party.

Civil Revn. No. 1451 of 1928, Decided on 20th February 1929, against order of Dist. Judge, Faridpur, D/- 11th August 1928.

Civil P. C., S. 20, Expl. 1—Suit instituted in Court within whose jurisdiction defendant has permanent residence is properly instituted though he resides for business elsewhere.

A suit instituted in the Court within the jurisdiction of which the defendant has a permanent residence is properly instituted. The mere fact that the defendant resides with his family and carries on business in a place which is not his permanent place of residence and that he seldom goes to the latter place is no bar to the suit being filed in the latter place. [P 347 C 2]

Saratkumar Mitra—for Petitioner.

Hemendrachandra Sen—for Opposite Party.

B. B. Ghose, J.—In this case, the learned Subordinate Judge on appeal decided quite rightly that the suit was properly brought in the Court of Gopalganj, within the jurisdiction of which the defendant had a permanent residence. This is in accordance with Expln. 1, S. 20, Civil P. C. The mere fact that he carries on a business in Calcutta and lives there with his family does not oust the jurisdiction of the Gopalganj Court. This rule must, therefore, be discharged with costs: one gold mohur.

R.M./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 348 (1)

RANKIN, C. J.

Bhim Naik—Petitioner.

v.

Chakradhar Maity and *others*—Opposite Parties.

Civil Revn. No. 1222 of 1929, Decided on 17th January 1930, against order of Munsiff, Second Court, Contai, (Midnapur), D/- 12th June 1929.

Civil P. C., O. 21, R. 101—Restoration of possession to purchaser from judgment-debtor of non-transferable occupancy holding—Order cannot be interfered with in revision as another and better remedy by way of suit is open.

Where an application is brought in revision against an order restoring a purchaser from the judgment-debtor of a non-transferable occupancy holding, to possession under O. 21, R. 101, the High Court of Calcutta as a rule does not interfere in revision because another and better remedy by way of suit is open to the parties: 3 *P. L. J.* 579, *Dist. from.*

[P 348 C 1]

Sarat Kumar Chatterji for *Bijan Kumar Mukherji*—for Petitioner.

Heera Lal Ganguli — for Opposite Parties.

Judgment.—I am afraid that this rule must be discharged. The applicant purchased in execution of a rent decree what appears to be a non-transferable occupancy holding. When he was put in possession by the Court, it was found that certain persons were on the land who claimed to be in possession as purchasers from the original tenant. The Court peon gave symbolical possession only; but these persons were, in fact, on the land applied under O. 21, R. 100. Civil P. C. The Munsiff made an order in their favour restoring them to possession under R. 101. Now, the present application is brought in revision against that order. notwithstanding that the auction-purchaser has a remedy by suit under O. 21, R. 103, Civil P. C., and, as a rule, this Court does not interfere in revision in such cases because there is another and better remedy open to the parties. I may say that I am by no means satisfied that the case of *Panchratan* v. *Ram Sahai* (1), upon which the learned advocate for the petitioners relies was correctly decided. I see nothing in R. 100 about "the representatives of the judgment-debtor" and I am at a loss to see any sufficient justification for importing decisions under S. 47 into rules which contain nothing of the language of 47 as regards representatives of the judgment-debtor. On the contrary, it seems to me that R. 101 provides explictly and expressly for this very matter the question being whether the applicant is in possession on his own account or on account of some person other than the judgment-debtor. In such cases, the law says that a person cannot get execution against another person who is not the judgment-debtor in the suit. No doubt, the matter can be put right by suit; but ordinarily one cannot get possession of a property without bringing a suit against all the persons in possession. That being so, I am not at all satisfied that the Munsiff is wrong; but, in any case, I am quite satisfied that it is unnecessary to interfere in revision in this case.

The rule must be discharged with costs, hearing-fee two gold mohurs.

R.M./R.K. *Rule discharged.*

(1) [1918] 3 Pat. L. J. 579=43 I. C. 969=4 Pat. L. W. 129.

A. I. R. 1930 Calcutta 348 (2)

B. B. GHOSE AND S. K. GHOSE, JJ.

Satish Chandra Bhaduri and *others*—Appellants.

v.

Pabna Dhana Bhandar Co. Ltd.—Respondents,

Appeal No. 92 of 1928, Decided on 15th July 1929, against order of Sub-Judge, Second Court, Pabna, D/- 17th November 1927.

Civil P. C., O. 21, R. 22—Notice to judgment-debtor must issue where last order within year of subsequent application was passed behind his back.

Where the last order passed against a judgment-debtor within one year of the subsequent application for execution is passed behind his back, the case does not come under the proviso to O. 21, R. 22 and notice must issue.

[P 349 C 1]

Jatindra Nath Sanyal — for Appellants.

Krishna Kamal Moitra—for Respondents.

S. K. Ghose, J.—This is an appeal by the judgment-debtors against an order refusing an application under O. 21, R. 90, Civil P. C. The learned Subordinate Judge found that no notice was served under O. 21, R. 22, Civil P. C.; but he held that under the proviso to that rule no notice was necessary. This is the point in this appeal.

It appears that a previous execution

case was started on 1st March 1924, and three orders were passed on 16th June and 17th June,1924 .The first two orders numbered 5 and 6 in the order-sheet related to the sale and O. 3 directed that set off be allowed as prayed for. It may be argued that these orders, or at least the last order, can be construed as orders against the judgment-debtors on the previous application for execution. But it is pointed out that according to the judgment in the previous execution case dated 17th December 1924, the Court has found that the notice under R. 66 of the Code was not served and that the sale proclamation was not published. The appellants are, therefore, entitled to say that the orders of 16th and 17th June 1924 were passed behind their back and that, therefore, the decree-holder cannot take advantage of those orders for the purpose of evading notice under O. 21, R. 22. I think this contention is sound and that it must prevail.

It is contended by the other side that this is a new point taken in appeal. But as a matter of fact the point that no notice was served under R. 22 has all along been taken and the present point does arise out of that contention. It is also contended that in the previous case notice under R. 22 might not have been necessary. But there is nothing to show this. On the contrary it appears from the order-sheet of the previous execution case that notice under R. 66 was the only notice that was directed to be issued, that no other notice was issued, and that consequently no other notice was served.

Another point taken by the learned advocate for the respondent is that the present application for execution must be taken to be a revival of the previous execution case which was directed to be struck off on 20th December 1924 and we are referred to the case of *Jira Bibi* v. *Majiruddin Chowdhury* (1). There the point was one of limitation, whereas in the present case altogether a new case was started.

The appeal is allowed, the order of the learned Court below is reversed as the sale is set aside on the ground of want of service of notice under O. 21, R. 22 of the Code.

The appellants are entitled to their costs in this Court: the hearing-fee being assessed at two gold mohurs.

B. B. Ghose, J.—I agree.

J.M./R.K. *Appeal allowed.*

(1) A. I. R. 1921 Cal. 594.

A. I. R. 1930 Calcutta 349

MUKERJI AND GUHA, JJ.

Shyama Charan De Tahbildar and *others*—Appellants.

v.

Protap Chandra Das and *others*—Respondents.

Appeal No. 318 of 1929, Decided on 24th January 1930, from appellate order of Dist. Judge, Dacca D/- 20th April 1929.

(a) Execution—Construction of a decree—Interest allowed in judgment but omitted in decree—No ambiguity but omission and hence decree can be amended—Civil P. C., O. 20, R. 6.

Where interest has been omitted in the decree though allowed in the judgment, it is a case of pure omission and not one of any ambiguity. Hence, the rule that, where a decree is ambiguous, the Court should put such construction upon it as would make it in accordance with law, has no application to such a case and the decree should be amended to bring it on line of judgment : 21 *All.* 361, *Dist.* [P 350 C 1, 2]

(b) Execution—Scope of—Interest omitted in previous application for execution is not claimable in subsequent application.

Where a decree-holder has failed to claim for a portion of interest accrued due in a previous application for execution, he cannot be allowed to claim that portion in a subsequent application on the principle that a portion of an entire decree for which execution is not claimed cannot form part of a subsequent claim in execution. [P 350 C 2]

Profulla Chandra Chakravarty — for Appellants.

Jadu Nath Kanjilal, Nripendra Ch. Das—for Respondents.

Judgment.—The facts of this case are quite simple. In 1918 the decree-holders obtained a preliminary decree in a mortgage suit. The ordering portion of the judgment therein directed that after expiry of the period of grace, interest would run on the amount due at 6 per cent per annum. In the decree drawn up in accordance with the judgment this portion of the order was omitted and interest was allowed only up to the expiry of the period of grace. In the final decree drawn up about a year later it was provided:

"that the sum of Rs. 3,290-8-0 as payable under the said preliminary decree together with Rs. 284-12-0 as the costs of the suit as specified in the said preliminary decree and further interest up to the date of payment at.

the rate specified in said decree would be payable to the plaintiffs,"

and there were other directions therein with which we are not concerned.

In 1920 the decree-holders applied for execution for a sum of Rs. 3,681-1-0 whether they meant to include in this amount any interest after the period of grace is a matter on which the two Courts below are not in agreement. The Court of first instance was of opinion that they did and the Court of appeal below that they did not. The point is not clear : all that appears is that a small amount in excess of interest up to the date of grace was included in it though not the whole amount that would be due on calculation of the interest at 6 per cent for the period from the date of grace to the date of the application for execution. This execution case was dismissed, but subsequently the judgment-debtors made payments which aggregated a substantial amount. The decree-holders then again applied for execution for realization of the balance, and this time they expressly claimed interest at 6 per cent per annum from the date of grace. The judgment-debtors objected to this claim for interest. This objection was rejected by the Court of first instance but has been upheld on appeal. Hence this appeal by the decree-holder.

A good deel of technicality has been introduced into the case on behalf of both sides, for which, however, there is some justification in the view which the District Judge has expressed. The question in the first instance, in our judgment, is a question of construction of the final decree.

There can be no question that the final decree meant to provide for interest after the expiry of the period of grace and till payment; it expressly said so. The rate at which such interest was to be calculated was in the words of the final decree "the rate specified in the preliminary decree," but there was no rate specified for this interest in the preliminary decree; two rates were mentioned therein, but for different purposes, i. e., 9 per cent compound with yearly rests and 6 per cent simple, the former payable under the contract and the latter only for costs. So the case was one of pure omission and there was no question of ambiguity. In that view the case of *Bakar Sajjad* v. *Udit Narain Singh* (1), upon which a good deal of reliance has been placed by Mr. Chakravarty in his arguments will not help him. It being a simple case in which the preliminary decree was not in accordance with the judgment which it had to follow, and failed to reproduce the decretal order in that judgment, we do not understand why the decree-holders should not avail of the easy course of applying for amending the preliminary decree in order to bring it on a line with the judgment. The only apprehension that he may have is that a future execution may be barred, but that can be avoided by keeping the present execution proceedings pending and giving the decree-holders sufficient opportunity to avail of this remedy. We propose to make that order.

Then a question arises as to whether in view of the application for execution filed in 1920 the decree-holders are competent to claim this interest. It is conceded by the decree-holders that in that application he did not claim the whole amount of interest which had accrued due till then subsequent to the expiry of the period of grace. It is urged on behalf of the judgment-debtors that no such interest was claimed at all. The consequence of both the positions is the same. It is well-settled that a portion of an entire decree for which execution was not once claimed cannot form part of a subsequent claim in execution. The decree-holders, therefore, are not entitled to claim any interest for the period from the date of grace to the date of his application in 1920. There is, however, no reason why he should not get interest for a subsequent period.

The result is that this appeal is allowed. The orders of the Court below are set aside. The execution proceedings will stand as pending and a reasonable time on calculation of interest will be given to the decree-holders to apply for and obtain the necessary amendment of the preliminary decree and when they have done so the execution will go on for the period subsequent to the date of the application for execution made in 1920.

(1) [1899] 21 All.361=(1899) A.W.N.91 (F.B.).

There will be no order for costs in this appeal.

J.M./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 351

B. B. GHOSE AND S. K. GHOSE, JJ.

Ashutosh Sikdar and *others*—Defendants—Appellants.

v.

Chidam Mondal — Plaintiff—Respondent.

Appeal No. 2356 of 1927, Decided on 9th August 1929, from appellate decree of Addl. Sub-Judge, Jessore, D-/ 11th July 1927.

Hindu Law—Debts—Necessity—Widow—Payment of barred bebts of husband is legal necessity—Widow can alienate whole property for that purpose.

Payment of barred debt left by her husband is a pious duty on the part of the widow and amounts to legal necessity. It is not necessary that there should be any danger to the estate in order to entitle the widow to incur debt or alienate the property of her husband in order to pay off barred debts. She may alienate the whole of the estate inherited if she cannot raise sufficient money for the purpose by alienating a part : 21 *Cal.* 190; 21 *Cal.* 190*n* and 6 *M. I. A.* 393, (*P.C.*) *Ref.*

[P-351 C.2, P 352 C 2]

Profulla Kamal Das—for Appellants, *Atul Chandra Gupta* for *Bijan Kumar Mukherji*—for Respondents.

B. B. Ghose, J.—This is an appeal by defendants 1 to 4 against the judgment and decree of the Subordinate Judge affirming those of the Munsif. The suit was brought by the plaintiff for recovery of possession of some lands on the ground that he was the reversionary heir of one Gadadhar. The defendants claimed the property under a mokarari lease given by the widow of Gadadhar. The defendants pleaded that the mourasi patta was executed by the widow Gunamani on 4th Chaitra 1289 B. S., for legal necessity, that with the nazar paid by the defendants or their predecessor-in-interest the lady paid off some debts of Gadadhar, defrayed the expenses of his sradh, paid rents of the malik, defrayed the expenses of her own maintenance and those of her visit to Gaya. The trial Court did not accept grounds 2 and 5 urged by the defendants. The main question on which the defendants relied was that there was a bond executed by Gadadhar dated 1276 B. S., and in order to pay off that debt the widow executed the maurashi patta. The learned Munsif held that even accepting that the payment of the debt of the husband was true it could not amount to legal necessity, firstly, because the debt was not proved to have been alive at the time or in other words the debt was barred by limitation and secondly, because there was no legal necessity for the widow to transfer the entire corpus of her husband's estate. His view was that when the creditor allowed the debts to lapse by efflux of time the widow might have a moral duty to pay off the debt but there was no legal obligation to pay and the payment was only voluntary. The learned Subordinate Judge seems to have confirmed the view of the Munsif. He stated that there was no danger to Gunamani's husband's estate on account of the dues of the bond; and as the Munsif has come to the conclusion that the lease was not granted by Gunamani for legal necessity, the learned Subordinate Judge supported the decision of the Munsif.

The defendants contend that the payment of barred debts of the husband by his widow who has inherited the property of her husband is a legal necessity. The cases to which we have been referred are those of *Udai Chunder Chuckerbutty* v. *Ashutosh Das Majumdar* (1) and *Tarini Prosad Chatterjee* v. *Bhola Nath Mookerjee* (2) reported in the foot-note in which the decisions of other High Courts have been reviewed. There is no doubt that the Courts below were in error in holding that the payment of the barred debt of a husband does not amount to legal necessity. With regard reliance being made on the proposition that there was no danger to the husband's estate at the time for the dues upon the bond, the learned Munsif evidently was in error. The payment of husband's debt although barred has been held to be a pious duty on the part of the widow and it is not necessary that there should be any danger to the estate in order to entitle the widow to incur debts or to alienate the property of her husband in order to pay off barred debts. The question of danger to the estate has been taken probably from the well-known case of *Hunoomanpersaud Pan-*

(1) [1864] 21 Cal. 190.
(2) [1891] 21 Cal. 190n.

day v. *Mt. Bobooee Munraj Koonweree* (3), but that is not the only ground upon which a widow can alienate the property of her husband. For instance pilgrimage to Gaya can never be a pressure on the estate. But it is the accepted law that a widow can incur debts and alienate property sufficient for the purpose of expenses for the pilgrimage to Gaya and the expenses of the sradh of her husband. The learned advocate for the respondent does not contest the proposition that the payment of barred debt of the husband is a legal necessity so for as the widow is concerned. But his contention is that assuming, as the lower Court assumed, that the mokarari lease was granted for legal necessity, the widow had no necessity to alienate the whole of the husband's property by way of a permanent lease in order to pay off a barred debt. His argument is based on the observations of their Lordships of the Judicial Committee in the case of *Sardar Singh* v. *Kunj Behary Lal* (4), at p. 109 (of 49 *I. A.*), where theirs Lordships say that there are two sets of religious acts for which a widow can alienate her husband's property. One set to be essential and the other not essential or obligatory, but still pious acts which conduce to the bliss of the departed soul. With regard to the second set of acts it is said that a widow can alienate a small portion of her husband's estate. In that particular case it was a gift to a Brahmin of Puri. Within this second class of religious acts, fall digging of tanks, establishing of idols, building of temples etc. The learned advocate for the respondent contends that the payment of barred debts falls within the second category, because as he seems to argue, that debt could not have been enforced by the creditor against the husband's estate. The Hindu Law does not, however, take cognizance of any bar of limitation. As Mr. Mayne has observed:

"It is very much to be doubted whether the plea of limitation would be accepted in the Court of the Hindu Radhamanthugs . . . . ,"

and I do not remember to have found any text which would support the contention urged on behalf of the respondent. On the other hand there are texts which enjoin on the son, grandson, and greatgrandson the duty of the payment of their ancestors' debts even if they have not obtained any assets from their ancestor. According to the Hindu Shastras, so far as I am aware, a person dying without payment of his debts is subject to tribulations in after life and it is, therefore, the pious duty of his descendants to pay off his debts even if they have got no property from him. It is only in the case of the fourth generation that this pious duty of repaying any debt even if he got no estate, is exonerated. It seems to me, therefore, that payment of a deceased's debts by his widow who has received assets from him falls within the first class of debts. I am of opinion that is an essential duty of the widow for which she may alienate the property inherited from her husband. In this case, however, the fact is that whether the widow did execute the lease in favour of the predecessor-in-interest of the appellants for payment of any debt of her deceased husband although barred, has not been found by either of the Courts below. It is, therefore, necessary to send the case to the lower appellate Court to come to a finding on the point. If it is fonnd that the lease was granted for payment of the debt of the husband though barred, the alienation will stand. It should, however, be necessary to go into the question whether it was possible for the widow to raise the money by alienating a portion of the property or not. With these observations the case is remitted to the lower appellate Court for final disposal. Costs will abide the result.

S. K. Ghose, J.—I agree.

R.M./R.K. *Case remanded.*

(3) [1854-57] 6 M. I. A. 323=18 W. R. 81=2 Suther 29=1 Sar. 552 (P.C.).

(4) A. I. R. 1922 P. C. 261=44 All. 503=49 I. A. 383 (P.C.).

A. I. R. 1930 Calcutta 352

PEARSON AND PATTERSON, JJ.

Surendra Nath Jana—Accused—Petitioner.

v.

Kumeda Charan Misra — Opposite Party.

Civil Revn. No. 18 of 1929, Decided on 3rd January 1930, from order of Dist. Judge, Midnapur, D/- 2nd August 1929,

Criminal P. C., S. 476—Express finding by Court that it is expedient in interest of

justice to make complaint under S. 476 is necessary — Express provision is not satisfied by inferences from findings of fact.

There must be an express finding by the Court that " it is expedient in the interest of justice " that a complaint should be made into the offence of giving false evidence under S. 476. Such an express provision for a finding to be recorded is not satisfied by inferences which may or may not be drawn from other findings of facts arrived at by the Court: *A. I. R.* 1928 *Cal.* 862, *Rel. on.* [P 353 C 1]

Satindra Nath Mukerji, *Apurba Charan Mukerjee* and *Manmath Nath Das Gupta*—for Petitioner.

Sarat Chandra Jana—for Opposite Party.

Judgment.—The present rule is on behalf of one Surendra Nath Jana and is directed against an order of the District Judge dated 2nd August 1929, directing that a complaint should be drawn up against the petitioner under Ss. 465 and 471, I. P. C. This order of the District Judge was made upon an appeal from the order of the Munsiff who had already refused to make such an order. The main ground placed before us is that the order is bad in law, inasmuch as there is no finding by the Court of appeal below that it is expedient in the interests of justice that a complaint should be made. We have examined the record and it is conceded that on the face of the appellate Court's judgment no such finding is recorded. But it is said that there is a finding that a clear prima facie case has been made and that coupled with the fact that a complaint has been ordered is sufficient to enable the Court to infer that the opinion of the lower appellate Court was that it was expedient in the interests of justice that such an enquiry should be made. The matter is really on the same footing as disclosed in the case of *Keramat Ali* v. *Emperor* (1), where the learned Chief Justice said:

" I look in vain for any recorded finding to the effect that it is expedient in the interest of justice that an enquiry should be made into the offence, ..."

That is the position in which we find ourselves in the present case and it is not possible to say that an express statutory provision for a finding to be recorded is satisfied by inferences which may or may not be drawn from other findings of fact arrived at by the lower appellate Court. The result, therefore, is that the order of the District Judge is set aside and this rule made absolute.

R.M./R.K. *Rule made absolute.*

(1) A. I. R. 1928 Cal. 862=55 Cal. 1912.

A. I. R. 1930 Calcutta 353

B. B. GHOSE AND BOSE, JJ.

Sm. Rani Basanta Kumari Dasi and *others*—Appellants.

v.

Tulsi Charan Ghosh and *others*—Respondents.

Appeal No. 425 of 1928, Decided on 23rd May 1929, against order of Dist. Judge, Addl. Court, Howrah, D/- 2nd June 1928.

Civil P. C, O. 21, R. 54—Amendment of petition for execution asking for attachment of additional property after first attachment and sale of certain property—Judgment-debtor aware of amendment and attachment but not appealing against order—Order is final though it may be ex parte.

Where in execution of a decree certain property of the judgment-debtor is attached and sold and a subsequent application is made for amending the petition for execution setting out additional property against which it was intended to proceed, and in pursuance thereof attachment made, provided the judgment-debtor has notice of attachment and does not impeach the order of attachment by appeal, although the order may be ex parte and amendment erroneous, the order of attachment is final and not open to be challenged in subsequent proceedings; 8 *Cal.* 51, 6 *All.* 269; *A. I. R.* 1924 *Mad.* 1, *Ref.* [P 355 C 1, 2]

Jogesh Chunder Roy and *Ramoni Mohan Chatterji*—for Appellants.

Bhupendra Kumar Ghose—for Respondents.

B. B. Ghose, J.—This is an appeal by the decree-holder against an order of the learned Additional District Judge of Howrah reversing an order of the Subordinate Judge rejecting an objection of the judgment-debtors to the execution of a decree by sale of certain properties ordered by the Subordinate Judge.

The facts have been clearly stated by the learned Additional District Judge in his judgment. A decree was passed on 29th June 1911. An application for execution was filed on 31st July 1922 and some properties were attached. Some items of the properties attached were sold on 17th March 1927 and only Rs. 100 out of the decretal amount of over Rs. 4,000 was realized. On 22nd April 1927 the decree-holder applied for an amendment of his application for execution by putting in a large number of properties against which he intended to proceed in execution. This application was allowed ex parte. It does not ap-

pear whether notice of this application was at all served upon the judgment-debtor or not. An order for attachment was made under O 21, R. 54, Civil P. C. of these properties which were included in the petition by reason of the amendment, and the properties were actually attached in May 1927. It has been found by the trial Court and has not been questioned in the Court of appeal below that the judgment-debtors had notice of the attachment and that it was properly made. On 6th June 1927 an order for notice under O. 21, R. 66, Civil P. C., for settlement of the terms of sale was passed. This notice was also served upon the judgment-debtors and a sale proclamation was issued fixing 12th September for the date of sale of the properties attached. On 16th August 1927 an objection was made by the judgment-debtors to the sale of these properties on the ground that the amendment of the petition for execution on 22nd April 1927 ought not to have been allowed as the decree was barred by limitation.

The Subordinate Judge has held, upon the circumstances stated, that there was a waiver by the judgment-debtors of their objection, they not having appeared at any of the stages in the proceedings referred to above. He has also held that, as the decree-holder was prevented from executing the decree by force or fraud of the judgment-debtors under S. 48 (2) (a), Civil P. C., the decree-holder's application for execution was not barred by limitation on the date when the order for amendment was made and that therefore, the amendment was in form.

The learned Judge, on appeal by the judgment-debtors, has held that there was no waiver because the objectors came forward with their objection within fifteen days after the date when the terms of the sale proclamation were finally settled and about four weeks before the date of sale. He also refers to the delay the decree-holder made which was about two months, to comply with the Court's order for the issue of notices under O. 21, R. 66. The learned Judge did not deal with the question as to whether the execution of the decree was barred by limitation with reference to S. 48 (2), Civil P. C., because he was of opinion that it was open to the decree-holder to present a fresh application for execution stating the facts, and bringing the application within S. 48 of the Code, and that it was not necessary for him to decide whether the amendment prayed for was within the period of limitation for execution of the decree with reference to S. 48, Civil P. C. The learned Judge by an elaborate discussion of the question with regard to the amendment held that the amendment ought not to have been allowed by the Subordinate Judge. From that order the decree-holder appeals.

I may state at once that I quite agree with the reasoning of the learned Additional District Judge that the amendment ordered by the Subordinate Judge was on erroneous grounds. The matter did not fall within O. 21, R. 17, Civil P. C., and if the matter has stood there I should have been inclined to dismiss the appeal on the ground that the order for amendment had been erroneously made. It is conceded by the learned advocate for the appellant that it would be wrong to order amendment of an application for execution after the execution is barred by limitation. But it is argued that in this case, having regard to S. 48 (2) (a), Civil P. C, his application for execution was not barred at the time when the amendment was directed and that if his application for amendment of the execution petition be considered as a fresh application for execution he will be quite within his rights to execute his decree. That proposition seems to me to be quite right, but the learned Additional District Judge has not found the facts with regard to the application of S. 48 (2) although the learned Subordinate Judge has found in favour of the decree-holder. It would have been necessary for us to remand the case to the lower appellate Court in order to come to a finding on that question if we did not choose to consider the evidence on that point ourselves here; but, having regard to the next proposition that I am going to consider, I do not think that that step is necessary.

It was argued before the learned Judge that the order of the Subordinate Judge allowing the amendment and attaching the properties and directing a sale in execution of the decree was res judicata. The learned Judge has rejec-

ted that argument on the ground that if the objection had been raised by the judgment-debtors in a subsequent proceeding the authorities show that the failure to appear and take objection in the present proceedings would be a complete answer to the objection. The learned Judge's opinion seems to be that if an objection is taken at a subsequent stage of the same execution proceeding to an order which has become final as not having been appealed against, that order can be questioned at any time and the principle of res judicata does not apply. In my judgment, this view is not correct having regard to the various cases decided by the Privy Council. It is true that the question in the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1), arose in a subsequent execution proceeding, but in the case of *Ram Kirpal Shukul* v. *Mt. Rup Kuari* (2), the question whether a certain decree allowed mesne profits or not arose in an execution proceeding and was decided by the Court to the effect that mesne profits had been allowed. At a later stage of the execution proceeding the question was raised that the previous decision of the Court was erroneous.

The Allahabad High Court, as a matter of fact, set aside the previous decision of the executing Court as, in the view of the High Court, upon a proper construction of the decree, mesne profits were not allowed. Their Lordships of the Privy Council reversed the decision of the High Court and they held that the previous judgment of the Judge executing the decree was final and could not be questioned at a later stage. In this case no doubt if any order was made without notice to the other side that order would not be binding upon the party on whom no notice was served. The order of amendment apparently was made without service of any notice, but subsequent to that in May 1927 it has been found that the properties now sought to be sold were attached, and the attachment was regularly made of which the judgment-debtors had notice and the judgment-debtors were prohibited from dealing with the properties in any way. No objection was taken to the order of attachment, nor was that order appealed against. Subsequently it has been found that there was a notice served upon the parties for fixing the terms of the sale-proclamation of the properties attached. It is true it has been held in the case of *Chidamtaram Chetti* v. *Theivanai Ammal* (3), that this notice is for a proceeding in the nature of an administrative action. In that case it was held that if a judgment-debtor did not put in appearance at the time when the sale-proclamation was settled that would not preclude the legal representatives of the judgment-debtor from taking an objection to the sale of a property on the ground that the property did not belong to the judgment-debtor. In that case it does not appear that any notice was served on the legal representatives when they were brought on the record; but in this case there is no doubt that the judgment-debtors were bound by the order of attachment which was made with regard to these properties. It was pointed out to us by the learned advocate for the respondents that in the case above cited in the Madras Court there was also an attachment of the property; but the learned Judges do not refer to that fact in any of the judgments nor do they refer to the fact that the order of attachment coupled with the direction on the judgment-debtors not to deal with the property attached is an order which is binding on the parties if not questioned by appeal or otherwise reversed. In my judgment, therefore, the decree-holder is entitled to proceed with the execution of the decree against the properties which were included in the execution application by the amendment, on the application of the decree-holder, on 22nd April 1927 although, in my judgment, the order of amendment was erroneous.

The order of the learned Additional District Judge will, therefore, be set aside and that of the Subordinate Judge restored with costs in this Court as well as in the lower appellate Court. The hearing fee is assessed at five gold mohurs.

Bose, J.—I agree.

V.B./R.K. *Order set aside.*

(1) [1882] 8 Cal. 51=11 C. L. R. 112=8 I. A. 128=4 Sar. 248 (P. C.).

(2) [1884] 6 All. 269=11 I. A. 37 (P. C).

(3) A. I. R. 1924 Mad. 1=46 Mad. 768 (F.B.).

A. I. R. 1930 Calcutta 356

RANKIN, C. J., AND MUKERJI, J.

Panchananda Debnath—Defendant—Appellant.

v.

Brojendra Kumar Sutradhar and *others*—Plaintiffs—Respondents.

Letters Patent Appeal No. 8 of 1929, Decided on 29th May 1929, from decision of Mitter, J., D/- 30th November 1928, in Appeal No. 657 of 1928.

Decree—Execution— Anterior agreement that decree shall not be executed cannot be set up as bar—But suit may be brought to restrain execution contrary to agreement—Civil P. C., O. 21, R. 2.

An anterior agreement that a decree shall be allowed to be passed but shall not be executed cannot be set up as a bar to execution. But such an agreement is not opposed to public policy and suit can be brought to restrain execution contrary to the agreement. An injunction restraining execution until a breach of obligation under the agreement has occurred is the correct form of relief to ask for and not a declaration that the decree is unenforceable : 29 *Cal.* 810 and 31 *Cal.* 179, *Ref.*

[P 356 C 2, P 357 C 1]

Hemendra Kumar Das for *Nripendra Chunder Das*—for Appellant,

Nasim Ali—for Respondents.

Rankin, C. J.—In this case, the appeal is brought from the judgment and decree of my learned brother Mitter, J., sitting in second appeal. It appears that the present appellant who was the defendant in the suit had certain carpenter's work done for him by the plaintiffs and also lent to the plaintiffs certain sums of money represented by three or four bonds. The appellant sued upon one of the bonds and, on 24th June 1926, got an ex parte decree thereon. The plaintiffs' case is that, by an anterior agreement, it was arranged between the parties that the plaintiffs at certain times would pay certain sums of money and that, though the decree was to be allowed to go ex parte, it would not be executed, provided the plaintiffs kept to their bargain and paid by the instalments agreed upon. The plaintiffs did keep to their bargain as regards the instalments, though the time for paying off all the instalments had not arrived when, on 14th July 1926, the present appellant applied for execution of the decree.

According to the facts found by the Courts below, this application for execution was contrary to good faith and to the terms of the bargain on which the defendant had obtained the ex parte decree. The present suit is brought for relief somewhat inartistically worded but it is in substance for an injunction to restrain the defendant from putting in execution the ex parte decree of 24th June 1926 obtained pursuant to the anterior agreement with the plaintiffs to which I have referred. Various objections have been taken, but the first question that we have to consider is whether such a suit will lie, whether the claim ought to have been brought by an application under S. 47 of the Code and whether there is anything in law to prevent the plaintiffs from getting an injunction in these circumstances. The cases cited to us show that, where there is an anterior agreement to the effect that a decree shall be allowed to be passed but shall not be executed, such an agreement cannot be set up in bar to the execution of the decree because the execution proceedings are based upon the decree and, to allege infirmities in the decree qualification to the decree (sic) is not proper when the Court is merely the executing Court Such a case of anterior agreement which was not allowed to be set up in execution will be found Illustrated in *Benode Lal Pakrashi* v. *Brajendra Kumar Saha* (1) and *Hassan Ali* v. *Gauzi Ali Mir* (2). Again, there are cases where adjustments after decree which could quite properly be set up as a bar to execution had not been allowed to be set up because they were not recorded under O. 21, R. 2, Civil P. C. Those cases have no bearing upon the present case.

The present case is one of an agreement anterior to the decree, an agreement that the decree should not be enforced except in certain event, namely, default of the plaintiffs in paying certain instalments and the suit is brought to restrain execution contrary to the agreement. It has been suggested that an agreement that a decree shall be passed but, if the defendant pays so much money in certain time, it shall not be executed is an agreement contrary to public policy. I can only say that, in my opinion, that is a novel doctrine and is entirely unsubstantial. It is quite right that such an agreement should not be set up in bar to execution.

(1) [1902] 29 Cal. 810=6 C. W. N. 838.
(2) [1901] 31 Cal. 179.

but I know of no doctrine to say that such a thing is contrary to public policy. The relief asked was asked in the form of a declaration. That certainly was wrong in form. The correct form of the relief was to ask for an injunction to restrain the present appellant from putting in execution the decree of 24th June 1926 unless and until the opposite parties committed a breach of their obligation under the agreement to which I have referred. It appears that now the whole of the money has been paid. There is no reason, therefore, why we should recast the form of the decree made by the Courts below. In my opinion, this appeal fails and must be dismissed with costs.

Mukerji, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 357

B. B. GHOSE AND S. K. GHOSE, JJ.

Kumar Chandra Gain and *another*—Defendants—Appellants.

v.

Narendra Nath Mitter and *others*—Plaintiff and Defendants—Respondents.

Appeal No. 1161 of 1928, Decided on 16th August 1929, against appellate decree of Addl. Dist. Judge, 24-Parganas, D/- 7th February 1928.

(a) Transfer of Property Act, S. 40—Covenant to pay share of purchase money to landlord as condition precedent to recognition of transfer is covenant running with land.

A covenant binding a tenant, his heirs or successors-in-interest to pay a certain share of purchase money to the landlord on the sale of the tenure, as a condition precedent to landlord recognizing the sale as valid and binding on him is a covenant running with the land and makes the purchaser liable for the same and the landlord can recover the same by suit and Court can in its discretion award interest to the landlord by way of damages although there may be no stipulation in covenant: *Tulk* v. *Moxhay*, 2 *P.L.* 774; *Lambert* v. *Norris* 2 *M & W.* 333; *Flight* v. *Glossop*, 2 *Bing* (*N. C.*) 125, *Dist.* [P 360 C 2]

(b) Transfer of Property Act, S. 40—When agreement is negative in substance, negative form of expression is immaterial and principle of restrictive covenant applies.

Absence of negative form of expression in a covenant is immaterial when from the substance of the agreement a negative agreement can be seen to be implied and the principle of restrictive covenants will then apply. [P 360 C 1]

(c) Civil P. C., S. 34—No stipulation for interest—Still interest can be allowed as advance.

Where money is due to the plaintiff but has not been paid through proper channel, the Court may allow interest by way of damages even though there is no stipulation for interest in the contract. [P 360 C 2]

Sarat Chandra Roy Chaudhury and *Jatindra Nath Sanyal*—for Appellants.

Narendra Chandra Bose and *Satyendra Kumar Mitra*—for Respondents.

B. B. Ghose, J.—This is an appeal by defendants 4 and 5 against the judgment and decree of the Additional District Judge of the 24-Parganas, partly decreeing the plaintiff's suit for the recovery of a sum of money under the following circumstances. The plaintiff created a mourashi mokarari tenure in favour of defendants 1, 2 and 3 in January 1906. Defendants 4 and 5 purchased that tenure from the other defendants for a sum of Rs. 8,675 on 13th December 1923. A dispute arose with reference to a provision in the patta granted by the plaintiff to his tenants which runs thus:

"If it be necessary to sell any portion of the potta land or the trees, one-fourth share of the proper value shall be deposited in my sherista as chauth selami; otherwise I shall not be bound by the said sale or purchase and the said sale shall not be valid. If you do not conform to the terms of this patta and by your negligence I suffer any loss, you will be liable to compensate the said loss. Observing all the aforesaid terms you do enjoy the pottai land with great felicity down to sons, grandsons and successors-in-interest being entitled to make a gift and sale of the pottai land on payment of rent etc., to me or my sons, grandsons etc. and successors-in interest."

The present suit was brought against all the defendants by the plaintiff for recovery of one-fourth of what he considered to be the proper value of the tenure at the time of the sale. His case was that the proper value was Rs. 12,000, and he claimed Rs. 3,000 plus interest making up Rs. 3,385. The learned Subordinate Judge made a decree in favour of the plaintiff only against defendants 1, 2, and 3 for one-fourth of the purchase money paid by defendants 4 and 5 (the appellants here) to the other defendants, with interest at the rate of 12 per cent from 13th December 1923 up to the date of the suit. The suit was dismissed against the appellants. There was a prayer for declaration of a charge on the property for the money due to the plaintiff. This declaration was disallowed by the trial Judge. Defendants 1, 2 and 3 did not appear in the trial Court, nor do they appear in this Court. The plaintiff appealed against the decree of the Subordinate Judge dismissing his suit against the

appellants here. The learned District Judge has made a decree also against them for one-fourth of the purchase money with interest. He has also made a declaration that this money was a charge on the tenure. Against that decree defendants 4 and 5 have appealed, and their contention is that according to the terms of the lease the covenant contained in it was not enforceable against the appellants. The learned District Judge relied upon a case decided by the Allahabad High Court; *Parbhu Narain Singh* v. *Ramzan* (1). There the agreement between the owner of the land and the lessee amongst other stipulations, was that if at any time the lessee were to vacate any land and to sell any house or houses which she had built thereon, she would, according to the custom of the locality pay to the plaintiff one-fourth of the purchase money. The heirs of the lessee sold two houses built by the original lessee to one of the defendants in the case. The plaintiff brought a suit against the surviving heir of the original lessee and the purchaser for recovery of one-fourth of the purchase money. In that case the trial Court gave a decree to the plaintiff jointly and severally against both the defendants. The purchaser appealed against the decree to the District Judge and the District Judge dismissed the suit as against him holding that under the agreement only the heir of the original lessee was liable for the plaintiff's claim. From that decree, the plaintiff appealed. One of the learned Judges, Piggot, J., decided the case against the purchaser mainly basing his judgment on the pleadings. Walsh, J., while agreeing with that decision made the following observations in his judgment:

"There is an undertaking in the sarkhat under which the tenant enjoyed her holding binding her in the most absolute form (and alleging further that it was in accordance with a custom prevailing in that locality) not to part with her interest by transfer without the zamindar receiving his right of one-fourth of the purchase money, and it cannot be contended that there is any legal or equitable ground which would justify a purchaser who had read that document, in paying the tenant the purchase money without seeing that the zamindar received his one-fourth share; or in other words, that the restriction which the tenant had imposed upon herself was not broken, when the transfer took place. To my mind, if that is a correct view of the legal position, it is no more than the expression applied to this case of the old English rule in *Tulk* v. *Moxhay* (2)."

(1) [1919] 41 All. 417=49 I. C. 865=17 A. L. J. 469.

The learned District Judge in this case relied upon those observations in decreeing the appeal as against defendants 4 and 5. The above case is said to have been followed in another case decided by a single Judge in this Court. The trial Court cited the case of *Saradâ Kripa Lala* v. *Bepin Chandra Pal* (3) and it seems to have held on the strength of that case that the purchaser is not bound to pay the chauth in terms of the patta. In that case there was this covenant, that the tenant would, if he transferred the property, pay the landlord out of the purchase money in his hands one-fourth as nazar and would obtain registration in the name of the transferee. The covenant further provided that if this step was not taken, the transfer would be invalid and the tenant would continue to be liable for the rent. The words in the present patta in question in this appeal, I have already quoted, are wider than the terms in the lease of the above case. What happened in that case was that defendant 1 had purchased the tenure in execution of his mortgage decree and then subsequently sold the property to defendant 2; the landlord brought his suit against both the defendants for recovery of the fourth share of the purchase money. The learned Judges held that that was a covenant running with the land and they cited some cases in support of the conclusion. Mr. Roy Chowdhury for the appellants argued that this decision is erroneous on the ground that the agreement did not directly affect the demised premises and that it was not something which was to be done on the land. He further seems to argue that the cases cited do not support the conclusion of the learned Judges. I do not think that that contention can be supported. The cases which were cited were apparently taken from the notes in *Spencer's* case (4) in Smith's Leading Cases, and I find the cases noted at p. 76 of Smith's Leading Cases (12th Edn.) in the order in which they have been referred to in the judgment. The learned Editors gave a summary of what

(2) [1849] 2 Phillip 774.
(3) A. I. R. 1923 Cal. 679.
(4) [1853] 5 Rep. 16a=1 Sm. L. C. 60.

was the covenant in each case, that is, to repair, to renew and replace the tenant's fixtures etc; not to assign without the consent of the lessor, the assignee being named, and so forth. It is true that in order to hold that a covenant runs with the land, it must be a covenant which relates to or touches and concerns the land or to have reference to the subject matter of the lease. But as the learned Editors of Smith's Leading Cases say whether a particular express covenant sufficiently "touches and concerns the thing demised" to be capable of running with the land is not unfrequently a question of difficulty. The learned advocate for the appellants argued relying upon 18 Halsbury, para. 1122, that such a covenant as this does not run with the land; and he particularly referred to two cases in the foot note. One of them is *Lambert* v. *Norris* (5). There the landlord gave a lease of certain premises. After the lease had been executed the lessee asked the landlord to enlarge the building. The landlord consented to do so on an agreement by the lessee to pay an additional rent of 10 per cent on the outlay. The lessee became bankrupt. The question was whether the assignees were bound to pay the additional rent. It was argued on behalf of the landlord that under the circumstances it should be held that there was in fact a surrender of the old lease and the grant of a new lease on an increased rent and so the assignees should be liable. This argument was repelled. It was apparently held, relying on an older case, that the new agreement was to have the effect of a lease at will. It will be noticed that the Statute of Frauds was referred to in the course of the argument. This case to my mind, has no bearing upon the facts of the present case.

The other case referred to in the foot-note in 18 Halsbury was *Flight* v. *Glossop* (6). There some persons borrowed money from the plaintiff promising to pay at a certain date, and stipulated that between the date of loan and the date of payment the plaintiff should have the use of two boxes at the Victoria Theatre. This was held to be a covenant not running with the land, as it was a mere personal covenant to pay the money borrowed and no interest passed under the agreement to any specific part of the theatre. The stipulation for the use of two boxes was stated by one of the learned Judges to be a sort of bonus. Under these circumstances as no interest in any part of the land was concerned, it could not be said that the covenant was one running with the land.

These being disposed of, there is no doubt that under the authority of the case of *Sarada Kripa Lal* v. *Bepin Chandra Pal* (3) which lays down that such an agreement as this is a covenant running with the land, it should be held that this is a covenant running with the land. At one time in the course of his argument Mr. Roy Chowdhury admitted that if it was a covenant running with the land, then the appellants would be bound to pay. But at a subsequent stage he seems to have reconsidered his argument and said that even if it was a covenant running with the land, then defendants 1, 2 and 3 were only liable to pay (which, to my mind, it is superfluous to say, because they were the original contractors), but that the appellants would not be bound to pay, as there is no term in the document which would affect these defendants; and he relied upon the case in *Sarada Kripa Lal* v. *Bepin Chandra Pal* (3) in support of his proposition. In that case, however, the learned Judges refrained from considering the question whether the conveyance by defendant 1 had created a valid title in favour of defendant 2 as against the plaintiff. In that case a decree was made in the lower Court against both the defendants; but defendant 2, that is the last purchaser, did not appeal against the decree. So it was not necessary for the learned Judges to consider whether defendant 2 in that case was liable for the money or not. That case, in my opinion, does not support the contention of the appellants.

The present case appears to be exactly similar to *Parbhu Narain Singh* v. *Ramzan* (1). Mr. Roy Choudhury attempted at first to distinguish that case from the present. But as a matter of fact it was not possible to find any distinction between the position of the

(5) [1837] 2 M. & W. 333=6 L. J. Ex. 103.
(6) [1895] 2 Bing (n. c.) 125=2 Scoth 220=4 L. J. C. P. 268=1 Hodges 263.

purchaser in that case and in this. Finding that to be so, he next contended that the observations of Walsh J. were made in that case as there was a negative covenant for the lessee not to part with her interest except under certain conditions. The doctrine of *Tulk* v. *Moxhay* (2) might, therefore, be applicable in that case. In the statement of the facts of the case, however, there is no such negative word to be found. The broad principle as regards the use of the word "not" in such cases seems to me to have been laid down in the case *Wolverhamton & Waisall Ry. Co.* v. *London & North Western Railway Co.* (7) (at p. 440). Lord Selborne there said :

"The technical distinction being made, that if you find the word "not" in an agreement "I will not do a thing" as well as the words "I will," even although the negative term might have been implied from the positive, yet the Court, refusing to act on the implication of the negative, will act on the expression of it. I can only say, that I should think it was the safer and the better rule, if it should eventually be adopted by this Court, to look in all such cases to the substance and not to the form. If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise whether this is the Court to come to for a remedy. If it is, I cannot think that ought to depend on the use of a negative rather than an affirmative form of expression."

These observations were cited and followed in the case of *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (8): see also *Burn & Co.* v. *McDonald* (9) (at p. 363). It seems to me, therefore, that the observations of Walsh J. in the case referred to cannot he said to be inapplicable here on the ground that the negative word has not been used in the lease.

But although I am unable to accept the contention that *Parbhu Narain's* case (1) does not apply to this on the ground of absence of a negative covenant, I do not think that the appellants can be held liable to pay the amount claimed by the application of the doctrine of *Tulk* v. *Moxhay* (2). That doctrine cannot be extended to other than restrictive covenants. The doctrine is, that any one coming to the land with notice actual or constructive, of a covenant entered into by a previous owner of the land restricting the use to be made of that land will be prohibited from doing anything in breach of the covenant. *In re : Nisbet and Potts' Contract* (10). The grantees and assignees would be restrained from doing anything in breach of the restrictive covenant, if they came with notice of it and this would be regardless of the question whether the covenant runs with the land. The contemplated breach of the negative covenant would be restrained by an injunction. But the covenant to do anything (in this case to pay a sum of money on assignment) cannot, in my opinion, be enforced by applying the doctrine of *Tulk* v. *Moxhay* (2): see *Haywood* v. *Brunswick &c. Society* (11).

The appellants, however, are liable to pay the amount claimed by the plaintiff, as, in my opinion, the covenant is one running with the land being a benefit reserved for the landlord with reference to the land demised. It is stipulated that on breach of the covenant the grantee as well as his successors-in-interest which includes assignees would be liable to compensate the landlord. This case, therefore, falls within the authority of *Spencer's* case (4). The covenant in the present case, as I have said, is wider than the covenant in *Sarada Kripa Lal* v. *Bepin Chandra* (3). The compensation awarded in this case is a fourth share of the purchase money with interest as stated above.

The only other argument advanced was with regard to the interest awarded. It is urged that there is no stipulation for interest to be paid on the fourth share of the price and the Court below ought not to have allowed it. But where money is due to the plaintiff but has not been paid in proper time, the Court may allow interest by way of damages and that is what both the Courts below did. The rate at which such damages were allowed does not seem to be excessive being only 12 per cent. simple interest.

The result, therefore, is that the appeal stands dismissed with costs.

S. K. Ghose, J.—I agree.

V.B./R.K. *Appeal dismissed.*

(7) [1873] 16 Eq. 433=43 L. J. Ch. 131.
(8) [1926] A. C. 108.
(9) [1909] 36 Cal. 351=9 C. L. J. 190=1 I. C. 829=13 C. W. N. 255.
(10) [1906] 1 Ch. 386=75 L. J. Ch. 239=22 T. L. R. 233=54 W. R. 286=94 L. T. 297.
(11) [1881] 8 Q. B. D. 403=51 L. J. Q. B. 73=30 W. R. 299=45 L. T. 699.

*A. I. R. 1930 Calcutta 361

SUHRAWARDY AND JACK, JJ.

Lal Mahammad and *others* — Petitioners.

v.

Deputy Inspector General of Police, of C. I. D., Bengal—Opposite Party.

Criminal Revn. No. 5 of 1929, Decided on 29th July 1929, from an order of Addl. Sess. Judge, Dinajpur, D/- 17th January 1929.

*** Criminal P. C., S. 476-B — District Judge hearing appeal under S. 476-B has power to transfer appeal to competent Court and transferee Court can make necessary complaint.**

An appeal to District Judge under S. 476-B preferred over an order of a subordinate Court refusing sanction for prosecution, can be transferred by the District Judge to any competent Court. The latter Court, on such transfer, has authority to make the necessary complaint under S. 476-B: 39 *Cal.* 774, *Ref.*; *A. I. R* 1929 *Cal.* 172, *Dist.* [P 362 C 1]

Suresh Chandra Talukdar and *Surajit Chandra Lahiri*—for Petitioners.

Satindra Nath Mukherji — for Opposite Party.

Suhrawardy, J.—This rule was issued on ground No. 9 which is to this effect : For that the learned Additional Sessions Judge had no jurisdiction to hear the appeal or to lodge the complaint. The facts are that the petitioner sued the defendants upon a hatchita in the Court of the Munsiff at Raigunje in the District of Dinajpore, and on behalf of the defendants the suit was contested by the opposite party D. I. G., C. I. D., Bengal. The suit was transferred by the order of the District Judge from Raigunje to the Munsiff at Dinajpore. The petitioner applied to the Munsiff for leave to withdraw from the suit with liberty to bring a fresh suit on the same cause of action. It was refused and the suit was dismissed for non-prosecution. Thereafter the opposite party applied to the Munsiff for sanction to prosecute the petitioner under S. 476, Criminal P. C. on charges under Ss. 120-B, 109, 209, 471, I. P. C., etc. The application was refused by the Munsiff and the opposite party preferred an appeal from the order of the Munsiff to the District Judge of Dinajpore under S. 476-B, Criminal P. C. The District Judge allowed the appeal and made a complaint under S. 476-B. Against that order there was an application for revision in this Court. This Court set aside the order of the District Judge and sent the matter back to the Munsiff with certain directions. The Munsiff again rejected the petition of the opposite party for sanction. The opposite party preferred an appeal to the District Judge against the order of the Munsiff, who transferred the case to the Additional District Judge to deal with it. The latter officer allowed the appeal by his judgment dated 17th January 1929. The petitioner objects to this order on the ground that the Additional District Judge had no authority to make the complaint under S.476-B, Criminal P. C. The matter is not free from doubt and I have given my best consideration to it. Under S. 476-B any person whose application under S. 476 has been refused or against whom such a complaint has been made may appeal to the Court to which such former Court is subordinate within the meaning of S. 195, sub-S. (3). Under S. 195 sub-S. (3) the Court to which the primary Court is subordinate shall be deemed to be the Court to which appeal ordinarily lies from the appealable decree or sentence from the former Court. Section 476-B then lays down that on such appeal being made the superior Court may thereupon pass necessary order.

Now, there can be no doubt that an appeal under S. 476-B lies to the Court to which the trial Court is subordinate and in this instance the District Judge's Court is the Court to which appeal lies. So that so far as the filing of the appeal is concerned, there is no irregularity. The next question is whether the District Judge having received the appeal has authority to transfer it to the Additional District Judge. This question does not seem to have been finally settled under the Code as amended in 1923. But we may refer to a case under the old code, namely, the case of *Ram Charan Chandra* v. *Taripulla* (1). There the learned Judges in interpreting the relevant clauses of the old S. 195 held that no one except the District Judge has power to hear an appeal under Ss.195 (6) and 195 (7) of the old code. The ratio of that decision as given by N. R. Chatterjea, J. is that a District Judge is competent to dispose of any appeal or

(1) [1912] 39 Cal. 774=13 I. C. 1007=15 C. W. N. 645.

proceeding himself or to transfer it to a Subordinate Judge. But under S. 195 (6) Criminal P. C. 1898, the power of revoking or granting any sanction given or refused is given to the authority to which the authority giving or refusing it is subordinate. The judgment of D. Chatterjee, J. also deals with the powers of a District Judge to transfer appeals pending in his file to an Additional District Judge. Now, these clauses of S.195 have been repealed and the new Ss. 476-A and 476-B have been substituted. S. 476-B lays down that an appeal must be preferred to the Court to which the primary Court is subordinate in the sense that appeals ordinarily lie to the former Court from the decisions of the latter Court, but the final orders may be passed by the superior Court. The Court of the Additional Judge may be said to be a superior Court in relation to a Munsiff's Court. Reference may also be made to S. 8, Civil Courts' Act 1887 which empowers an Additional District Judge to discharge all the functions of a District Judge which may have been assigned to him. Section 24 (a), Civil P. C., gives unfettered jurisdiction to the District Judge to transfer an appeal or any proceeding pending before him to any competent Court subordinate to him. Now, it has been held that an appeal under S. 476-B is an appeal under the Criminal Procedure Code and has to be governed by the provisions of that Act: *Rajani Kanta Kayal* v. *Bistoo Moni Dassi* (2), *Chunder Kumar Sen* v. *Mathura Debya* (3) and *Hamid Ali* v. *Madhusudan Das* (4). If it is an appeal under the Criminal Procedure Code it is governed by S. 409, Criminal P. C. which says that an appeal to the Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge.But an appeal under S. 476 in a civil matter is not preferred to the Sessions Judge but to the District Judge, the same officer who combines in him both the functions and power is given to District Judge under the Civil Procedure Code and the Civil Court's Act to regulate the procedure of an appeal.

I have been pressed for the view I have taken in this matter by considerations of reasonableness in the procedure laid down by the Code. Under S. 476-A the power under S. 476 may be exercised by a Court to which the trial Court is subordinate within the meaning of S. 195 (3). To give a strict interpretation that only the Court to which the primary Court is subordinate can make a complaint under S. 476 is to deprive Subordinate Judges and Judges other than District Judges, who ordinarily hear most of the appeals from the Munsiffs of the power of making any complaint under S. 476. It often happens and such cases frequently come before us, that when an appellate Court forms an opinion in connexion with any proceeding in a civil Court it does act under S. 476 and make a complaint before the proper Court. It is never intended to deprive Judge other than the District Judges, who hear ninety per cent of the appeals, of the power of making a complaint where they find that an offence has been committed.

Reference in this connexion has also been made on behalf of the petitioner to the decision in the case of *Mohim Chandra Nath* v. *Emperor* (5). That case does not discuss the question raised before us. There the appeal was not preferred to the District Magistrate to whom the trial Court was subordinate but to an officer specially empowered to hear appeals from Second Class Magistrates. In the view I have taken of this matter this rule should be discharged.

Jack, J.—I agree ; but I would simply base my decision on the fact that the District Judge is empowered under S. 24 (a), Civil P. C. to transfer any proceedings to the Additional District Judge.

V.S./R.K. *Rule discharged.*

(2) A. I. R. 1927 Cal. 718.
(3) A. I. R. 1925 Cal. 1228=52 Cal. 1009.
(4) A. I. R. 1927 Cal. 284=54 Cal. 355.
(5) A. I. R. 1929 Cal. 172=56 Cal. 824.

A. I. R. 1930 Calcutta 362

SUHRAWARDY AND PAGE, JJ.

Muktal Hossein and *another*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 334 of 1929, Decided on 2nd December 1929.

Criminal P, C., S. 216—In case of serious offences like those under Ss, 363 and 367 Penal Code, every opportunity should be given to accused to adduce evidence on be-

half of defence—If evidence is inadmissible or irrelevant it may be refused.

Where the accused are tried for offences under Ss. 363 and 367, I. P. C. every opportunity should be given to them to adduce evidence on behalf of the defence either oral or documentary and in refusing such evidence the Judge does not exercise proper discretion. If the Judge is of opinion that the evidence adduced by the accused is inadmissible or irrelevant or that such evidence is adduced for the purpose of vexation or delay or to defeat the ends of justice he can refuse to receive such evidence. [P 363 C 2]

Shyama Prasanno Deb — for Appellants.

Lalit Mohan Sanyal—for the Crown.

Suhrawardy, J. — In this case the accused have been convicted under Ss. 363 and 367, I. P. C. and sentenced to long terms of imprisonment. It is not necessary to consider the various points which have been urged before us in appeal by the learned advocate appearing for them, as we think it enough if we refer to one objection which is to the effect that the learned Addl. Sessions Judge did not give sufficient opportunity to the accused to examine the witnesses for the defence. It appears from the record that before the Magistrate the accused had submitted presumably under S. 211, Criminal P. C. a list of 19 witnesses to be examined at the trial on their behalf. Before the prosecution case was closed the defence pleader on 18th March 1929 prayed for calling for certain records from the District Magistrate's room and for summoning three defence witnesses for the following day. The learned Judge ordered that the records should be called for and directed the District Magistrate to summon the witnesses for the following day. On the following day, that is, 19th March, apparently the witnesses did not come and the defence pleader put in a petition for adjournment of the case for a day to produce certain defence witnesses. The learned Judge dismissed the application on the ground that those witnesses would not prove relevant matters or any matter admissible in evidence under the law, without allowing the accused to produce their witnesses and then deciding about the relevancy of their evidence. We think that the learned Judge should have in a serious case like the present allowed the accused an opportunity of adducing such evidence as they chose. If at the examination of the witnesses for the defence the learned Judge was of opinion that the statements made by them were not admissible or were not relevant in evidence he could rule them out. He did not exercise a proper discretion in refusing to examine the witnesses for the defence. Under S. 216, Criminal P.C., the Magistrate was bound to summon all the witnesses named by the accused for appearance before the Court of the Sessions Judge except those whose evidence was taken by the Magistrate himself or whom the Magistrate considers to have been included in the list for the purpose of delaying or defeating the ends of justice. We think that in this particular case the accused have a just grievance that they were not allowed to adduce evidence on their behalf.

We accordingly set aside the convictions and sentences passed by the learned Addl. Sessions Judge and direct that the accused be retried according to law. Every opportunity should be given to them to adduce evidence on behalf of the defence either oral or documentary. If the learned Judge is of opinion that the evidence adduced by the accused is inadmissible or irrelevant, or that such evidence was adduced for the purpose of vexation or delay or to defeat the ends of justice, he can refuse to receive such evidence.

We direct that the accused be retried according to law. It will be in the discretion of the Sessions Judge to allow bail to the accused pending their retrial.

Objection has been taken to the propriety of the charge framed on the authority of the decision in *Mafizaddi* v. *Emperor* (1). If it were necessary to decide the point, we would have had to examine the case, but as the case is to be retried, the Sessions Judge will do well to frame separate charges for kidnapping and abducting.

R.M./R.K. *Case remanded.*

(1) A. I. R. 1927 Cal. 644.

A. I. R. 1930 Calcutta 363

PEARSON AND PATTERSON, JJ.

Jnananjan Niyogi—Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 909 of 1929, Decided on 6th February 1930.

Penal Code, S. 124-A — Person vilifying the British by contrast, by holding up admired character as pattern is guilty, under S. 124-A.

It is one thing to hold up an admired character as a pattern in a speech and quite another to vilify the British by contrast; but a speaker cannot be allowed to use the former as a cloak for the latter if the result of what he says in fact be to inspire his audience with hatred and disaffection towards Government. Where the speaker, in his speech, oversteps the boundary line, he is guilty under S. 124-A. [P 364 C 2]

Mrityunjoy Chattopadhya, *Manindra Nath Banerjee*, *Debabrata Mukherjee* and *Bholanath Roy*—for Appellant.

Debendra Narain Bhattacharjee—for the Crown.

Pearson, J.—The accused Jnananjan Niyogi has been charged under S. 124-A, I. P. C., in regard to a speech made by him on 16th June last at Hazra Park, Bhowanipur. He has been convicted and sentenced to rigorous imprisonment for one year, and against that he now appeals.

As stated by the learned Magistrate the evidence shows that the meeting lasted from about 6-30 to 9 p. m., that about 4000 persons attended composed mostly of young men and students, and about 100 volunteers dressed in a khaki uniform also attended. The occasion was a gathering in memory of the late Mr. C. R. Das.

The speaker begins by reminding his audience of the faith that Mr. Das had had in the nation, and his belief in its future, his desire to build up its strength; that the people of this country would be able to bring about a revolution on the face of the earth; that possessed with a new idea the Bengalis would be able to create that revolution. At first, he goes on, no one would accept him

"but the force of revolution latent in Bengali danced a mad dance in his heart, roared and having crowned with success the new revolution showed the world that the Bengali could think on new lines, see in a new light and again tread the path of creation. What has he left for us to-day? that force of revolution."

Then again:

"Just now Nripendra remarked that today we were not merely desirous of destroying dyarchy. Why? Because the immense force which lies in the soul of Deshbandhu can create a new path".

Shortly afterwards we get this:

"We do not still believe that the whole world has really admitted that the English are carrying on the administration of our country against our consent. We want to convince the world that the English carry us along against our consent. We want to convince it that we do not accept their unfair administration and ordinance. We know that we do not accept."

Then there is a call to tell the English that Government cannot be carried on in this country by neglecting public opinion. Then attention is directed to the misery and poverty of the country, and how Mr. Das offered his life "to crown with success the independent rule", destroying and ending the subjection of the country. The revolutionary force envisaged by Mr. Das is then put forward as a cure for the "agony of subjection."

"So, with our creed of revolution in our hearts we say that we shall build up the country, we shall build up the nation, we shall not look expectantly towards the English. After 150 years of English administration we have throughly realized that the French are not our enemies, Germany is not our enemy. Italy is not our enemy, our only enemy is the English. It is our right to curtail their strength and their talent."

Of this last passage it has been argued on behalf of the appellant that the contradistinction of French and Germans goes to show that the economic feature is that on which the speaker is insisting. From the above passages cited, and reading the article as a whole, we note that the learned Magistrate has come to the conclusion that although in one way the speech was an exhortation to his audience to emulate the example of Mr. C. R. Das, the whole tenor is a tirade against the present Government of the land and for its complete overthrow. The speech, he says, is delivered with a venom which is sure to excite feeling of hostility and hatred to Government. Naturally it is one thing to hold up an admired character as a pattern, and quite another to vilify the British by contrast; but a speaker cannot be allowed to use the former as a cloak for the latter if the result of what he says in fact be to inspire his audience with hatred and disaffection towards Government. Our duty is only to say whether we consider he has brought himself within the terms of S. 124-A, and although we are not prepared to say that we are at one with the Magistrate in his wholesale condemnation, we think that at certain points in his speech the boundary line is undoubtedly overstepped, particularly having regard

to the nature of his audience. Especially is this so even upon a fair, free and liberal construction when he refers to the unfair administration and ordinance of the English, and again when he speaks of the English being our only enemy.

Mention must be made of the written statement filed by the accused. It does not affect the intention of the accused, which is to be derived from a construction of the speech itself. Nevertheless it is a matter to be taken into consideration, and shows how the accused is minded. It does him no good, at any rate. He impugns the good faith of even the highest judicial tribunals; he makes the statement that England and England alone has driven Bengal from literacy into dismal illiteracy, and, in a later passage, that England has strangled the commerce and manufactures of India. We cannot agree that the speech was calculated primarily to emphasise, as the written statement suggests, the economic adversity of India with a view to appeal to his hearers to emulate the sacrifice and self-reliance of Mr. Das. The language goes far beyond that. We think that the conviction was right and must be upheld. The sentence we think is more than is demanded by the circumstances.

We reduce the sentence from one year's to three months' rigorous imprisonment.

The appellant will surrender to his bail forthwith and serve out the remaining portion of the sentence.

R.M./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 365

MUKERJI, J.

Gangadas Banerjee and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 686 of 1929, Decided on 4th September 1929, from order of Sess. Judge, 24-Perganas, D/- 26th April 1929.

Bengal Public Gambling Act, Ss. 3, 4, 5 and 6—Presumption under S. 6 arises only under peculiar circumstances mentioned by statute itself—Magistrate not satisfied that premises are used as common gaming house, —No presumption under S. 6 arises.

The presumption of law under S. 6 arises only in the peculiar circumstances mentioned by the statute itself, i. e., if the warrant authorises a search on the footing of the premises being a common gaming house and when the search results in a find of instruments of gaming.

When the requirements of S. 5 are not strictly complied with inasmuch as the Magistrate does not say anywhere in the proceedings that the premises were used for a common gaming house, the presumption under S. 6 does not arise, and if there is no evidence showing that the premises had been kept for the profit or gain of the accused, they cannot be convicted under S. 3 or S. 4. [P 366 C 1, 2]

Hiralal Ganguli—for Petitioners.

Birlhusan Dutt—for the Crown.

Judgment.— The petitioners have been convicted under S. 3 and 4, Bengal Public Gambling Act (Act 3 B. C. of 1867), petitioner 1 under S. 3 and all the other petitioners under S. 4 of the said Act. The question for consideration in this rule is whether the convictions are supportable in so far as they are based upon finding that the place where gambling used to go on was a common gaming house within the meaning of the Act. Offences under Ss. 3 and 4 have for their foundation as one of the ingredients the fact that the place where gaming goes on is a common gaming house within the meaning of the definition given in S. 1.

As regards this matter the learned Sessions Judge held in the first instance that :

"petitioner 1 or those who were interested in the venture along with him have not been proved by any evidence to have either drawn commission or worked so as to ensure more or less certain profits."

He found, however, that instruments of gaming were found in the premises which were in the occupaton of petitioner 1, who is said to be the lessee of the premises ; and as those instruments were found on a search purporting to have been carried out under the provisions of S. 5 of the Act, he applied to the case the presumption provided for in S. 6 thereof. The said presumption is to the effect that when instruments of gaming are found in a place searched in accordance with a warrant issued under S. 5, the place is to be regarded as a common gaming house until the contrary is proved. The question, therefor, is whether the presumption upon which the learned Judge has relied really arises in the present case.

The search warrant that was issued under the provisions of S. 5 of the Act did not state that the premises were

used as a common gaming house ; but it was stated therein that tha user of the premises was for unauthorized race-gambling. The learned Sessions Judge held that user for unauthorized race-gambling and user as a common gaming house mean one and the same thing. The reasoning upon which the learned Sessions Judge came to that conclusion is that unless the premises were a common gaming house the Magistrate could not issue the search warrant; or, in other words, that if the premises were used merely for unauthorised race-gambling without it being shown that they constituted a common gaming house the learned Magistrate could not have very well issued the search warrant. The learned Sessions Judge has observed further that it must be assumed that the Magistrate was aware of the law. On an assumption of this character the learned Sessions Judge came to the conclusion that the search warrant must have been issued because the Magistrate was satisfied that the premises were a common gaming house as defined in S. 1 of the Act.

I am clearly of opinion that in the process of reasoning that the learned Sessions Judge has adopted he has begged the very question he had to determine. The question is whether the presumption under S. 6 arises in the case. The law says that it will arise if the warrant authorized the search on the footing of the premises being a common gaming house, and when the search held under warrant has resulted in a find of instruments of gaming. The reason of the presumption is that where the Magistrate is satisfied on the materials before him that the premises constitute a common gaming house, and there is the find, there is a prima facie case. The argument that because there is a find and because the search was in execution of a warrant it should be taken that the Magistrate must have been satisfied that the premises were a common gaming house, and that therefore the Court which tries the case will also take it that they were a common gaming house, is to ignore the reason of the presumption which is a statutory presumption and to proceed on a wholly different line and create a new rule of evidence altogether.

The presumption of law arises only in the peculiar circumstances that are mentioned by the statute itself. In the present case the requirements of S. 5 of the Act have not been strictly complied with, and the Magistrate has not said anywhere in the proceedings that in issuing the search warrant he was satisfied that the premises were used as a common gaming house. In circumstances such as these, the presumption mentioned in S. 6 of the Act, in my opinion, does not arise. If this presumption does not arise, as I hold that it does not, and as there is no evidence showing that the premises were kept for the profit or gain of petitioner 1 or his confederates, as the learned Sessions Judge has himself observed in his judgment, it must be held that it has not been established that the premises were a common gaming house. The petitioners' convictions therefore fail.

The rule is, accordingly, made absolute.

The convictions of and sentences passed upon the petitioners are set aside and it is ordered that the fines if paid be refunded.

R.M./R.K. *Rule made absolute.*

A. I. R. 1930 Calcutta 366

RANKIN, C. J., AND PATTERSON, J.

Probhat Chandra Adhikari and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 247 of 1929, Decided on 30th August 1929.

Penal Code S. 228—No direction by Local Government as regards Sub-Registrar being civil Court—Offence committed before him under S. 228 cannot be dealt with under Criminal P. C., Ss. 480 and 482.

In the absence of a direction by the Local Government as regards the Sub-Registrar being a civil Court within the meaning of Ss. 480 and 482, Criminal P. C., an offence under S. 228, Penal Code, if committed before a Sub-Registrar cannot be dealt with under Ss. 480 and 482, Criminal P. C. [P 368 C 1]

Mrityunjoy Chattopadhya, *Manindra Nath Banerji* and *Susil Kumar Banerjee*—for Petitioners.

Amiruddin Ahmed for *Debendra Narain Bhattacharjee*—for the Crown.

Rankin, C.J.—In this case it appears that while the Sadar Sub-Registrar of Pabna was sitting on a judicial proceeding certain persons who were deed-

writers finding fault with a certain ruling which he had given about the alteration of a figure in a deed came into his room and insulted him and caused interruption to his duty. The Sub-Registrar made a complaint to this effect to the District Registrar who happened also to be the District Magistrate and at the end of his recital of the circumstances he says that the accused persons may be prosecuted under S. 228, I. P. C. The District Magistrate apparently in his double capacity sent the case to the Sub-Divisional Officer for disposal and the Sub-Divisional Officer apparently summoned the accused under S. 228. In the meantime at the earliest possible moment the accused made an application to the Additional Sessions Judge taking several objections to the proceedings and this application was rejected. Thereupon the accused obtained a rule from this Court calling upon the prosecution to show cause why proceedings against the accused should not be quashed or why such other order should not be made as to this Court may seem fit and proper the ground upon which the rule was issued being that the Sub-Divisional Officer had no jurisdiction to issue process and that S. 476, Criminal P. C., is not applicable to the case. It would appear that throughout the proceedings the case has been assumed to be one under S.228, I. P. C.

Mr. Chatterjee on behalf of the accused person calls our attention to the fact that S. 228 deals with an offence which by Sch. 2, Criminal P. C., may be tried by the Court in which the offence is committed subject to the provisions of Ch. 35 of the Code and this provision in Col. 8, contrasts with the provision made in respect of an offence (which also comes under S. 480, Criminal P. C.) under S. 175. In that case the Court by which the offence is triable is said to be the Court in which the offence is committed subject to the provisions of Ch. 35 or the Court of the Presidency Magistrate or a Magistrate of the First and Second Class. Beginning with the assumption that the Court by which the offence is triable is the Court in which the offence is committed, we are taken to S. 480, Criminal P. C. We find in that that section refers first of all to a case where an offence is committed in the view of or presence of any civil, criminal or revenue Court and in such a case a summary procedure is prescribed and the Judicial Officer who is insulted and interrupted in his duty may cause the offender to be detained in custody and then sentence the offender to fine not exceeding Rs. 200 and he is required to record the facts constituting the offence with the statement, if any, made by the offender. In default of payment of fine he may pass a sentence up to one month's rigorous imprisonment. If, however, the Court considers in such a case that this punishment is insufficient, S. 482 empowers the Court to record the facts constituting the offence with the statement of the accused if any and to forward the case to a Magistrate having jurisdiction to try the same and also empowers the Court to take security from the offender and in default of giving sufficient security to forward such person in custody to such Magistrate. Having regard to the fact that an offence under S. 228 is made triable by the Court in which the offence is committed subject to the provisions of Chap. 35 it appears to me that prima facie the intention of the legislature was that such a case should be dealt with under Ss. 480 and 482.

In this case the offence was committed before the Sub-Registrar and S. 84, Registration Act, makes it clear that the registering officer is a public servant and that a proceeding under the Registration Act is a judicial proceeding for the purposes of S. 228. As Col. 8, Sch. 2, assumes that the offence is committed in a Court it may well be argued that there is no difficulty in holding that the Sub-Registrar is a Court for the purposes of Col. 8, Sch. 2. It would appear that under the Registration Act of 1877 there was a clause in addition to what is now repeated in S. 84, Registration Act of 1908, to the effect that the Registrar should be and the Sub-Registrar should not be a Court within the meaning of the section which corresponds to Ss. 480 and 482. It is, therefore, somewhat difficult to lay it down that by virtue of the Criminal Procedure Code the Sub-Registrar is a Court for the purposes of Ss. 480 and 482 and we find that S. 483 appears to leave the matter to the directions of the

Local Government. In this case it appears that the Local Government has made no direction as regards the Registrar or the Sub-Registrar being a civil Court within the meaning of Ss. 480 and 482 and the result of that is that the offence under S. 228 if committed before a Sub-Registrar cannot be dealt with under Ss. 480 and 482, that is to say, in the first instance by the Court in which the offence was committed. On my part there is a grave difficulty in saying that such an offence can be dealt with outside the provision made in S. 480 or 482 or in the absence of any directions by the Local Government in saying that it can be dealt with by himself under S. 480.

After examinnig the matter it appears to me that it is almost hopeless to suppose that in the proceeding now started any final result can possibly be arrived at under S. 228. To my mind the intention of the legislature is that a charge under S. 228 as distinct from a charge under S. 175 should be dealt with in a summary manner under S. 480 or else in a rather more elaborate manner provided by S. 482 and the latter section is confined to a case where the Court against whom the offence is committed has applied its mind on the question to decide if a fine of Rs. 200 will not be adequate. It has, however, been pressed upon us that in this case the Magistrate to whom the matter had been sent has tried it as a complaint in a summons case. But it does by no means follow that he will find in the end that S. 228 is the only section which can be applied. It will be open to him if he thinks fit to find that the accused is guilty of another offence triable as a summons case and S. 186, I. P. C., is suggested as a possible alternative. In the circumstances it is said that we should not quash the proceeding but let the Magistrate go on with it. In my judgment that contention must prevail. We think we ought to give direction in this case to the effect that under S. 228 proceedings should not be further continued but that the Magistrate's proceedings should not be quashed because it is open to the Magistrate to consider the facts and come to a conclusion whether under any other section he should proceed. With this direction the rule is discharged.

Patterson, J.—I agree.

V.B./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 368

CUMING, J.

S. M. Choudhuri — Accused — Petitioner.

v.

Corporation of Calcutta — Opposite Party.

Criminal Revn. No. 1441 of 1929, Decided on 20th January 1930.

Calcutta Municipal Act, S. 175 and Sch. 6, Item 18—Even if person carries only passengers yet he is carrier within Sch. 6, item 18.

Even if a person carries only passengers for hire yet he is a carrier within the meaning of Sch. 6, item 18, for any person who carries goods or passengers for hire or gratuitously by land or water is a carrier. [P 368 C 2]

Mrityunjoy Chattopadhyay—for Petitioner.

Braja Lal Chakrabarti and *Gopendra Krishna Banerji*—for Opposite Party.

Cuming, J.—The petitioner in this case who is an advocate of this Court is also the owner of a motor bus and apparently carries on the trade of a motor bus owner. He was prosecuted at the instance of the Corporation of Calcutta and has been fined Rs. 50 on the ground that he is liable under S. 175, Calcutta Municipal Act 1923 read with Sch. 6, Item 18, to take out a license as a carrier.

The petitioner contends that he carries only passengers and not goods for hire. His case is that small cases such as suit cases are allowed on his bus but no hire is paid for the carriage of the goods and hire is only paid for passengers. His contention would seem shortly to be this that a person who carries only passengers for hire is not a carrier within the meaning of Sch. 6, item 18, Calcutta Municipal Act. The whole case depends upon the meaning of the expression "carrier." In Halsbury's Laws of England vol. 4, p. 2 we find the word 'carrier' defined as

"Any person who carries goods or passengers for hire or gratuitously by land or water is a carrier."

Accepting this definition there can be no doubt but that the petitioner is a carrier within the meaning of S. 175 read with Sch. 6, item 18 and as such he is liable to pay the tax. The decision of the lower Court is therefore right. The rule is discharged.

V.S./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 369 (1)

MUKERJI, J.

Ah Yung and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 80 of 1929, Decided on 24th April 1929, from order of Addl. Presy. Magistrate, Calcutta, D/- 8th January 1929.

Calcutta Police Act (4 B. C. of 1866) Ss. 45, 46 and 47—Presumption is inapplicable where search in consequence of which find takes place is of place other than that ordered to be searched.

Under S. 47, Police Act, if gaming instruments are found in a house, the presumption is that it is a common gaming house, provided the finding of the instrument is in conformity with S. 46. The search in consequence of which the find takes place must, therefore, be of a place of which a search warrant is issued and no such presumption can be drawn from search resulting in find of a place which is not ordered to be searched. [P369 C 1]

Probodh Chander Chatterjee and *Bireswar Chatterji*—for Petitioners.

Mrityunjoy Chatterji—for the Crown.

Judgment.—Of the several grounds upon which the conviction of the petitioners which is under S. 45, Calcutta Police Act, (4 B. C. of 1866) in this case has been assailed, none is of any substance except one which in my judgment goes to the very root of the matter and is positively fatal.

The learned Magistrate in dealing with the question which is the primary question in the case, namely, whether the place can be called a 'common gaming house" has observed :

"Section 47 of the Act lays down that if gaming instruments are found in a house, the presumption is that it is a common gaming house."

This proposition is entirely correct provided the finding of the instruments is in conformity with the provisions of S. 46, as S. 47 itself provides for by the use of the words "under the provisions of the last preceding section." To go back to S. 46 for a second, the search as a consequence of which the find takes place must be of the place, etc., in respect of which the search warrant was issued under that section. In the present case, the search warrant was for premises No. 71/4 Bentinck Street and and the search was of premises No. 71/5 Bentinck Street. This is not a technical defect but a matter of substance, the law attaching serious consequences and importance to the discretion that a Magistrate or the Commissioner of Police exercises in the matter of issuing a search warrant under this section. The result is that what would hold good in respect of premises No. 71/4 cannot hold good as regards 71/5 unless of course the latter is included in the former of which, however, there is no evidence.

Apart from the presumption under S. 47 upon which the learned Magistrate has relied, the evidence aliundi does not satisfy the requirements of the definition of a common gaming house as given in S. 3 of the Act.

The result is that the convictions of the petitioners must fail. The rule is made absolute. The petitioner's convictions and sentences are set aside. The fines, if paid should be refunded.

R.M./R.K. *Rule made absolute.*

A. I. R. 1930 Calcutta 369 (2)

RANKIN, C. J., AND PATTERSON, J.

Lori Chand Saha—Accused—Petitioner.

v.

Niroda Sundari Saha—Complainant—Opposite Party.

Criminal Revn. No. 577 of 1929, Decided on 9th August 1929.

Criminal P. C., S. 494—Where accused is discharged on withdrawal of prosecution fresh complaint can be entertained.

Prosecution against an accused under S. 359, I. P. C. was withdrawn with the leave of the Court and an order under S. 494, Criminal P. C., was passed, the accused being discharged. Subsequently a fresh complaint was made to the Magistrate.

Held: that the order of discharge could not prevent a fresh complaint being entertained and inquired into. [P 370 C 1]

K. N. Choudhury, *Gopal Chandra Das* and *Bishwanath Roy*—for Petitioner.

N. N. Sircar and *D. N. Bhattacharjee*—for the Crown.

Rankin, C. J.—In this case the petitioner was accused of an offence against a woman under S. 354 P. C. After certain negotiations to which I shall refer in a moment the case was withdrawn with the leave of the Court. The letter purporting to compromise the case runs thus:

"I have the honor to withdraw from prosecution the marginally noted case with the permission of the Superintendant of Police and pray that the case may accordingly be withdrawn."

Thereupon an order was passed by the Sub-divisional Officer of Bracourba-

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Jammu & Kashmir

ria uuder S. 494,Criminal P.C. Then the accused man the present petitioner came before the Sub-Divisional Officer again as prosecutor in a case upon the narrative that he had paid Rs. 1000/- to a relative of the person who had been the prosecutor in the previous case, that he had paid this sum to that relative in order that it might be given to the District Superintendent of Police so that the District Superintendent of Police might give this sum to some charity, that the relative after he had taken the money from the present petitioner did not give it to the District Superintendent of Police and the petitioner was able to get only half of the money back out of the hands of this relative of the man who had prosecuted him on the previous occasion. That being his own story the Sub-Divisional Officer began to think that the order under S. 494 was an attempt to compound an offenee which was not really compoundable and so he acted upon this information and therefore set aside the order of discharge. So far as the merits of the proceedings go I think it is a reasonable thing to do if done in a proper way.

Then the matter was taken by the applicant to the Sessions Judge who was very much worried as to the proper way to go about the matter and finally he thought that the best thing to do was to set aside the order of discharge, because the Sub-Divisional Officer had not as much power to do that as the Judge had. He says that the best course for he Sub-Divivison all Officer was to get a comlpaint direct from the woman concerned in the previous charge and to proceed to try that case out upon a fresh complaint. This the Sub-divisional Officer has done and the complaint of the woman against the present applicant is now in the course of trial.

It is contended before us that strictly speaking the proper procedure to get rid of this order of discharge would be by an order of the Sessions Judge to serve a notice upon the applicant calling upon him to show cause why the complaint in the previous case should not be further enquired into. On the other hand it is pointed out by the learned Advocate General that whether this order of discharge stands or does not stand it is of no importance because it cannot in any way prevent the woman's complaint being enquired into. I entirely agree in the view taken by the learned Advocate General. In no circumstances can any order that is made on this application affect the validity of the woman's complaint or of the proceeding which the Sub-Divisional Officer has taken in the ordinary course to try out that complaint. So far as the present question is concerned it is entirely unnecessary for us to wrestle with any such difficulty.

This rule is therefore discharged.

Patterson, J.—I agree.

R.M./R.K. *Rule discharged.*

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* A. I. R. 1930 Calcutta 370

PEARSON AND PATTERSON, JJ.

Government of Bengal—Appellant.

v.

Santiram Mondal—Respondent.

Government Appeal No. 2 of 1929, Decided on 27th February 1930.

*** (a) Evidence Act, S. 163—Statements during departmental enquiry – Notice by defence to Crown to produce such statements—Statements inspected and used for cross-examining witnesses—Statements are in exclusive possession of Crown—Crown is entitled to have whole of statements as evidence.**

Application of S. 163 is not restricted to civil proceedings only. It is applicable also to criminal trials and even though the Crown is the prosecutor. [P 373 C 2]

Where, therefore, notice to produce statements made to a Magistrate during departmental enquiries is given to the Crown by the defence and such statements are produced, inspected and used for cross-examination of several witnesses, the Crown is entitled to have the whole of the statements as evidence. The Crown as prosecutor is not a different person from the Crown that recorded the statement and the statements cannot be said to be not in exclusive possession of the Crown. [P 373 C 2]

(b) Evidence Act, S. 74—Statements during departmental enquiries byMagistrate are not public documents—Evidence Act,S. 163.

Departmental enquiry by a Magistrate in his executive capacity is not judicial enquiry and statements recorded therein is not evidence taken on oath. Such statements, therefore, are not public documents, and S. 163 can be applied to such statements. [P 374 C 1]

(c) Criminal P. C., S. 297—Case depending not on probative value of circumstantial evidence but of probative value of testimony of witnesses — Judge while charging jury saying that circumstances must be entirely inconsistent with innocence—No further explanation by Judge — This amounts to misdirection.

The correct principles in criminal trials are that in a case dependent upon circumstantial evidence the incriminating fact must be incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis than that of his guilt. Where

therefore, the Judge in a case depending not on the probative value of the circumstantial evidence but of the weighing of direct testimony of witnesses while charging the jury says "it should be established by the prosecutor beyond reasonable doubt that the circumstances are not merely consistent with the guilt of the accused but entirely inconsistent with his innocence" without explaining to the jurors in the light of the principle above enunciated, it amounts to misdirection : 17 *C. W. N.* 379, *Expl.* ; 8 *C. W. N.* 278, *Rel. on.* [P 374 C 2]

(d) Criminal P. C., S. 297— Person prosecuted for giving false evidence—Case not depending on expert opinion—Judge directing that truth of the accused's statement must be impossible without explaining how far it affects his case—It amounts to misdirection.

In a case depending upon expert opinion no doubt the true rule is that no man can be convicted of giving false evidence except on proof of facts which if accepted as true show not merely that it is incredible but that it is impossible that the statements of the party accused made on oath can be proved. But where in a case, not dependent upon expert opinion, but of a different nature the Judge enunciated the above ruls without explaining to the jury wherein and how far it can be said to apply to the evidence in the case before them there is misdirection to the jury : 11 *W. R. Cr.* 25, *Expl.* [P 374 C 2 ; P 375 C 1]

(e) Criminal P. C. S. 423 (1) (a) — Trial by jury — Appellate Court having all materials before it can deal the case itself— It is not necessary to send it for retrial.

There is nothing in the language of the Code to differentiate the way in which the powers of the appellate Courts are to be exercised, according as it is a jury trial or not. The language is wide enough and comprehensive enough to enable the Court to deal with the matter itself on an appeal even in a jury trial. No doubt the action which the appellate Court should take depends upon the circumstances of the particular case but when all the materials are before the appellate Court and the case has prolonged for nearly two years and the verdict of the jury is erroneous owing to the misdirection by the presiding Judge it is in the interests of justice that the appellate Court should deal with the matter itself : 21 *Cal.* 955 and 25 *Cal.* 230, *Ref.* ; 25 *Cal.* 711, *Rel. on.* [P 378 C 2]

Mritunjoy Chatterjee and *Bhola Nath Roy* - for Accused.

N. Sirkar, S. K. Sen and *D. N. Bhattacharjya*—for the Crown.

Judgment.—This is an appeal by Government against an order of acquittal passed on the unanimous verdict of a jury on charges unde Ss. 194, 193 and 211, I. P. C.

To understand the question of law which has been raised, the facts out of which the appeal arises may be stated as follows. On 5th March 1928, a number of men employed in the Railway workshops at Lilooah under Mr. W. C. Mould, Deputy Chief Mechanical Engineer E. I. Ry., went on strike. On 8th March the workshops were closed down. On 28th March the Agent E. I. Ry. received a deputation of strikers, but their demands were refused. In the afternoon a large number of strikers proceeded to Bamangachi, between Howrah and Lilooah, and the result of their attitude was that the police were obliged to disperse them by force. Rifle fire was opened and the result is said to have been that one person was killed, one died in hospital and two others were wounded : more, according to the assertion of the accused. After the dispersal, the District Magistrate Mr. G. S. Dutt was informed of the occurrence by Mr. Jones A. S. P., and came to Bamangachi, where he made enquiries and examined Mr. Jones, the accused Santiram Mondal and others. On 2nd April 1928 the accused lodged a complaint before a Magistrate of Howrah charging Mr. Mould and Mr. Jones, together with two other railway officials, Messrs. Withinshaw and Hitchcock, and Major Hewett, Officer in Charge of the E.I.R. Auxiliary Force, with offences under Ss. 147, 148, 149, 302, 304, 325 and 326, I. P. C., that is to say, putting it comprehensively, rioting and murder. The complaint contained the allegation, among others, that after Mr. Sturgis, Mr. Within Shaw, Major Hewett and Mr. Jones had taken over a rifle each from some of the Gurkha guards :

"Mr. Mould came running from the direction of the loco quarters and snatching off a gun from a Gurkha guard fired it without any previous warning at the strikers. One man was hit and fell down by the side of the road. Then Withinshaw, Hewett and Mr. Jones began firing at random. I saw seven or eight men lying on the ground wounded bleeding and insensible."

This complaint of Santiram Mandal was taken up by the District Magistrate, and on 9th May 1928 was dismissed by him under S. 203, Criminal P. C., after a judicial enquiry in the course of which Santiram was examined on oath. In the meantime, by 2nd April 1928, the District Magistrate, in the course of his departmental enquiry started on 28th March, had recorded the statements of Captain Christie of the Eastern Frontier Rifles, Mr. Jones, Santiram Mondal, Messrs. Venables, Hannay, Mould, Severs and others.

Following on the dismissal of that complaint under S. 203, Criminal P. C., Mr. Mould moved the District Magistrate under S. 476, Criminal P. C., praying that a complaint should be filed against Santiram Mondal charging him with offences under Ss. 211 and 193, I. P. C. The accused filed a petition in answer, showing cause. The complaint was made on 14th June 1928, and the accused was committed to the Sessions. He was tried by the Sessions Judge and a mixed jury of five persons, who on 23rd March 1929 found the accused not guilty and he was acquitted.

The case for the prosecution was that the allegations of Santiram Mandal against Mr. Mould and the others in his complaint and in his evidence were intentionally false, that Mr. Mould had not been at Bamangachi on 28th March at all nor participated in the incidents there, and that no firing had taken place except by the Gurkhas under orders of Captain Christie. In support of this various witnesses were examined, including most of those who had made statements before Mr. G. S. Dutt in the course of his departmental enquiry from 28th March to 2nd April.

On the question of law the main point argued before us relates to the procedure adopted at the Sessions trial with regard to these statements and the way they have been dealt with. Briefly stated, the matter stands thus. On behalf of the accused at the trial, notice was given to the Crown to produce them. They were called for, produced, and inspected: not only so, but the statements themselves were placed in the hands of the prosecution witnesses by the defence and they were cross-examined upon them. Nevertheless the Judge refused to admit them on the record with the exception of only a portion of Captain Christie's statement, and they were accordingly not before the jury.

The learned Judge in his charge to the jury, however, refers to these statements in what is said to be an objectionable manner. Take for instance the cross examination of Mr. Venables, where a passage from the previous statement was put to him as being inconsistent with his evidence.

"Q. Did you in the departmental enquiry tell Mr. Dutt, that you were busy with a few constables in keeping the mob out from the compound?

A. No, I did not.

Q. I put it to you that on the other hand you told Mr. Dutt this.

"I was all the time fully employed in trying to keep the workers inside the loco shed pacified and at work."

A. I did.

Q. Is that correct?

A. Yes.

Q. As a matter of fact to Mr. Dutt you did not say a single word about the firing.

A. No.

Q. I put it to you again that having been reminded of that, you will still swear that you were not in the loco shed and were engaged with constables on the compound.

A. Yes. I was not in the loco shed all the time."

This is referred to by the learned Judge in his charge in this manner:

"It has been brought to the notice of the jury by the defence that in his earlier statement before Mr. Dutt this witness stated that he was all the time fully employed in trying to keep the strikers inside the loco shed pecified and at work, and it is argued that his present version of keeping back the crowd from the compound was not mentioned before. Mr. Venables explains that he was not in the loco shed all the time. Jury to consider."

The jury having been told to consider were, however, deprived of the assistance of the complete statement itself. The complete statement which has been placed before us shows the matter in another light, and the quotation referred to by the Judge may well be said to give a wrong impression, standing by itself, in forming their judgment. Similarly in regard to a witness named Gordon, who speaks to a meeting with Mr. Mould at Howrah, he is also cross-examined on his previous statement, and as to this, though the whole statement was not before the jury, the Judge tells the jury:

"The story of Mr. Gordon going to platform 1 was not given to the District Magistrate Mr. Dutt at the initial stage."

Then much was also made by the defence of an answer recorded in the re-examination of this witness, (a slip, according to the prosecution), which might suggest that on 28th the witness and Mr. Mould had travelled on the train only as far as Bamangachi. The whole earlier statement would have shown that the previous story was, and that it corroborated the evidence of this witness on the point. Then again another witness named Dunsdon, giving evidence as to a meeting with Mr. Mould at Howrah on 28th was cross-examined upon his statement to Mr. Dutt, in the following terms.

"Q. Did you then to Mr. Dutt say that you met Mr. Mould at Howrah station at 4-15 p. m.

A. It is extremely improbable that I said that I had met Mr. Mould at 4-15.

Q. Do you see that recorded in fact? (witness looks into the record and says).

A. Yes, I see it recorded.

Q. You signed that statement?

A. I signed it without reading it.

Q. Do you attach any value to your signature?

A. Yes.

Q. As Superintendent of way and works do you sign documents without knowing what you are signing?

A. No.

Q. Can you on that statement point out anything which you might describe as inaccurate?

A. No, as far as I can see, the rest is all correct. I notice at the conclusion of the statement it is recorded that the times I have mentioned are very approximate.'

Q. Therefore you might have mentioned the time as 4-15 approximately.

A. I should say it was a mistake in recording."

The learned Judge deals with it in his charge thus:

"In this Court Mr. Dunsdon has said that he met Mr. Mould on platform No. 6 at about 5-15 p.m. In the departmental enquiry he said before Mr. Dutt that he met Mr. Mould at 4-15. It is argued by the prosecution that this might be a mistake on the part of the recording Magistrate as this timing does not fit in with other timings given by the witness in the same statement before Mr. Dutt Mr. Dunsdon in other portions of his statement before Mr. Dutt said that when going up to Bally in a train he passed through Bamangachi at about 4-10 p.m. and when he was returning by the train to Howrah he passed Bamangachi again at 5 p. m. It is argued by the defence that the witness was giving various stories and therefore got confused over the timings. Jury to decide what view they will take."

Obviously if the whole statement had been before the jury they would have been in a position to say for themselves whether the mistake was one of recording or not and how if at all it affects the credibility of the witnesses' story and the whole case. We have had the statement laid before us, and it is quite obvious from the other facts and times mentioned therein, that the witness is right in saying it is a mistake in recording. The jury could have seen that for thmselves, had the statement not been kept from them.

As regards the efforts made by the prosecution to have these statements exhibited, these have not been denied, and they appear again and again in the Sessions record, usually after the statement had been put into the hand of witness I and questions asked upon it in cross examination. A petition was submitted by the prosecution for the admission of these statements, on which the learned Judge passed an order dated 11th March 1929. From what is there stated it appears that the contention was that the defence was bound to tender the documents under S. 163, Evidence Act, upon which the learned Judge remarks:

"No case law in support of this proposition in a criminal trial in which the Crown is the prosecutor is placed before me or can be found in any of the commentaries. I hold that S. 163, Evidence Act has no application to the present case."

The learned Judge adds that it was not argued that the statements should be admitted under S. 74, Evidence Act, and he holds that these cannot be admitted in evidence as public documents. The opinion of the learned Judge touching the effect of S. 163, Evidence Act seems to be based upon the idea that the section can have no applicability to criminal trials, at any rate where the Crown is the prosecuter. There is, however, nothing to support this view, and no such limitation is to be found in the wording of the section itself. In the argument before us no such contention was sought to be upheld. The contention before us has been that S. 163 does not apply, having regard to the nature of the documents in question, though it is admitted that the other conditions specified in the section have been fulfilled. It is conceded that notice to produce was given to the Crown, that the defence called for the documents and they were thereupon produced and inspected, and, it may be added, they were mostly used for cross examining the several witnesses. It is, however, said that the section does not apply to this kind of document but that it necessarily contemplates only that class of document to which the party calling for it would have no access unless his opponent produces it, which is inaccessible because in the exclusive possession of the other party. Then it is argued, these were not in the exclusive possession of the other side, because such statements, which were recorded departmentally by a public officer in his executive capacity, cannot be said to be in the exclusive possession of the prosecution. This is tantamount to saying that the Crown as prosecutor is a diffe-

rent person from the Crown that had recorded the statements, and there is no substance in such contention. The Crown undoubtedly has exclusive possession of such a document, whether it be in one department or another. We are of opinion that it was not a judicial enquiry, nor was the evidence given upon oath, and it seems to us that no question arises of these statements being public documents, but that they were documents in which S. 163, Evidence Act, could properly be applied, and that the defence were bound to put them in. The further contention is that if they are to be admitted, they cannot be put in or at any rate used without proof. But the section itself says that the party calling for it is bound to give it as evidence if required to do so, and that certainly means that it goes in as a record of the particular proceeding and that it can be looked at to see what it includes or omits. Moreover the writing of the statements and the signature by the Magistrate have been proved. It is not a sufficient answer to say that in certain cases the witnesses were asked certain questions based upon these statements when re-examined by the prosecution, and that therefcre the prosecution could have got in the whole of the statements in that way as evidence. They were entitled to have the statements themselves in evidence, they made every .effort to do so, and they could not foresee the manner in which the learned Judge would place the matter before the jury. Next, two further passages are objected to by the Crown as being misdirections in the charge. In dealing with the charge under S. 211 the Judge says:

"It should be established by the prosecution beyond reasonable doubt that the circumstances are not merely consistent with the guilt of the accused but entirely inconsistent with his innocence."

In point of fact this passage is to be found in a judgment of Mookerjee, J., in *Ram Prasad* v. *Emperor* (1), in deciding case where two Judges of the Criminal Bench had differed, arriving at different conclusions on a view of the facts in the case, particularly the effect of an entry in an account book. Mookerjee, J. says that the vital point in the case was whether the petitioner was deprived of a sum of Rs. 101 to which the entry in question related, and he came to the conclusion that the entry was not suspicious and that there was no reasonable ground for the theory that certain words had been added to the entry to corroborate the charge of theft. Having found that to be so it was unnecessary to do more than give effect to that finding: it would seem therefore that there is good ground for the contention of the Advocate-General that the passage objected to is obiter. The objection is to the words "entirely inconsistent" and we think that there was no need to have formulated the proposition in that way or to go beyond what was laid down in the Full Bench case *Hurjee Mull* v. *Imam Ali* (2), which laid down the test in other terms, that in a case dependent upon circumstantial evidence the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It would perhaps not have mattered if the learned Sessions Judge in the present case had placed the passage in question before the jury and then proceeded to explain it to them further in the light of the principle enunciated in *Hurjee Mull's* case: but he has not done so. He might also have pointed out to the jury while dealing with this subject that it was not so much in the present case a question of the probative value of circumstantial evidence, but of the weighing of direct testimony of witnesses. Standing as it does, in the way in .which the learned Judge has made use of it, it seems to us to amount to a misdirection.

The other passage is one taken from the case of *Queen* v. *Ahmad Ally* (3), where it is said that the:

"true rule is that no man can be convicted of giving false evidence except on proof of facts which if accepted as true show not merely that it is incredible but that it is impossible that the statements of the party accused made on oath can be true."

That passage again must be taken, in all fairness, with reference to the nature of the particular facts with which it dealt, and it will be observed that the main point in that case was whether a doctor in giving expert evidence of his opinion, might or

(1) [1913] 17 C. W. N. 379=17 I. C. 993=16 C. L. J. 453.

(2) [1904] 8 C. W. N. 278.

(3) 11 W. R. Cr. 25.

or might not be mistaken :

"The evidence of the medical man (at p. 27) or other skilled witness, however eminent, as to what he thinks may or may not have taken place under a particular combination of circumstances, however confidently he may speak, is ordinarily a mere matter of opinion. Human judgment is fallible. Human knowledge is limited and imperfect,"

and so on. Here again we think the passage objected to must be taken as a misdirection, not from anything wrong in itself, but from the use made of it by the learned Judge, without explaining to the jury wherein and how far it could be said to apply to the evidence in the present case, which is of a different nature and not dependent upon expert opinion at all.

Clearly the matters above referred to are misdirections upon essential points arising in the case, and as will hereafter appear from a consideration of the evidence, we think that the verdict is erroneous owing to such misdirections, and that such misdirections have in fact occasioned a failure of justice: also that if the rejected evidence had been received it ought to have varied the decision, the verdict of the jury and the order of acquittal based thereon should therefore in our opinion be reversed.

The charges which the accused had to meet were under Ss. 211, 193 and 194, I. P. C. Of these the Advocate-General does not press the charges under S. 194. The charge under S. 211 is :

"that you on or about the 2nd day of April 1928 at Howrah, with intent to cause injury to Mr. W. C. Mould filed a complaint under Ss. 147, 149, 302, 304, 325 and 326, I.P.C., before Mr. B. N. Mukherji, Deputy Magistrate, charging the said Mr. W. C. Mould with having committed the offence of rioting with murder etc. knowing that there was no just or lawful ground for such complaint."

The charges under S. 193 as to giving false evidence related to (1) a statement before the Deputy Magistrate on 3rd April 1928 in support of the accused's complaint :

"Then Mr. Mould came running from the Loco, snatched up a gun from a Gurkha and shot a man who was standing under a banian tree on the side of the road and the man dropped down and did not move again";

(2) a statement on or about the 7th April 1928 in the enquiry before the District Magistrate Mr. Dutt :

"I saw Messrs. Mould, Hewett, Withinshaw and Jones take a rifle each from the hand of the Gurkha Military Police riflemen";

(3) a statement on or about the 14th April 1928 in the course of deposition at the enquiry by the District Magistrate Mr. G. S. Dutt :

"I said that Mr. Mould fired the very first shot and that the subsequent shots were fired by the other Europeans named by me."

Before going into the evidence, it is convenient to notice that at the scene of the occurrence, the railway runs in general direction of north and south while the bridge carrying the road way over it runs east and west. The bridge has an eastern approach from the Grand Trunk Road, while the western approach slopes down from the bridge into what is called the old Benares Road, having the loco shed immediately to the north, and a little further on, to the south, a walled enclosure called a graveyard, a latrine, and beyond that again a musjid with a banian tree. (The judgment then discussed evidence and proceeded). To summarise the evidence, the evidence of Captain Christie, Mr. Jones and Mr. Hannay, definitely states that the firing was done by the Indian rifle-men and not by Europeans. There is no half way house between this evidence being either true, or on the other hand calculated and deliberate perjury with a view to crush the accused. If false, it involves the formation of a conspiracy between all these persons: and it involves particularly the suggestion that Captain Christie had the readiness and presence of mind to concoct a false story straight away, and get it supported. His statement in Court as to the details of the occurrence is substantially and solidly supported in the essential points by the statement made to the Magistrate, Mr. Dutt, immediately after the occurrence and recorded by him on that very evening of the 28th March at which time it does not appear that the question of Mr. Mould's participation in the affair had become of importance though it does appear later, and it is obvious that the conspiracy must have already taken shape by the 2nd April by which time Messrs. Hannay, Christie, Venables, Mould, Dunsdon, Gordon and Jones had all given statements substantially in accord with their present testimony.

On the question of the absence of Mr. Mould from Bamangachi, the names of the various witnesses and the evidence they gave have already been referred to, and it is to be noticed especially that the definite suggestion through-

out has been that all these witnesses, not excluding Captain Christie and Mr. Hannay, are conspiring to perjure themselves with the object of keeping Mr. Mould out of it. That appears from what was put to Mr. Hannay in cross-examination, that he had himself removed Mr. Mould in his car; as also from the suggestion that it was the railway officials who did the firing, including Mr. Mould. The facts themselves really lie within a small compass. On the one side, repeated statements by the accused that Mr. Mould and others fired and killed: and against that a solid body of evidence to show that the firing was done only by the Gurkhas and not by any Europeans, including Mr. Mould who was not there.

Santiram's statement.

It will be convenient here to mention the different statements of the accused.

The first is his statement in the departmental enquiry by Mr. Dutt made on 29th March 1928. He deals first of all with the disturbance on the eastern approach, when he says Mr. Sturgis "snatched a rifle from a Gurkha. So did Mr. Withinshaw and Major Hewett and Mr. Jones." He then says that Mr. Sturgis turned back with the other Europeans, who went towards the western side of the bridge. He then goes on to say :

"I followed Mr. Sturgis up to the lamp post No. 219/7 on the (western approach). I then saw Mr. Mould, Mr. Hannay, Mr. Collett and other Sahibs came rushing from the loco yard on the north of the bridge western approach on to the west end of the approach."

Then he says the police and the Gurkha choukidars began to use their lathis and the crowd began throwing stones. He says, immediately that happened, rifle fire was opened. Shots were fired over the brick wall at the men standing behind the brick wall. Then comes the most important statement for the present case, his first recorded statement of the part taken by Mr. Mould and others :

"Mr. Mould, Mr. Jones, Mr. Withinshaw and Major Hewett rushed behind the crowd into the maidan beyond the public latrine with rifle in hand, and began to shoot people indiscriminately with their rifles at random. Altogether 14 or 15 shots were fired. Then Mr. Withinshaw came back from the maidan beyond the public latrine with a wound on his eye. I was standing all the time near Mr. Sturgis half way up the western approach of the bridge."

Let it be noted that here the place of firing is put in the maidan behind the crowd, indiscriminate shooting, and 14 or 15 shots fired.

Next in order comes the petition of complaint filed by the accused on 2nd April 1928. Here he says that after the affair on the eastern side, Mr. Sturgis, Mr. Withinshaw, Major Hewett and Mr. Jones ran across with rifles back to the western side, and he himself ran after them. Then he speaks of the fight between the crowd and the police with lathis, and then says that while all this was goiug on Mr. Mould came running from the loco quarters and :

"snatching off a gun from a Gurkha Guard, fired it without any previous warning at the strikers. One man was hit and fell down by the side of the road. Then Withinshaw, Hewett and Mr. Jones began firing at random. I saw seven or eight men lying on the ground wounded, bleeding and insensible."

This statement differs materially from the other, in that it is now suggested that Mr. Mould took his rifle from a guard, that Mr. Mould is credible with one shot which hit a man, while the others fired indiscriminately. There is no mention of the shooting on the maidan from behind the crowd, and the indication is rather that the firing was somewhere from the western approach, seeing that Mr. Mould and the others had got their rifles from the Gurkhas.

The next statement of the accused is his statement on solemn affirmation made on 3rd April when examined in support of his complaint. This is the statement containing the passage forming the charge under S. 193, that Mr. Mould came running from the loco quarters, seized a gun from a Gurkha, and shot a man standing under a banian tree at the side of the road, and the man dropped down and did not move again: then that Withinshaw, Jones and Hewett began to shoot at random and about 7 or 8 men were wounded. This again differs from the earliest statement very much as the last one did. Mr. Mould is credited with shooting a particular man instead of firing indiscriminately, and there is no suggestion of the shooting from the maidan behind the crowd: rather it is suggested from the statement that he followed Mr. Sturgis that the shooting was from the western approach.

The next statement is one before the Magistrate on 7th April and contains the statement forming the subject matter of the second charge. Here he states definitely for the first time that the Military Police did not fire a single shot: he still says he was near a particular lamp post on the western bridge approach near Mr. Sturgis when the firing took place. It is important to bear this in mind on the question of the possibility of bonafide mistake. He adds that 35 men were wounded and two died, in addition to three carried away by the Gurkhas and he clearly remembers seeing eight men hit with bullets. Then later he says that he saw Mould, Hewett, Withinshaw and Jones take a rifle each from the hands of the Gurkhas, and adds that Captain Christie was not there at the time of the occurrence, but arrived afterwards.

The fifth and final statement we have been referred to is Ex. B the petition by which he showed cause in the proceedings under S. 476. Criminal P. C., and which he puts forward as representing his case when in the Sessions trial whether he had anything to say. This also is important on the question of bonafide mistake, because it contains no suggestion of that kind, but on the other hand maintains the attitude of justification by the accused as a person present at the spot who saw Mr. Mould doing the acts in person. For instance, it states that Mr. Mould should consider himself fortunate to escape trial for murder: that he instituted no false complaint, and that to the best of his observation, knowledge and belief he saw Mr. Mould take the part ascribed to him: and that attitude of justification is maintained throughout the remainder of the petition.

In his argument for the defence in this Court based upon the whole of the evidence after it had been placed before us, Mr. Chatterji has not attempted to substantiate any such conspiracy (as referred to above) on the part of the prosecution witnesses. He recognizes that if the evidence of the prosecution witnesses in its essential points is accepted, as we do accept it, then Santiram's statements could not have been true. He does not say that Mr. Mould or any prosecution witness has perjured himself or deposed falsely, but he says that he can suggest good reasons from the evidence why the jury and the Court could and should come to the conclusion that, at the worst, having regard to the circumstances attending the events of 28th March the statements of witnesses and Santiram's statements, the benefit of reasonable doubt should be given to the accused: or, as he subsequently put it, that from all the facts it cannot be said to be unreasonable for the jury or for the Court to say that it would not be quite safe to convict a man on these charges. Or, he says, the jury may have given effect to what they thought was a bona fide mistake on the part of the accused in the confusion and excitement of the moment, whereby he may have been led to confuse his impressions with direct knowledge. At any rate it is suggested that it would be not unreasonable for the Court or the jury to say that it was not satisfied that the prosecution had proved affirmatively that Mr. Mould could not have been present at the scene of the occurrence, or that the accused could not be under the honest but mistaken impression that Mr. Mould was there.

Some of the circumstances so relied upon have already been indicated in dealing with the evidence of the witnesses. It is, therefore, for instance, admitted that some European officers were at the scene of the occurrence, some of whom saw Santiram, and some of whom he must have seen. Then it is said that with reference to the evidence of Mr. Mould's movements on 28th, there is no corroboration of his statements as to his lunch at the Club ; no one else speaks of it. Also there is no corroboration of the statement that he went to the Chief Mechanical Engineer's office after lunch. Then as regards the period after 3.30 it is said there was no necessity for his return to Head Office, and curious that if he did so, he should meet Mr. Hannay by chance and be told to go to Mr. Gumbrill, and that then he should have been directed into Mr Sewer's room on the way. The interview with Mr. Gumbrill is one of comparatively late introduction in the case, and it is in evidence that this is the only draft notice or proclamation with which either Mr. Mould or Mr. Gumbrill ever had to do. Then as regards the

Howrah meetings, it is said that Mr. Mould had information of the disturbances (though not of the shooting) before he left, and though not strictly responsible for anything at Bamangachi because his place was at Lillooah, still he would naturally be anxious to avert any clash or catastrophe and give his assistance, besides having a natural human interest in the matter. Then it is said that it is unlikely that Mr. Mould should be in a position to remember the details of all his movements on the 28th, there are certain discrepancies in his long cross-examination, and he is not altogether candid in what he says about whom he asked to give evidence for him. Then again it is admitted that Mr. Sturgis in the affair on the eastern slope had taken over a rifle from one of the riflemen. The accused had started his accusations as soon as the District Magistrate arrived, and some of the persons mentioned have not been called as witnesses.

In considering and weighing the value of these suggestions as bearing upon the case, we cannot be blind to the fact that the essential facts of the prosecution case have been established by a compact and weighty body of testimony in regard to the events which took place at the scene of the occurrence itself. That testimony is clear that Mr. Mould was not there, that he did not participate in the firing, that the firing was done by the riflemen alone, and not by any European at all. It is corroborated in its essential details by the statements recorded by Mr. Dutt immediately after the occurrence in the case of the most important witnesses. The accused's case has been, not that there was room for a bona fide mistake on his part, but that as an eye witness on the spot he saw Mr. Mould, and saw him and the others fire, though no other witness has suggested any such thing. To say that the prosecution story has been displaced and proved to be untrue would be idle : and no sueh contention is put forward before us. To say that the facts or inferences above referred to so weaken the prosecution case that any question of reasonable doubt could arise in the minds of the jury or of the Court is in our opinion an untenable position. We have considered the matter with the most anxious care. If we accept the evidence of the prosecution witnesses in the main essentials of the case as we do, that evidence is so overwhelming and so conclusive that there is no room for saying that the other facts relied on might have impaired or do impair the prosecution case to such an extent as to make it not unreasonable for the jury or for the Court to hold that there was a doubt and that it was not a case for conviction. Still less is there any foundation for suggesting that there is room to imagine that there was any case of honest mistake or bona fide confusion : that has never been the defence case, and there is no reasonable foundation for it in the record.

As already stated we have reversed the verdict of the jury and the order of acquittal based thereon. The question then is whether we should order a retrial, or whether we should proceed to dispose of the matter ourselves. For the defence it is argued that the alternative powers given to the Court for dealing with the case on appeal under S. 423 (1) (a), Criminal P. C., show that those powers are intended to be exercised according to the different circumstances prevailing in each case. In the present case it is said that if certain evidence did not go to jury which should have gone, the proper course would be to send the case back to the jury for their verdict on the case with the additional evidence before them. Thus it is said that an order for new trial is the course which was followed in *Wafadar Khan* v. *Queen Empress* (4) and in *Ali Fakir* v. *Queen Empress* (5). On the other hand it is to be observed that there is nothing in the language of the Code to differentiate the way in which the powers of the Court are to be exercised according as it is a jury trial or not : the language is wide enough and comprehensive enough to enable the Court to deal with the matter itself on an appeal, though in a jury trial. If as we hold there has been misdirection, and the Court is of opinion that the verdict of the jury is erroneous owing to that misdirection, and that it has in fact occasioned a failure of justice, there is no reason why in a proper case the Court may not as-

(4) [1894] 21 Cal. 955.
(5) [1898] 25 Cal. 230.

sume to deal with the whole case itself, under the powers and duty conferred upon it by law : see *Taju Paramanik* v. *Queen Empress* (6). No doubt the action which the Court will be inclined to take will depend upon the circumstances of the particular case. To deal with the whole case itself, it would no doubt require to have all the materials before it, as we have in the present case. In the present case, also, it is nearly two years since the events out of which case arises, and in all the circumstances we consider it to be in the best interests of justice to deal with the matter ourselves. For the reasons stated above we find the accused guilty of the offences under Ss. 211 and 193 under which he has been charged and sentence him to 5 years' R. I. under S. 211, I. P. C. and three years under each of the charges under S. 193, I. P. C., all the sentences to run concurrently. The charges under S. 194 are not pressed : the accused is accordingly acquitted of those charges.

R.K. *Order accordingly.*

(6) [1898] 25 Cal. 711=2 C. W. N. 369.

A. I. R. 1930 Calcutta 379 (1)

C. C. GHOSE AND PEARSON, JJ.

Mani Krishna Sen Gupta — Petitioner.

v.

Emperor—Opposite Party.

Misc. Criminal Revn. No. 247 of 1929, Decided on 6th December 1929, against order of Sub-Divisional Magistrate, Rajshahye, D/- 21st October 1929.

Practice—Criminal Trial—Trying Magistrate should not make any suggestion or representation in his explanation submitted to High Court—Criminal P. C., S. 438.

The trying Magistrate is not entitled to make any suggestion or representation in the explanation which he may submit to the High Court of anything which is not founded on the record before him. The Magistrate is not the prosecutor. He must hold the scales evenly. [P 379 C 2]

S. K. Sen and *Indu Prokash Chatterji* —for Petitioner.

Anil Chandra Rai Choudhari—for the Crown.

Judgment.—We have examined the record in this case and perused the explanation submitted by the Magistrate. It appears that a warrant for the arrest of this accused was applied for on 10th October 1926, and that he was arrested on 12th October 1929. There is, therefore, no ground whatsoever for the suggestion made by the trying Magistrate in his explanation that this accused was absconding. In our opinion, such a suggestion ought never to have been made. Further, there is no warrant whatsoever for the Magistrate suggesting in his explanation that this accused's brother is a zamindar's Naiab at Kabilpur and is already trying to secure false evidence of alibi on behalf of the accused. The trying Magistrate ought to have remembered that he is not entitled to make any suggestion or representation in the explanation which he may submit in any case to the High Court of anything which is not founded on the record before him. The Magistrate is not the prosecutor. He must hold the scales evenly and a suggestion of the description referred to above to a very large extent prejudices his position as Magistrate. In this case, we direct that the accused be forthwith released on bail. The amount of bail should be determined by the Magistrate and it would be such as, in the opinion of the Magistrate would be sufficient to secure his attendance in the proceedings which may follow.

R.M./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 379 (2)

PEARSON AND JACK, JJ.

Emperor

v.

Chintamoni Shahu—Accused.

Criminal Jury Ref. No. 85 of 1929, Decided on 17th March 1930, under S. 307, Criminal P. C., by Addl. Sess. Judge, Hoogly.

Penal Code, S. 302—Possession of stolen goods recently after murder is material evidence to support conviction.

The possession of stolen goods recently after the loss of them may be indicative not merely of the offence of larceny or of receiving with guilty knowledge but of any other more aggravated crime which has been connected with the theft; this particular fact of presumption forms also a material element of evidence in case of murder. [P 382 C 1, 2]

The presumption is particularly applicable where there is satisfactory proof in case of a murder of a woman that the stolen articles were habitually worn by the deceased and that she was actually seen wearing it on the evening before the murder : 17 *C. W. N.* 1077, *Ref.* : *A. I. R.* 1926 *Mad.* 638 and *A. I. R.* 1926 *Lah.* 691, *Dist.* [P 382 C 2]

Khondkar—for the Crown.

A. K. Dhar—for Accused.

Judgment.— This is a reference under S. 307, Criminal P. C., by the Additional Sessions Judge of Hooghly in a case where the accused was acquitted by the unanimous verdict of the jury upon charges under S. 302 and S. 392 read with S. 397, I. P. C., in connexion with the death of Gyanodamoyee Dassi.

According to the evidence for the prosecution one Kali Charan Ghose had a house at Moheshpur where he resided along with his mother Gyanodamoyee, the deceased, and the accused Chintamani who was their servant. The house consisted of two rooms and verandah; in one room Kali used to sleep, in the other his mother. There was also a corrugated iron cowshed, in part of which the accused used to sleep and a thatched cowshed and cookshed. On 24th April 1929, Kali with a neighbour Dulal Ghose went to the house of one Sarat Ghose in another village for a marriage ceremony and stayed the night, leaving his mother and the accused at home. On the following day Kali went to his father-in-law's house whither his wife had gone for her confinement, and stayed there for that night. On the morning of 26th he returned home and after making enquiries and finding the verandah doors locked, he sent a lad Amulya to obtain entrance to the verandah from the stairs leading to the roof. The dead body of Gyanodamoyee was then found in the verandah with most terrible injuries on her head and body, and blood stained katari near by.

The drain from the verandah had been blocked up by clothes from inside, and there were some cow dung cakes outside. The accused was not forthcoming, and certain properties were found to be missing. The chaukidar Rasu Keora was sent for and despatched to the thana 10 miles away with the first information which was recorded at 7 p. m., and would have been recorded earlier but for the fact that the Sub-Inspector in charge was not available at the time. The first information included statement that the deceased had a gold necklace on her neck, and a silver chain on her waist, which the thief had taken away, and it was also stated that the perpetrator was the Ooriya servant. On 27th about 3 a. m. the Sub-Inspector went to the scene of occurrence and among other things obtained a list of the missing articles, which besides cash and certain dhoties were described as "Bichha har (necklace) of sovereign gold weighing 2½ tolas" value Rs. 50, and "Bichha waist chain of silver weighing 5 tolas Rs. 2/8." On 28th April, a telegram was sent by the Polba police to the police at Cuttack in the following terms :

"Daroga Manga Cuttack arrest murderer for gain Chintamoni Sahu son of Nitai, Moyra village Tulsipur search his house stolen properties gold ghasa har silver gote churipar cloths cash Rs. 250 letter follows."

On that there is an endorsement of S. I. Town 10-15 p. m. :

"I don't know who "Daroga Manga" is. This refers to a murder case. Take action tonight according to this telegram. Confirmation of telegram will probably be received tomorrow."

The result of this was that on 1st May 1929, the head-constable of the Mohanga Thana (P. W. 14) went to the house of the accused and arrested him. He was accompanied by Bowri Bandhu Naik and Ananta Shau, both of whom have given evidence. One of the accused's boxes was opened by a key from the accused's possession and in it was bound a gold chain, said to be Ex. 1, since identified as the bichha har of the deceased. On this occasion, however, the head-constable says that he did not seize it, partly because the accused said it was brass and he had bought it in Calcutta for keeping his keys, and partly because the telegram raferred not to a bichha har but to a ghasa har. It was not until 2nd June 1929 that a further search was made by this witness of accused's house in the presence of Bhagaban Sarman a Lakhinda Das and the chain was then taken not from the box but from the neck of the accused's wife. It was forwarded to the police at Chinsurah and on 3rd July the investigating officer said that he came to know the har had come, and he had a test identification. Meantime on 13th May the investigating officer had come to know of accused's arrival at Hoogly and on 17th May his statement had been recorded by the Magistrate. The accused's original statement says that two men whom he names gave him Rs- 5 and coerced him into leaving for

his native village: but in his statements in Court he simply pleads his innocence.

Admittedly the case against the accused must depend on the circumstantial evidence, and the question for consideration is whether the facts proved are incompatible with his innocence and not capable of explanation upon any other reasonable hypothesis than that of his guilt.

It has been proved by the witnesses Dulal Ghose, Charubala Dasi, Hari Dasi, and Jogal Ghose that deceased was alive up to about 11 p. m on the evening before the discovery of the murder, and that the accused was living there up till then. There is also his statement which shows he was there. There is evidence that he was missing on the morning of 26th, and that he arrived at Cuttack two or three days afterwards. Then came the search on 1st May above referred to.

Then as regards the katari, it is identified by Kali Charan as the one belonging to the house, and the evidence is that it was kept in the corrugated iron shed along with other implements in the custody of the accused. It is also referred to by the investigating officer, and he says he saw implements of agriculture in the tinroofed cowshed.

Mention must also be made of the two cloths found in the machan, which are identified by Kali Charan as belonging to the accused, one of which as well as the katari was stained with human blood, according to the report of the Chemical Examiner.

Two witnesses, Dulal Ghose and Hari Dassi depose to the fact that on the evening before the occurrence the accused had made enquiries from Dulal as to when Kali Charan would return home.

Charubala Dassi has stated that the milk from the cows was kept in a sika in the verandah, and that she milked Kali Charan's cow the previous evening: while from the evidence of Monmotha Nath Ghose it appears that after the discovery of the murder the sika was in the cookshed. Too much must not be made of this because it was there also on the previous day, and it seems it would be left there if the verandah was not accessible.

Then as to the important questions of the necklace. It was mentioned in the first information as a gold chain, and the chowkidar who gave the first information says he was informed it was a bichha har. It also appears as such in the list furnished on 27th April of the missing article, and the investigating officer says he was told about it when he went to the spot. The head-constable who searched the accused's house had explained why he did not seize it in the first instance, and his story and explanation are substantially supported by the witnesses Bowri Bandhu and Ananto Shau who were present on that occasion. The witness Hari Dassi and Charubala Dassi say that the deceased always wore a chain for some time previously and that they saw her with it on upon the night of 25th; and they identify it. Kali also identifies it as the chain belonging to his mother. Then there is the evidence of the goldsmith who produces his book to show that the bichha har was ordered for the deceased by her uncle in Aswin 1332, as well as other articles on other occasions. He identifies the one in question, and his workman who actually made it does the same, though he admits there is no private mark on it: but he says he can recognize it from the style and the workmanship. Dulal Ghose also stated the deceased used to wear a gold chain on her neck. It has been argued for the defence that the identity of the har found with accused has not been established with that of the deceased.

It is pointed out that in the first instance it was considered to be brass, and it is not explained how the second search originated; while no attempt was made to conceal it between the first and the second searches. The delay in its arrival at Hooghly on 24th June is also pointed at as showing the possibility of substitution, and the weight in this malkhana register is somewhat different from that given by the goldsmith. Then P. W. 6 admits that she was shown the har by the Daroga before the test identification. The wife of the accused when examined says that when accused came he brought cloth and a chain, and after the search she says she kept the chain round her neck by request of her husband's brother; she adds

that the jamadar asked her where the chain was; that he left previously and she then gave him the chain from her neck. She identified the chain in the Magistrate's Court, and though she does not identify it in her statement before the sessions, she does not repudiate it. Accused's brother also testifies that the har on the first occasion was like the har in question (Ex. 1) and that on the second occasion the accused's wife gave this har (Ex. 1) to the jamadar. Taking all these facts together we think that there can be no doubt upon the evidence that the necklace worn by the deceased was the one found in possession of the accused on 1st May and seized by the police on 2nd June and produced in Court as Ex. 1.

Next it is contended for the accused, that if the chain found with him was the bichha har of the deceased, the presumption arising from his possession not otherwise explained, does not go beyond a presumption against him as receiver of stolen property. Two cases were cited, namely, *Sogaimuthu* v. *Emperor* (1) where it was said that when the unexplained possession of stolen property is the only circumstance appearing in evidence against an accused charged with murder and theft, the accused cannot be convicted unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. But it was also recognized in that case that if there is other evidence to connect the accused with the death a jury might find upon circumstantial evidence that he was the murderer. The other case of *Gauns* v. *Emperor* (2) is merely an instance where circumstantial evidence, including the unexplained possession of jewellery belonging to deceased was held not sufficient to warrant a conclusion that the accused had committed the murder. The learned Judge in his charge has rightly referred to the principle cited in *Emperor* v. *Neamatulla* (3) that the possession of stolen goods recently after the loss of them may be indicative not merely of the offence of larceny, or of receiving with guilty knowledge, but of any other more aggravated crime which has been connected with theft; this particular fact of presumption commonly forms also a material element of evidence in cases of murder, which special application of it has often been emphatically recognized. The presumption would be particularly applicable where, as in the present case, there is satisfactory proof that the necklace was habitually worn by the deceased and that she was actually seen to be wearing it on the evening before the murder.

Upon a consideration of the whole of the evidence above referred to and after giving due weight thereto and to the opinion of the learned Judge we accept the reference, set aside the verdict of the jury and find the accused guilty of the offences charged. In the circumstances of the present case we think we may recognize the verdict of the jury to the extent of refraining from the sentence of the extreme penalty, and accordingly we sentence the accused to transportation for life under S. 302, I. P. C. Ne separate sentence is necessary upon the other charges.

R.M./R.K. *Order accordingly.*

(1) A. I. R. 1926 Mad. 638=50 Mad. 274.
(2) A. I. R. 1926 Lah. 691=7 Lah. 561.
(3) [1913] 17 C. W. N. 1077=21 I. C. 156=14 Cr. L. J. 556.

A. I. R. 1930 Calcutta 382

RANKIN, C. J. AND C. C. GHOSE, J.

Khettra Mohan Dey & Co.—Plaintiffs—Appellants.

v.

Benode Behary Sadhu—Defendant—Respondent.

Appeal No. 31 of 1929, Decided on 4th July 1929.

Contract—Construction—Breach of term going to root of contract—Party in default cannot insist on remainder being performed—Contract Act S. 73.

The mere fact that a party has committed a breach of a term of the contract, with reference to the first instalment in which the goods are to be delivered, does not in itself entitle the other to treat the contract as at an end. But where the breach has been such as goes to the root oi the contract the party in default cannot insist on the remainder being carried out.

A entered into contract with *B* for 800 tons of goods to be delivered in January and February in two instalments. *B* was willing to deliver the January instalment but *A* not being ready to take delivery, *B* intimated to him that B treated the contract as cancelled. *A* later on, made a tender of money and demanded February instalment but *B* refused to admit the contract as subsisting. *A* brought suit for damages for breach of contract.

Held: that the contract was a single contract with a subsidiary agreement as to delivery and payment, and *A* having failed as regards no less than one-half at the outset of the contract, it would be in effect putting upon *B* a different contract if *A* were allowed to insist on performance of the second half. *A's* suit insisting on performance of the contract could not lie: *Honck* v. *Muller* 7 *Q. B. D.* 92; *Mersey Steel and Iron Co., Ltd*, v. *Naylor Benzan & Co.* (9 *A. C.* 434; *Simpson* v. *Crippin* (42 *L. J. Q. B.* 28) and *Hoare* v. *Rennie* (5 *H. & N.* 19), *Discussed.* [P 384 C 2]

S. N. Banerjee and *N. N. Basu*—for Appellants.

Ameer Ali and *T. Chatterjee*—for Respondents.

Rankin, C.J.—In this case, the plaintiff brought the suit for damages for the refusal on the part of the defendant to deliver to him certain quantity of rape seed cake. The contract between the parties was as follows: The appellant was the buyer and the respondent was the seller. The contract was 300 tons of rape seed cake at a certain price per maund; terms cash on delivery Delivery- January and February 1927.

Now, the first thing to observe is that it is now agreed on all hands that the meaning of the stipulation for delivery was that one-half of the goods, namely 150 tons, should be delivered in January and the balance in February. The defendant was ready and willing to deliver 150 tons in January, but the plaintiff was not ready and willing to take delivery or to make payment therefor. So far, therefore, as we are concerned with case, it is a case where at the end of January one-half of the contract was unperformed. Thereupon, the defendant wrote to say that 150 tons being ready for delivery and not being taken, the contract would stand cancelled. The plaintiff thereafter made a tender of the money and demanded the 150 tons that would be due in February. The defendant persisted in treating the contract as at an end aud the learned Judge in this case has applied the principle of *Honck* v. *Muller* (1) and has dismissed the suit.

Mr. S N. Banerji for the appellant contends that *Honck* v. *Muller* has been wrongly decided and that the principle upon which it proceeds is no longer the law. He has cited to us several cases; but he relies chiefly upon the case of the *Mersey Steel & Iron Co. Ltd.* v. *Naylor, Benzon & Co.*, (2) and he founds also upon the judgment of Blackburn, J., in the case of *Simpson* v. *Crippin* (3). He contends that *Honck* v. *Muller* (1) and *Hoare* v. *Rennie* (4) have in the view taken in the subsequent cases been slow to have proceeded upon grounds which are untenable.

It appears to me that the correct decision of this matter involves a construction of the contract and, in my opinion, this contract for 300 tons with an arrangement as regards delivery that the deliveries are to be in equal quantities in January and in February. I entirely decline to say that this particular contract is or is the equivalent of two separate contracts. In my judgment, the observations which the Lord Chancellor made in the case of *The Mersey Steel and Iron Co. Ltd.* v. *Naylor Benzon & Co.* (2) with reference to the contract there under construction, apply to this case:

"There are subsidiary terms in the contract as to the time of delivery and as to the time of payment, but that does not split up the contract into as many contracts as there shall be deliveries for the purpose of so many distinct quantities of iron."

That being so, what we find is that the buyer refused to take delivery within the stipulated time of no less than one-half of the total contract quantity. He claimed, therefore, being in that position, to be entitled to require the seller to deliver to him one-half only of what was originally the subject matter of the contract.

It appears to me that when one looks at the cases it is clear that the mere fact that the plaintiff committed a breach of term of the contract with reference to the first instalment would not in itself suffice as a ground for treating the defendant as entitled to refuse to carry out the contract as regards the second instalment. The contention that whenever there has been a breach or a breach in a material particular, the other party is entitled in a contract such as this to bring the contract to an end was negatived by the House of Lords which refused to accept Mr. Cohen's argument to that effect in the *Mersey*

(1) [1881] 7 Q. B. D. 92 =50 L J. Q. B. 529= 29 W. R. 830=45 L. T. 202.

(2) [1884] 9 A. C. 434=53 L. J. Q. B. 497=32 W. R. 989=51 L. T. 637.

(3) [1873] 42 L. J. Q. B. 28=21 W. R. 141= 27 L. T. 546=8 Q. B. 14.

(4) [1860] 5 H. & N. 19=8 W. R. 80=29 L. J. Ex. 73.

Steel and Iron Co. Ltd. v. *Naylor Benzon & Co.* (2). But it appears to me to be equally clear that the House of Lords did affirm the proposition that, if the breach that had taken place was one which went to the root of the contract, the consequence was that the party who was in default could not insist upon the remainder of the contract being carried out.

Blackburn, J.'s observation on the case of *Honck* v. *Muller* (1) was that, if the true construction of the contract was in effect as stated by Lord Bramwell, thenthe Court had come to the right conclusion. In the case of *Honck* v. *Muller* (1), Lord Bramwell stated that, in his opinion, the contract was to deliver and take 2000 tons of iron and that, inasmuch as it was to be by three instalments and the first was gone and there never could be more than two-thirds of the quantity deliverable the thing bargained for being the whole quantity of iron and no less, the defendant was not bound to deliver two-thirds when the plaintiff required the two-thirds only. Lord Bramwell in *Honck* v. *Muller* (1) pointed out that one-third was not a trifle ; and it does seem to me that a case where the contract fails as regards one-half of the total quantity may very well be in a different position from the case where there has been a breach as regards the first instalment but a breach which is not of like importance having regard to the contract as a whole. So far as I can gather from the report in the case of *Simpson* v. *Crippin* (3) the breach as regards the first instalment consisted of a failure to send waggons to take some 350 tons out of 500 tons, the total amount of the contract quantity being 6000 to 8000 tons. In the case of *Hoare* v. *Rennie* (4), the breach was, comparatively speaking more substantial. But it does seem to me that in a case of this character, the argument of Lord Bramwell is very difficult to meet. If a person has made a contract for 300 tons, it seems prima facie wrong that it should be converted against his will into a contract for 150 tons. If this were a case of a contract for supply of goods by a single delivery, it is quite clear that to tender a quantity that is short of the contract quantity would be to make a bad tender. But having regard to the amount of discussion upon this point that has taken place and the difference of opinion upon it, I can only say that I am not satisfied either that the decision in *Honck* v. *Muller* (1) as applied to such a contract as the present was wrong or that the decision in *Hoare* v. *Rennie* (4) has, in fact, been overruled in principle by the more recent cases. There may be dicta in *Honck* v. *Muller* (1) which were not necessary for the decision. But it seems to me that, if this contract be taken as a single contract for 300 tons with a subsidiary agreement as regards the dates of delivery and times of payment, the plaintiff having failed as regards no less than one-half at the outset of the contract would be, in effect, putting upon the defendant a different contract if he were allowed to insist upon delivery of the second half of the goods stipulated for On the whole, I am not prepared to differ from the view taken by the learned Judge and this appeal should be dismissed with costs.

C. C. Ghose, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 384

GRAHAM AND MITTER, JJ.

Jyoti Prasad Lala—Petitioner.

v.

Pearilal Lala and *others* — Opposite Party.

Civil Revn. No. 266 of 1929, Decided on 8th July 1929, from order of Dist., Judge, Hooghly, D/- 16th February 1929.

Guardians and Wards Act (1890), S. 12—Court can appoint receiver to minor's property and can direct him to sell minor's property for paying off debts due from minor's estate.

S. 12 empowers the Court to make such order for the protection of the properties of the minor as it thinks fit. The discretion which is conferred upon the Court by this section is a wide one, and there can be no doubt that it has the power to appoint a receiver, and the receiver when appointed must, having regard to the provisions of S. 141, Civil P. C., be deemed to have all powers of a receiver under the Code. Those powers would include the power to sell where the adoption of such a course is deemed to be necessary for the protection of the interests of the minor An order, therefore, directing the receiver to sell certain property of the minor in order to pay off the debts due ftom the minor's estate, is not ultra vires of S. 12 as it is a matter of the discretion of the Court. [P 385 C 1]

Rupendra Kumar Mitter — for Petitioner.

A. Quasim—for Opposite Party 2.

Graham, J. —This rule is directed against an order of the District Judge of Hooghly dated 16th February 1929 directing a receiver to let a godown at a suitable monthly rent and also to sell some iron safes, and some gold and silver ornaments, and bullion and to apply the sale proceeds towards the payment of debts due from the minor's estate. It appears that a receiver was appointed by the Court in this case and there is controversy between the parties as to whether the properties of the minor should be sold or not, or whether the petitioner should be allowed to continue the karbar. It has been argued on behalf of the petitioner that, inasmuch as no guardian has yet been appointed, the learned District Judge had no jurisdiction to order the sale of the minor's properties by the receiver. In support of that contention, reference has been made to S. 12, Guardians and Wards Act, and it was urgud that it would be straining the language of that section and that it would go contrary to the scheme of the Act to hold that the Court has power to make an order for sale in such circumstances as obtain in the present case. S. 12 empowers the Court to make such order for the protection of the properties of the minor as it thinks fit. The discretion which is conferred upon the Court by this section is a wide one, and there can be no doubt that it has the power to appoint a receiver, and the receiver when appointed must, having regard to the provisions of S. 141, Civil P. C. be deemed to have all powers of a receiver under the Code. Those powers would include the power to sell where the adoption of such course is deemed to be necessary for the protection of the interests of the minor. No objection is taken to the order in so far as it directs the letting of the godown at a monthly rental, but so far as it orders the properties to be sold it is strongly objected to and is claimed to be without jurisdiction. In my judgment, the order cannot be deemed to be ultra vires of S. 12 of the Act, and as it is a matter of the discretion of the Court, I do not think that we should be justified in interfering with an interlocutory order of this description. In my judgment, the rule must be discharged with costs, hearing fee being assessed at one gold mohur.

Mitter, J.—I agree.

R.M./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 385

MUKERJI AND MALLIK, JJ.

Ahamadar Rahaman Chaudhuri—Defendant 4—Appellant.

v.

Jaminiranjan Barua and *others*—Respondents.

Appeal No. 175 of 1927, Decided on 28th February 1929, from appellate decree of Dist. Judge, Chittagong, D/- 2nd August 1926.

(a) Lease—Construction—Stipulations that lessee shall not take objection as regards possession and dispossession of any kind or that he would not claim any dags possessed by another do not take away his ordinary right of being put into possession and to rescind contract in case of default.

A executed a deed of lease in favour of *B* which contained terms to the following effect: "I shall not be competent to raise any objection on the ground of drought, inundation etc., and possession and dispossession of any kind," "I shall not claim any dags etc., which may have been included in the lease but which are owned and possessed by anybody else." *B* being unable to take possession of the land instituted a suit for a declaration of title and recovery of possession with a prayer in the alternative for a refund of the premium. It was contended that because of the given conditions *B* was not entitled to a refund.

Held: that the stipulations did not in any way take away from the lessee the ordinary rights that he had of being put in possession and in default thereof claiming a rescission of the contract. [P 386 C 2]

(b) Civil P. C., S. 100—Plea of limitation though point of law but depending upon facts, if not raised in lower Courts or in memorandum of second appeal cannot be raised only at time of argument in second appeal.

Although limitation as a pure point of law can always be urged in defence in a suit at any stage, a plea of limitation which depends upon investigation of facts and which is not taken in any of the Courts below or in the memorandum of second appeal cannot be raised only at the time of arguments in second appeal. [P 387 C 1]

(c) Civil P. C., S. 34 — Lessee knowing lessor's inability to put him in possession instituting suit for possession after long period is not entitled to interest or premium or rent paid by him.

Where a lessee knowing perfectly well that the lessor would not be able to put him in possession of the property waits for three years and then institutes a suit for recovery of possession, he cannot justly claim an interest on the sum paid as premium by him or for the amount of rent paid at the time of the lease. [P 387 C 1]

Narendrakumar Das—for Appellant.

Khetramohan Ghose, *Sarojkumar Maiti* for *Mahendrakumar Ghosh* and *Chandraskekhar Sen*—for Respondents.

Judgment.—This appeal has arisen out of a suit which was instituted by the plaintiff for declaration of title and recovery of possession in respect of a certain quantity of land. There were four defendants in the suit. Defendant 4, in December 1919, had purchased a taluk at a rent sale. Out of the lands of that taluk, 6 kanis were let out by defendant 4, in March 1921, to the plaintiff on receipt of premium of Rs. 300. The plaintiff's case is that, shortly after the execution of the lease, he went to take possession of the property, but defendants 1, 2 and 3 offered resistance to him and the consequence was that he did not get possession. Of these 6 kanis of land, one of the plots, namely, No. 937, was in the possession of defendant 1 and the rest of the land was in the possession of defendants 2 and 3. The plaintiff, thereafter, in June 1924, instituted the present suit. As already stated, the suit was primarily lodged with a prayer for recovery of possession on declaration of title. But, in the alternative, there was a prayer for refund of the premium, namely, Rs. 300, which had been paid by the plaintiff to defendant. The trial Court found that plot 937 was in the possession of defendant 1 under a title which could not be challenged by defendant 4 and that, therefore, that was a plot to which defendant 4 was not entitled to at all and so was one in respect of which the plaintiff could not get any decree. Leaving that plot out altogether, the trial Court made a decree in plaintiff's favour in respect of the remainder of the land, declaring the plaintiff's right thereto and directing that he would get khas possession of the same. The trial Court also decreed wasilat as against defendants 2 and 3 to the extent of Rs. 100. From this decision of the trial Court, three appeals were preferred, one by the plaintiff, another by defendant 2 and the third one by defendant 4. As the result of these appeals, the learned District Judge has passed a decree in the plaintiff's favour, ordering defendant 4 to refund to the plaintiff the sum of Rs. 319, made up of Rs. 300, the premium paid on account of the lease, and Rs. 19, the amount of rent paid by the plaintiff on the same account, with interest at 12 per cent per annum from the date of the lease up to the date of suit and future interest at 6 per cent. Defendant 4 has then preferred the present appeal.

The judgment then stated that one of of the several contentions urged on behalf of the appellant in support of the appeal was that the plaintiff was not entitled to a refund of the premium. The terms of the lease relied upon were then quoted as under. The terms relied upon for the purpose aforesaid, are two in number. One of them is to be found in para. 2 of the lease: translated it runs in these words:

"I shall not be compatent to raise any objection on the ground of drought, inundation, etc., and possession or dispossession of any kind."

The other passage in the lease, on which reliance has been placed, is to be found in para. 5 thereof, and runs in these words:

"I shall not claim any dags, etc., which may have been included in this lease, but which are owned or possessed by anybody else."

It is said that, because of these two conditions aforesaid, the plaintiff is not entitled to get a refund of the premium that he had paid. We are wholy unable to accede to this contention of the appellant. The first of these stipulations evidently refers to an objection that may be raised if the lease had been given effect to; and it merely meant that, if the lessee, when he had been put in possession of the land, was dispossessed by somebody else, he would not be competent to claim an abatement of rent or suspension of rent on account of such dispossession. It had nothing whatever to do with the ordinary obligation of a lessor to put the lessee in possession of the property. As regards the second of the stipulations aforesaid, it merely means rhat the lessee will not be entitled to claim any land, which may have been included in the lease, but was in the possession of somebody else. These two stipulations, in our opinion, do not, in any way, take away from the lessee the ordinary rights, that he has, of being put into possession and, in default thereof, claiming a rescission of the contract.

The next contention, that has been urged, relates to the question of limitation, but it has been successfully an-

swered on behalf of the respondent, by showing that the plea of limitation was not taken in any of the Courts below, nor also does it find a place in the memorandum of appeal to this Court. Of course, limitation, as a pure point of law, can always be urged in defence in a suit at any stage, but then a question of limitation of this character will certainly depend upon an investigation of facts. If such an investigation has not been held in any of the Courts below, by reason of the omission on the part of the defendant to take the plea in proper time, the plea cannot be allowed to be raised only at the time of arguments in this appeal.

Thirdly, it has been urged that no interest should have been allowed to the plaintiff on the sum of Rs. 319, for which the learned Judge has made a decree in plaintiff's favour. We are of opinion that this contention of the appellant should be given effect to. The plaintiff, upon his own case, knew perfectly well, in April 1921, that defendant 4 would not be able to put him in possession of the property, and if he waited for three years or so and then instituted the suit, he cannot justly claim interest on the sum, which he had paid as premium, or for the amount of rent that he had also paid at the time of the lease. In our opinion, the circumstances of the case are such as would justify us in interfering with the order passed by the learned District Judge in so far as it relates to the question of interest.

The result, therefore, is that the appeal will be allowed to this extent that the decree of the learned District Judge will be modified by deleting from it the direction as regards the payment of interest and that the plaintiff will get a decree for recovery of Rs. 319 from defendant 4 with interest at 6 per cent per annum from the date of suit till realization. Each party will bear his own costs in this Court.

R.M./R.K. *Decree modified.*

A. I. R. 1930 Calcutta 387

PAGE AND PATTERSON, JJ.

Haridas Mukherjee —Plaintiff—Petitioner.

v.

Bijay Krishna Das and *others*—Opposite Parties.

Civil Revn. No. 832 of 1929, Decided on 22nd July 1929, from order of Third Class Munsif, Bashirghat, D - 7th May 1929.

Civil P. C., O. 9, R. 13—Court cannot restore suit decided ex parte when no sufficient cause has been shown for the non-appearance—There being specific provisions applicable to the case in hand it cannot apply—Civil P. C., S. 151.

An application under O. 9, R. 13, was made for restoration of a suit which had been decreed ex parte. The Munsiff held that no sufficient cause had been shown for the non-appearance of the applicant but restored the suit on certain terms purporting to act under O. 9, R. 13, and notwithstanding the failure of the applicant to bring himself within the conditions precedent to the making of an order under O. 9, R. 13.

Held: that the Munsiff in making the order in that form under the circumstances was acting without jurisdiction and it would not have been open to him to apply the provisions of S. 151 where there was a specific provision in the Code applicable to the case in hand.

[P 388 C 1]

Sitaram Banerji and *Prokas Chandra Ghose*—for Petitioner.

Bejoy Kumar Bhattacharjee—for Opposite Party.

Page, J.—Notwithstanding a skilful and ingenious argument on behalf of the opposite party in our opinion the rule must be made absolute. It appears that on the date fixed a case was called for hearing and an application was made on behalf of the defendant that the suit might be adjourned in order that he might have an opportunity of calling a certain witness. In the circumstances that application was dismissed. Thereafter as there was no appearance on the merits by the defendant the suit was decreed ex parte against him. Thereupon an application was made under O. 9. R. 13, Civil P. C., for the restoration of the suit. Now, on behalf of the opposite party it is urged that that application was really in two parts (1) with respect to the application for an adjournment in order that the defendant might procure the attendance of the witness and (2) under O. 9, R. 13, Civil P. C. for an order of restoration upon the footing that the defendant could

satisfy the Court that he had sufficient cause for not appearing when the suit was called. The application by the defendant, however, was not and did not purport to be, an application otherwise than under O 9, R. 13, Civil P. C. Nevertheless assuming in favour of the opposite party that it amounted in substance to an application under S. 151, Civil P. C., in so far as it related to the application for adjournment, in my opinion, that application under S. 151 was rejected and rightly rejected by the learned Munsiff. In so far as the application was one for restoration under O. 9, R. 13 the learned Munsiff held that no sufficient cause had been shown for the non-appearance of the defendant. There were ample grounds upon which he could have arrived at such a conclusion. Nevertheless purporting to act under O. 9, R. 13, Civil P. C and notwithstanding the failure of the defendant to bring himself within the conditions precedent to the making of an order under O. 9, R. 13, Civil P C., the learned Munsiff proceeded to restore the suit upoh certain terms. In my opinion in making an order in that form under those circumstances he was acting without jurisdiction and it would not have been open to him, as has been repeatedly held to apply the provisions of S. 151 (which, indeed he did not do) where there is a specific provision in the Code applicable to the case in hand. In those circumstances, in my opinion the rule must be made absolute and the order of 7th May 1929 discharged. The applicant is entitled to his costs. The hearing fee is assessed at two gold mohurs.

Patterson, J.—I agree.

R.M./R.K. *Rule made absolute.*

A. I. R. 1930 Calcutta 388

SUHRAWARDY AND JACK, JJ.

Prince Victor N. Narayan — Petitioner.

v.

Kumar Bhoirabendra Narayan Deb and *others* —Opposite Party.

Civil Revn. No. 430 of 1929, Decided on 14th May 1929, against order of First Sub-Judge, 24 Pargannas, D/- 19th January 1929.

(a) Civil P. C., O. 1, R. 10 (2)—Defendant adjudged bankrupt in England is not proper party to suit relating to property—English Bankruptcy Act, Ss. 53 and 167.

P purchased the interest of one of two plaintiffs in a suit and on the death of his vendor who had been subsequently made a defendant was substituted in his place. *P* was adjudged bankrupt in England and on the application of the sole remaining plaintiff his name was removed from the record.

Held : that under Ss. 53 and 167, English Bankruptcy Act, *P* had no right left in the property in suit which vested in the trustee in bankruptcy and *P* therefore was not a proper party to a suit relating to that property and his name was rightly removed from the record by the lower Court. [P 389 C 2]

(b) Civil P. C., O. 22, R. 10—No duty is cast upon plaintiff to bring assignee or trustee on record—It is discretionary with Court to allow such application.

Although O. 22, R. 10 enables the plaintiff to apply in the case of devolution of interest during the pendency of the suit either by assignment or otherwise including insolvency to bring on the record in place of the defendant insolvent his trustee in insolvency it casts no duty upon him if the thinks that the suit can go on without the insolvent defendant. The rule makes it discretionary with the Court to allow such an application in the circumstances of a particular case : *A. I. R.* 1924, *Cal.* 188 ; *A. I. R.* 1927 *P. C.* 108, *Rel. on.* [P 390 C 1]

Jatindra Nath Sen, Patit Paban Chatterji and *Probhat Kumar Sen*—for Petitioner.

N. N. Sircar, Sarat Chandra Basak, Kanaidhan Dutt ond *Jitendra Nath Banerji, S. C. Mitter, Rabindra Nath Chaudhuri, Ambika Pada Choudhuri, Prokas Chandra Pakrasi* and *Mritunjoy De*—for Opposite Parties.

Judgment.—This rule was issued at the instance of Prince Victor Narayan, defendant 9, in a suit pending in the Court of Subordinate Judge of 24-Parganas, who has now been declared a bankrupt under the English Bankruptcy Act. The rule is in these terms :

" Why the order striking out the names of defendant 9 mentioned in the petition should not be set aside and why the trustee in bankruptcy should not be brought on the record in place of defendant 9 referred to in the petition."

With regard to the second portion of this rule, it may be mentioned that there is no application before us either on behalf of the bankrupt or on behalf of the trustee in bankruptcy that such trustee should be substituted in place of defendant 9 in the suit.

The main question that has been argued before us is as to the propriety of the order of the learned Judge striking off the petitioner's name from the suit. A short history of this litigation may be useful in considering the nature of the objection. The suit was brought

by plaintiff 1 and one Uday Narayan as plaintiff 2 for declaration of their title to Bijni Raj and for other reliefs. The cases of the plaintiffs were not founded on the same right, plaintiff 1 claiming to be the next heir to the late Raja under the ordinary rule of primogeniture and plaintiff 2 claiming the same right under the rule of lineal primogeniture. The prayer in the plaint was that a decree might be passed in favour of either of the plaintiffs. Subsequently the plaintiffs fell out and there was an application by both the plaintiffs that one of them ought to go out of the suit. Before that application was heard, Uday Narayan had sold his interest in the estate to defendant 9 the petitioner before us. The question as to who should have the conduct of the suit was considered by the learned Subordinate Judge and he ordered that plaintiff 1 should remain on the record as plaintiff and have the carriage of the suit and that plaintiff 2 should be translated to the category of defendants. Plaintiff 2 died and in his place were substituted his son and defendant 9. Subsequent to that, the plaintiff applied that the only point that remained to be tried in the suit was the claim of plaintiff 1 as against the principal defendant being defendant 1 who is now in possession of the Raj; and that being the point for consideration in the suit, the issue which was framed with regard to the alternative right of the two plaintiffs originally on the record should be expunged. That issue which was issue 17 was in these words:

"Is the plaintiff 2 the eldest representative of the elder branch of the Bijni Raj family as alleged? Did he ever become and is he entitled to possession?"

The Court ordered the issue to be expunged. So at present there is no dispute between the plaintiff on the record on the one side and defendants on the other except with reference to the right claimed by the plaintiff based upon the ordinary rule of primogeniture. Defendant 9 was, however, kept on the record the reason for that being that when the plaintiff 2 was transposed to the category of the defendant the Court had ordered that if plaintiff 1 failed to furnish security he would lose the privilege given to him and in that case defendant 9 should be allowed to continue as the sole plaintiff. The security as ordered by the Subordinate Judge and as subsequently settled by this Court was furnished.

In April 1928 the petitioner was adjudged bankrupt in England. Thereafter the plaintiff made an application to strike off his name from the list of defendants. The learned Subordinate Judge has held that defendant 9 being a bankrupt, cannot continue as a party to the suit and has thereupon ordered that the name of defendant 9 be removed from the record. Against this order the present rule has been obtained.

The question, therefore, that falls for consideration is whether because of the bankruptcy of the petitioner he should no longer be retained as a defendant in the suit or whether the order of the Subordinate Judge in the circumstances of this case striking his name off is not correct. There can be no dispute that under the English Law a person being adjudged a bankrupt, all his properties personal and real, vest in the trustee under S. 53, Bankruptcy Act, 1914. The real properties which vest in the trustee in bankruptcy may be properties situated in England or elsewhere, S. 167. The law on this point has been widened by the Act of 1914, for previous to it property which vested in the trustee was property within the dominions of His Majesty and, before that it was property which situated in Great Britain. Unless there is anything repugnant in the lex loci where the property is situate, the property wherever it may exist, is assigned to the trustee in bankruptcy by virtue of the order of adjudication: see Williams' Bankruptcy Practice, Edn. 13, p. 264, and Dicey's conflict of Laws, Edn. 4, p. 368. That being so, the property in dispute to which defendant 9 claims to have acquired some right, under his purchase from Uday Narayan, now vests in the trustee in bankruptcy. The petitioner, therefore, has no right left in the property and therefore he is not a proper party to the suit relating to that property. But it has been argued by the learned advocate appearing for him that the plaintiff should bring the trustee in bankruptcy on the record; and reference is made to O. 22, R. 10, Civil P. C. That rule enables the plain-

tiff to apply in the case of evolution of interest during the pendency of the suit either by assignment or otherwise, including insolvency, to bring on the record in place of the defendant insolvent his trustee in insolvency. But it casts no duty upon him if he thinks that the suit can go on without the insolvent defendants. In fact the section makes it discretionary with the Court to allow such an application in the circumstances of a particular case, *Lakshman Chunder Dey* v. *Nikunja Mohini Dasi*, (1). And that discretion has been exercised by the Court below by striking off the petitioner's name from the lists of defendants. We cannot say in revision that the order passed by the Court below in the circumstances of this case is so erroneous as to entitle us to interfere with it. There are several practical difficulties in the way. If the insolvent defendant is allowed to remain on the record and fight the suit and if the suit is decreed, the plaintiff will be deprived of his costs against the insolvent and the decree which he may obtain will not be binding on the receiver or trustee of the insolvent *Kala Chand Banerji* v. *Jagannath Marwari* (2). Unless the law casts a duty upon the plaintiff to bring the receiver or trustee on the record it cannot be said that the insolvent must be represented in the suit. He has certainly no right to remain on the record as a defendant and he cannot insist that he must remain on record through his trustee. If his absence from the list of defendants vitiates the constitution of the suit, the plaintiff will have to take the risk of it. We are accordingly of opinion that the order passed by the lower Court should be maintained and this rule discharged.

A preliminary objection was taken on behalf of the opposite party as to the competence of the insolvent to make this application in this Court. It is not necessary to consider this point in view of the fact that this Court issued the rule under S. 115 which does not require the appearance of any party

The undesirability of allowing the defendant who is an insolvent to remain on the record is evident as we are unable to award any cost in favour of the successful party.

Let the record be sent down as early as possible.

R.M./R.K. *Rule discharged.*

(1) A. I. R. 1924 Cal. 188.
(2) A. I. R. 1927 P. C. 108=54 Cal. 595 = 54 I. A. 190 (P. C.).

A. I. R. 1930 Calcutta 390

MITTER, J.

Hridoy Krishna Kundu—Petitioner.

v.

Binode Behary Bandopadhaya and *others*—Opposite Party.

Civil Revn. No. 644 of 1929, Decided on 26th July 1929, from order of First Munsiff, Basirhat, D/- 4th Febru-ary 1929.

(a) Civil P. C., O. 21, Rr. 58 and 62—Property under attachment claimed under deed of sale—Deed of sale not established—Property cannot be released from attachment.

In a proceeding under O. 21, R. 58, and O. 21, R. 62, the objection of the claimant was that one of the three properties attached had been sold to him and the other two were mortgaged to him. The Court released the first mentioned property from attachment. It appeared that the registration of the deed of sale had been refused by the Registrar.

Held: that the deed of sale not being established, the property still lay with the judgment-debtor, and the order of the lower Court releasing the property alleged to be sold to the claimant was wrong and liable to be set aside. [P 391 C 2]

(b) Civil P. C., O. 21, Rr. 58 and 62—Property under attachment claimed under deed of mortgage—Decree-holder contending that deed was not registered—Proper course is to continue attachment subject to mortgage and not to make order for sale with notice of mortgage.

In a proceeding under O. 21, R. 58, and O. 21, R. 62, the objection of the claimant was that two of the properties attached had been mortgaged to him. The Court ordered the properties mortgaged to be sold with notice of the mortgage. According to the decree-holder the mortgage deed was invalid on account of non-registration.

Held: that the Court had misconceived the scope of an enquiry under O. 21, R. 62 Civil P. C. Having found that the properties were subject to a mortgage he could not give the direction that the property be sold with notice of the mortgage. He should have proceeded to make an order in terms of R 62, namely, to continue the attachment subject to such mortgage or mortgages. [P 391 C 2]

Anil Chandra Roy Chowdhury—for Petitioner.

Anilendra Nath Roy Chowdhury—for Opposite Party.

Judgment.—This rule arises out of a proceeding taken under O. 21, R. 58 as well as O. 21, R. 62, Civil P. C. It

appears that the petitioner brought a suit for money against two persons Atal Behari Dalal and Gour Charan Dalal who are opposite parties 2 and 3 in the rule in the Court of the Munsiff, First Court, Basirhat. That suit was ultimately decreed by the said Court. The decree was put into execution in the same Court and certain properties of the judgment-debtors were attached. On 15th December 1928 opposite party 1, Benode Behari Bandyopadhaya, made an application to the executing Court in which he prayed that lot 1 be released from attachment and lots 2 and 3 be sold subject to a mortgage in his favour under O. 21, R. 62, Civil P. C. The claim with regard to lot 1 was allowed by the Munsiff and with regard to lots 2 and 3 the Munsiff made an order to the effect that the said lots be sold with notice of the mortgage allged to have been executed in favour of Babu Benode Behari Bandhopadhya, that is, opposite party 1.

Against this decision of the Munsiff, the present rule was obtained and the terms of the rule are as follows :

"Let the record be sent for and a rule issue calling on the opposite party to show caues why the order of the Munsiff releasing half share of the property described as lot 1 and passing the order with reference to lots 2 and 3 directing such lots to be sold subject to the mortgage of the opposite party should not be set aside or such other or further order made as to this Court may seem fit and proper."

A copy of the petition was sent to the Munsiff in order that he might make certain observations with reference to para 6 of the petition. That paragraph runs as follows :

"That the said two deeds were alleged to have been executed by the two brothers Atal Behari Dalal and Gour Charan Dalal the judgment-debtors in the original suit. That the notes on both these documents by the Sub-Registrar showed that the execution was admitted by one of the executants only, namely, Atal Behari Dalal and that the other brother, namely, Gour Charan Dalal never appearsd nor admitted execution before the Sub-Registrar. That it was brought to the notice of the learned Munsiff by Babu Radhica Prosad Chakravarty, the lawyer of your petitioner both at the time of the hearing and at the time of the argument of the case. That the letter written by a Babu Radhica Prosad Chakrabarty to Mr, Anil Chandra Roy Chowdhury, advocate, in answer to an enquiry made by the latter sent through me is annexed herewith and marked Ex. A."

The Munsiff in his explanation states that at this distance of time he is unable to say that the facts referred to in para. 6 were brought to his notice. It appears now on an examination of the deed of sale which is referred to in para. 6 that registration of the said deed was refused. The claimant made his claim to the property in suit on the basis of this deed of sale and it appears now clear that there was no deed of sale such as the law requires in favour of the opposite party. Consequently, it cannot be said that the opposite party 1 was in possession of this property on his own account. If the deed of sale has not been established or proved, the property must be said to lie where it originally lay, namely, the judgment-debtor. The rule, however, is limited to half share of the property described in lot 1. Therefore, the Munsiff's order with reference to lot 1 in so far as it affects half of the said lot must be set aside and the claimant's claim with regard to lot 1 will be held good only with regard to the other half. To this extent the Munsiff's decision is varied with reference to lot 1.

With reference to lots 2 and 3 it seems to me that the Munsiff has misconceived the scope of an enquiry under O. 21 R. 62, Civil P. C. He finds on the evidence which is established that the properties were subject to a mortgage and at the same time he gives the direction that these properties be sold with notice of the said mortgage. That he could not do on an enquiry under O. 21, R. 62. That is a thing which is foreign to such a matter. If the Munsiff found on the evidence that the lots 2 and 3 were subject to one or several mortgages, he should have proceeded to make an order in terms of the said rule, namely, to continue the attachment subject to such mortgage or mortgages. Instead of doing that he made an order which is really an order which could properly be made in a proceeding under O. 21, R. 66, Civil P. C., but the present proceedings are not of that kind.

The result is that the order of the Munsiff in so far as it affects lots 2 and 3 should be set aside and case sent back to him in order that he may consider as to whether on the evidence the opposite party 1 has established that the property in question is subject to one or several mortgages. In arriving at a con-

clusion on this question the Munsiff must take into account the objection raised by the petitioner as to the validity of the mortgage or mortgages set up by reason of non-registration of the said deeds. If he finds that it has been established that the property is subject to mortgage then he will pass an order as is contemplated under O 21, R. 62, Civil P. C., namely, to continue the attachment subject to mortgage. If, on the other hand, he finds that the mortgage or mortgages have not been established then he will disallow the claim of the opposite party.

Having regard to the divided success of each party, there will be no order as to costs in this Rule.

R.M./R.K. *Case remanded.*

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* A. I. R. 1930 Calcutta 392

MUKERJI, J.

Nagendra Nath Ray—Appellant.

v.

Basanta Das Bairagya—Respondent.

Appeal No. 495 of 1928, Decided on 12th February 1929, against appellate decree of Sub-Judge, Rajshahi, D/- 6th December 1926.

*** (a) Malicious Prosecution—If defendant gives correct information to police, and police, without further interference, think fit to prosecute plaintiff, defendant is not responsible in damages.**

In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest asssistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant; if he misleads the police by bringing suborned witnesses to support it; if he influences the police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution has not technically been conducted by him. [P 394 C 1]

Therefore, it is impossible to hold that the defendant is liable for damages where there is not an iota of evidence to suggest that he ever went beyond giving a true information of the occurrence regarding a theft in his house and also a true statement of the fact that he suspected the plaintiff: 30 *All.* 525 (*P.C.*), *Foll.* [P 394 C 2]

(b) Malicious Prosecution—Prosecution is not commenced till summons is issued (*obiter*).

A prosecution is not commenced before a person is summoned to answer a complaint: *Yates* v. *Queen*, (1885); 14 *Q.B.D.* 648, *Rel. on.* [P 394 C 2]

(c) Malicious Prosecution — Proceedings before police are proceedings anterior to "Prosecution"—Semble.

Semble—In the decision of the Judicial Committee in the case of *Balbhaddar Singh* v. *Badri Sah* (*A. I. R.* 1926 *P. C.* 46) there is sufficient to indicate that proceedings before the police are proceedings anterior to "prosecution." There is also enough in the decision of the Judicial Committee in the case of *Gaya Prasad* v. *Bhagat Singh* (30 *All.* 525) to indicate that police proceedings are distinct from a "prosecution" for the purpose of a suit for malicious prosecution. [P 259 C 1]

*** (d) Malicious Prosecution — There are certain wrongs akin to malicious prosecution which entitle person aggrieved to sue—Therefore maintainability of malicious prosecution does not depend upon meaning of "prosecution" as understood in criminal cases.**

A suit for malicious prosecution is not a statutory suit and if the facts alleged disclose a cause of action, notwithstanding that the suit has been named or described as such, that cause must be tried. For there are certain wrongs akin to malicious prosecution which entitle the person aggrieved to sue, as for instance, malicious abuse of the process of the Court, malicious arrest, malicious search and malicious execution. These kindred suits are sometimes treated as being suits for malicious prosecution and this is the origin of the dictum "that the maintainability of a suit for malicious prosecution does not depend on there having been a prosecution in the sense in which that term is used in the Criminal Procedure Code." The dictum is perfectly correct so long as it is meant to apply to these kindred suits: 38 *Cal.* 880, *Rel. on.* [P 395 C 2]

(e) Malicious Prosecution—It is doubtful whether sanction proceedings disclose sufficient cause of action (*Quaere*)

How far, proceedings for sanction to remove the bar to the institution of a prosecution instituted by the defendant, disclose a sufficient cause of auction to found a claim of damages in malicious prosecution is a matter of considerable doubt. [P 395 C 2]

(f) Malicious Prosecution — Existence of reasonable and probable cause is question mixed of law and fact—Civil P. C., S. 100.

In malicious prosecution the existence of reasonable and probable cause is a question for the Judge and not for the jury. In India the balance of authorities is in favour of the view that the question is a mixed one of law and fact and the inference deducible from proved facts may be examined by the High Court on second appeal: 16 *C. W. N.* 540; 12 *C. L. J.* 410 and 28 *Cal.* 591, *Ref.* [P 393 C 2]

(g) Malicious Prosecution—Plaintiff was imprisoned for theft — He had reputation of being "dagi"—There was inquiry preliminary to starting of case under Criminal

P C., S. 110—On occurrence of theft in defendant's house, defendant in his information to police mentioned plaintiff as suspect · Arrest of plaintiff and discharge—Plaintiff brought suit for malicious prosecution—Reasonable and probable cause held not wanting on defendant'spart.

The plaintiff, a servant of the defendant's neighbour, was earning Rs. 7 a month. About 14 years ago, he was imprisoned for six months on a conviction of theft. Thereafter, about ten years ago, he stole some money by opening a trunk. He had the reputation of a "dagi" in the village. Quite recently there was an inquiry preliminary to the starting of a case under Criminal P. C., S. 110, in which proceedings the defendant had taken a prominent part. There was a theft in the defendant's house and the next day, in his information to the police, the defendant stated that he suspected the plaintiff in connexion with the theft. Upon this information the police arrested the plaintiff, kept him in hajat, and eventually, finding no evidence connecting him with theft, submitted a final report on which the plaintiff was discharged. The plaintiff brought a suit for malicious prosecution and damages.

Held : that in view of all these facts it was exceedingly difficult to hold that there was want of reasonable and probable cause on the part of the defendant in suspecting the plaintiff and mentioning about this suspicion in the information of the occurrence that he lodged with the police (*Case law consedered*).

[P 397 C 1]

Bireswar Bagchi—for Appellant.

Radhabinode Pal and *Premranjan Ray Chaudhuri* – for Respondents.

Judgment.—This appeal is by a defendant against whom a suit for damages for malicious prosecution was dismissed by the Court of first instance, but has been decreed on appeal.

The Munsif held that there was no 'prosecution," far less any at the instance of the defendant, that there was reasonable and probable cause on the part of the defendant, and that there was no malice. The Subordinate Judge has held just the contrary on all these points.

The facts, which are more or less undisputed, are the following : There was a theft in the defendant's house on the night of 23th July 1922. He informed the police on the next day about the theft, which was committed by cutting a sindh ; gave a detailed list of the articles stolen, together with their value, the aggregate coming up to Rs. 556 and odd ; stated that the steel trunks and boxes in which the articles were contained were found in the latter part of the night in the village itself ; and also stated that he suspected the plaintiff in connexion with the occurrence. It is not alleged that any of these facts is not true.

The police arrested the plaintiff on 29th July 1922 kept him in hajat, and eventually, finding no evidence connecting him with the theft, submitted a final report on which he was discharged by the Magistrate on 12th August 1922.

Now, after the decision of the Judicial Committee in the case of *Balbhaddar Singh* v. *Badri Sah* (1), there can be no dispute that the essentials to be proved by the plaintiff in a suit for damages for malicious prosecution are the following :

(1) That he was prosecuted by the defendant.

(2) That the proceedings complained of terminated in his favour, if from their nature they were capable of so terminating.

(3) That the prosecution was instituted against him without any reasonable and probable cause.

(4) That it was due to a malicious intention of the defendant and not with a mere intention of carrying the law into effect.

Essential 1 is composed of two elements which give rise to the following two questions: 1st.—Was there a prosecution ? 2nd.—Was such prosecution by the defendant ?

As regards the second question, the answer to it is furnished by two decisions of the Judicial Committee : one, the case of *Balbhaddar Singh* v. *Badri Sah* (1), above referred to, and the other the case of *Gaya Prasad* v. *Bhagat Singh* (2). In the former of these cases, their Lordships have said :

"In any country, where, as in India prosecution is not private, an action for malicious prosecution in the most literal sense of the word cannot be raised against any private individual. But giving information to the authorities, which naturally leads to prosecution, is just the same thing."

In the latter case, their Lordships, in dealing with the question as to who is a prosecutor observed :

"The question in all cases of this kind must be, Who was the prosecutor ? and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion : the conduct of the complainant before and after making the charge, must also be taken into consideration

(1) A. I. R. 1926 P.C. 46=29 C. C. 169.
(2) [1908] 30 All. 525=35 I. A. 189=11 C. C. 871 (P.C.).

Nor is it enough to say, the prosecution was instituted and conducted by the police. That again is a question of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who *pro hac vice* represents the Crown. In India, a private person may be allowed to conduct a prosecution under S. 495, Criminal P. C., which provides that "any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police ..... Any person conducting the prosecution may do so personally or by a pleader." When then this is permitted, it is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives. The foundation of the action is malice, and malice may be shown at any time in the course of the enquiry."

In the same case, their Lordships referred to the decision of the Madras High Court in the case of *Narasinga Row* v. *Muthaya Pillai* (1) and said :

"It will be convenient to refer at once to the decision of the Madras High Court (ubi supra) which the learned Judicial Commissioner appears to have followed with some reluctance. The judgmeut is in these terms :

"The only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case, though defendant 1 may have instituted criminal proceeding before the police, he certainly did not prosecute the plaintiff. He merely gave information to the police, and the police, after investigation, appear to have thought fit to prosecute the plaintiff. The defendant is not responsible for their act, and no action lies against him for malicious prosecution."

"The principle here laid down is sound enough if properly understood, and its application to the particular case was no doubt justified ; but in the opinion of their Lordships, it is not of universal application. In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant ; if he misleads the police by bringing suborned witnesses to support it ; if he influences the police to assist him in sending an innocent man for trial before the Magistrate it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him'"

No pronouncement can be more plain. In the present case, assuming for a moment that there was a "prosecution" within the meaning of "malicious prosecution," as the expression is used in connexion with suits of this nature, it is impossible to hold that the defendant was liable for damages, for there is not an iota of evidence to suggest that he ever went beyond giving a true information of the occurrence and also a true statement of the fact that he suspected the plaintiff.

What I have said above is sufficient to dispose of the appeal and the suit, but as other important matters have been argued I propose to deal with them. I proceed in the first place to consider the first of the aforesaid two questions, namely, was there a prosecution ? The answer to this question is not quite so plain, as there is some conflict, more apparent than real, in the authorities bearing on it. There are two decisions of this Court which stand out firm and clear and they lay down, following on *Yates* v. *Queen* (4) that a prosecution is not commenced before a person is summoned to answer a complaint : *De Rozario* v. *Gulab Chand Anundjee* (5) ; *Golap Jan* v. *Bholanath Khettry* (6). Both these cases, however, are cases in which complaints were made to a Magistrate and the Magistrate had ordered the police to enquire and report, a procedure under which there neither was, nor could be any arrest by the police. This element of distinction is important and will be referred to again, but it does not affect the meaning of the word "prosecution" as it is understood in connexion with a suit for malicious prosecution. In the earlier of the aforesaid two cases: *Clarke* v. *Postan* (7) and the decision of the Bombay High Court in *Ahmedbhai* v. *Framji Edulji Bamboat* (8), which proceeded on it and held that a prosecution commences when a complaint is made, were held as not having laid down good law. In a subsequent decision of this Court: *Bishun Pershad Narain Singh* v. *Phulman Singh* (9),a contrary view was propounded as to when the prosecution commences, and it

(3) [1902] 26 Mad. 362=12 M. L. J. 389.

(4) [1885] 14 Q. B. D. 648=54 L. J. Q. B. 258=49 J. P. 436=33 W. R. 482=52 L. T. 805.

(5) [1910] 37 Cal 358=6 I. C. 877.

(6) [1911] 38 Cal. 880=11 I. C. 311=15 C. W. N. 917.

(7) [1834] 6 Cur. & P. 423.

(8) [1903] 28 Bom. 226=5 Bom. L. R. 940.

(9) [1915] 19 C. W. N. 935=27 I. C. 449=20 C. L. J. 518.

was said that a prosecution commences as soon as the complaint is made to the Magistrate irrespetive of the result of the prosecution or of the stage at which it may fall through, and that when no action at all has been taken against the plaintiff upon such a complaint the action would fail, not because there was no prosecution commenced, but because there was no damage done to the plaintiff. What, however, is pertinent here is that in that decision also it was said that a prosecutiou exists when a criminal charge is made before a judicial officer or, tribunal. In the case of *Crowdy* v. *Reilly* (10). it was said that the enforcement of the crimiual law through Courts of justice concerning a matter which will subject the accused to prosecution without regard to the technical form in which the charge has been preferred and, irrespective of the grade of the criminal offence, is a sufficient proceeding upon which an action for malicious prosecution may be based. The Madras High Court has also held that a prosecution did not commence when a Magistrate issued only a notice and not a summons to the accused on receiving a complaint of defamation and subsequently dismissed it after hearing cause for both the parties: *K. Sheik Meeran Sahib* v. *C. Ratnavelu Mudali* (11). In the decision of the Judicial Committee in the case of *Balbhaddar Singh* v. *Badri Sah* (6), to which I have already referred, there is sufficient to indicate that proceedings before the police are proceedings anterior to "prosecution," because their Lordships have said:

"Information to the authorities which naturally leads to prosecutions," and "so far as the police were concerned there was ample eause for the initiation of prosecution proceedings."

It should be observed that the accused in that case had surrendered on warrants having been issued by the Magistrate and the police had neither sent them up nor arrested them. There is also enough in the decision of the Judicial Committee in the case of *Gaya Prasad* v. *Bhagat Singh* (2) to indicate that police proceedings are distinct from a "prosecution" for the purpose of a suit for malicious prosecution. If the present suit is to be regarded as a suit for damages for malicious prosecution, I am clearly of opinion that, on the plaint itself, it was liable to be thrown out, as there was no prosecution of the plaintiff at all.

But it is not possible to dispose of the suit on the above ground, because a suit for malicious prosecution is not a statutory suit and if the facts alleged disclose a cause of action, notwithstanding that the suit has been named or described as such, that cause must be tried. As Sir Lawrence Jenkins, C. J., pointed out, in *Golap Jan* v. *Bholanath Khettry* (6):

"There are certain wrongs akin to malicious prosecution which entitle the person aggrieved to sue, as for instance, malicious abuse of the process of the Court, malicious arrest, malicious search and malicious execution."

These kindred suits are sometimes treated as being suits for malicions prosecution and this is the origin of the dictum that is to be found in many of the decisions:

"That the maintainability of a suit for malicious prosecution does not depend on there having been a prosecution in the sense in which that term is used in the Criminal Procedure Code."

The dictum is perfectly correct so long as it is meant to apply to these kindred suits.

Numerous instances of such kindred suits will be found in the reports, based on different kinds of causes of action. Of these suits, there is one particular class, in connexion with which it has been held that they are maintainable, namely, where proceedings for sanction to remove the bar to the institution of a prosecution were instituted by the defendant: e. g., *Narendra Nath De* v. *Jyotish Chandra Pal* (12) and *Rabindra Nath Das* v. *Jogendra Chandra Deb* (13). The question whether this class of cases really discloses a sufficient cause of action to found a claim is a matter of considerable doubt, but the question how far thess decisions are defensible on principle need not be discussed here.

Then, there are two classes of causes of action, which are of a kindred character and which, in this country, are sometimes confounded with causes of action for suits for malicious prosecution. One is "malicious arrest," but the foundation of action for malicious

(10) [1912] 17 C. W. N. 554=18 I. C. 737=17 C. L. J. 105.
(11) [1912] 37 Mad. 181=21 I. C. 703=25 M. L. J. 1.
(12) A. I. R, 1922 Cal. 145=49 Cal. 1035.
(13) A. I. R. 1928 Cal. 691.

arrest is that the party has obtained an order of authority from a Judge to make an arrest, by knowingly imposing some false statement upon the Judge cr by stating certain facts as being true within his knowledge when he knew nothing about them, or as being true to his belief when he had no reasonable or probable cause for his belief: *Daniels* v. *Feilding* (14); *Walley* v. *M'Connel* (15) and *Clissold* v. *Cratchley* (16). The present suit does not come within the category of malicious arrest. If, by any chance, it could be treated as one of an analogous character, it would be met by the defence which the facts on the face of them establish that the suit it not sustainable, when the defendant has placed all the facts before the officer having the discretionary power to order the arrest and that officer, with full knowledge of the facts has exercised his discretion and orderedthe arrest : *Lock* v. *Ashton* (17); *Thakdi Hajji* v. *Badrudin Saib* (18).

Anoter class of such causes of action is "false imprisonment." In "false imprisonment," the personal liberty of the plaintiff may have been wrongfully restrained by a private individual or by setting a ministerial officer in motion while in "malicious prosecution," it is the judicial officer who is set in motion and the opinion and judgment of a judicial officer are interposed between the charge and the imprisonment. The distinction is illustrated by Willes, J., in the case of *Austin* v. *Dowling* (19) and in such cases as *Lock* v. *Ashton* (17) and *Elsee* v. *Smith* (20). If the present suit is treased as a suit for damages for "false imprisonment," it being said that the defendant got the plaintiff arrested by the police, then the question would arise as to whether there was reasonable and probable cause. So far as this question is concerned, there is a difference as to onus between a suit for malicious prosecution and a suit for false imprisonment. Any interference with a man's personal liberty is prima facie wrongful and, therefore, has to be justified ; but anyone is prima facie entitled to set a Court of justice in motion. As Alderson B pointed out in *Panton* v. *Williams* (21), "Imprisoning is prima facie a tort, prosecuting is not so in itself." This is why, in an action for malicious prosecution, the plaintiff must allege and prove affirmatively the non-existence of reasonable and probable cause : *Abrath* v. *North Eastern Railuay Co.* (22), while in an action for false imprisonment it is for the defendant to prove affirmatively the existence of reasonable and probable cause: *Hicks* v. *Faulkner* (23); *Hailes* v. *Marks* (24).

As regards reasonable and probable cause, the conclusions of the two Courts below are contrary to each other. The existence of reasonable and probable cause is a question for the Judge and not for the jury : *Panton* v. *Williams* (21) : *Lister* v. *Parryman* (25) ; *Hailes* v. *Marks* (24), which was a case of false imprisonment. The cases bear out what Salmond says in his Law of Torts, 7th Edn. pp. 620, 621 :

> "This rule, however, is subject to the qualification that preliminary questions of fact on which this ultimate issue depends are for the jury. That is to say, the jury must find what the facts of the case were, as known to or believed by the defendant, and then the Judge decides whether these facts constituted reasonable and probable cause, viz., whether the defendant showed reasonable care and judgment in believing and acting as he did."

In India also, the balance of authorities is in favour of the view that the question is a mixed one of law and fact and the inference deducible from proved facts may be examined by this Court on second appeal. *Bishun Singh* v. *Wyatt* (26) ; *Shama Bibee* v. *Chairman of Baranagore Municipality* (27) ; *Harish Chunder Neogy* v. *Nishi Kanta Banerjee*

(14) [1846] 16 M. & W. 204=15 Jur. 1061=4 D. & L. 329=16 L. J. Ex. 153.
(15) [1849] 13 Q. B. 903=14 Jur. 193=19 L. J. Q. B. 162.
(16) [1910] 2 K. B. 244=79 L. J. K. B. 635=26 T. L. R. 409=54 S. J. 442=102 L. T. 520.
(17) [1848] 12 Q. B. 871=13 Jur. 167=18 L.J. Q. B. 76
(18) [1906] 29 Mad. 208.
(19) [1870] 5 C. P. 534=39 L. J. C. P. 60=18 W. R. 1003=22 L. T. 721.
(20) [1822] 1 D. & R. 97=2 Chit. 304.
(21) [1841] 2 Q. B. 169=10 L. J. Ex. 545=1 G. & D. 504.
(22) [1886] 11 A. C. 247=55 L. J. Q. B. 457=50 J. P. 659=55 L. T. 63.
(23) [1878] 8 Q. B D. 167=51 L. J. Q. B. 268=30 W. R. 545.
(24) [1861] 7 H. & N. 56=9 W. R. 803=7 Jur. (n. s.) 851=30 L. J. Ex 339=4 L. T. 505.
(25) [1870] 4 H. L. 521=39 L. J. Ex. 177=19 W. R. 9=23 L. T. 269.
(26) [1911] 16 C. W. N. 540=11 I. C. 729=14 C. L. J. 515.
(27) [1910] 12 C. L. J. 410=6 I. C. 675.
(28) [1901] 28 Cal. 591.

We cannot, therefore, content ourselves with accepting as final the conclusion of the Subordinate Judge on this question, but must examine whether it is correct as a matter of inference.

Now, the findings of the Court below may be summarized thus : The plaintiff is a servant earning Rs. 7 a month. He has been working in the house of the neighbour of the defendant, a fact which is important on the question of probability and opportunity. About 14 years ago, he was once imprisoned for 6 months on a conviction for theft. Thereafter, about 10 years ago, he stole some money by opening a trunk in a press by breaking open a trunk and had soon after to disgorge the amount. He has the reputation of a "dagi" in the village. Quite recently, there was an inquiry preliminary to the starting of a case under S. 110, Criminal P.C., against him along with other persons. The plaintiff's name, according to the police witness, is probably in the list of suspects at the thana, and he had before now been suspected in connexion with other thefts in the village. The fact that he is not regarded by the police as an active criminal is more or less beside the question, so far as the defendant is concerned.

In the enquiry relating to the prospective proceedings under S. 110 Criminal P. C., the defendant had taken a prominent part and had actually deposed against him. In view of all these facts, it is exceedingly difficult to hold that there was want of reasonable and probable cause on the part of the defendant in suspecting the plaintiff and mentioning about this suspicion in the information of the occurrence that he lodged with the police. The plaintiff certainly was a person who might reasonably be considered by the defendant, as having been concerned in the theft, bearing as the plaintiff did or might be supposed to have done a grudge against the defendant for his activities in connexion with the projected proceeding under S. 110, Criminal P. C., and, in view of the antecedents of the plaintiff, a suspicion of this character in the defendant's mind cannot be condemned as being unjustified or improbable. I am of opinion that the conclusion at which the Subordinate Judge has arrived, as regards reasonable and probable cause, does not take into account all the facts and circumstances of the case and was somewhat hastily drawn and that the Munsiff's inference on the point is correct.

I am accordingly of opinion that, upon all conceivable points of view, this appeal should succeed. It is. therefore, ordered that the decree of the Subordinate Judge should be reversed and that of the Munsiff restored with costs in all the Courts.

V.S./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 397

MUKERJI AND GUHA, JJ.

Sm. Asalata Roy — Applicant—Appellant.

v.

Society for the Protection of Children of India—Opposite Party—Respondent.

Appeal No. 96 of 1929, Decided on 10th February 1930, against original order of Dist. Judge, 24-Parganas, D/- 18th December 1928.

(a) Guardians and Wards Act, S. 7—Married sister of minor applying to be made guardian—She being only person fit to be entrusted with care of minor's person—Minor above 14 showing preference for sister—Application resisted by "Society for the Protection of the Children in India" but by no other relative of minor—Sister should be appointed as guardian and Society may be allowed to visit minor at his house and to take necessary measures for his protection in co-operation with guardian.

A married sister of a minor applied for being appointed as a guardian. The application was opposed by "the Society for the Protection of Children in India." The sister was the only person who could be entrusted with the care of the boy and there was no definite evidence of ill treatment of the minor against her. The minor was above 14 years of age and showed a decided preference for his sister. The other relations of the minor did not come forward to act as the guardian of the minor either in respect of his person or of his property, and there was no opposition offered by any of these relations to the appointment of sister as guardian of the minor.

Held: that in the interests of the minor the sister should be appointed as the guardian of the person of the minor; the Society as a philanthropic and charitable institution, willing to do good to unprotected children may be allowed to visit the minor, at his house, and take all measures necessary or expedient to protect the minor from harm, whether moral or physical, in co-operation with the guardian: 2 *C. L. R* 593, *Dist.* [1' 399 C 2]

(b) Guardians and Wards Act, S. 7—Guardian of property — Individual and not

society with varying office bearers can be appointed.

In considering the appointment of guardian of the minor's property anyone having an interest adverse to that of the minor cannot be appointed such guardian, and for the proper management of the property the character, the capacity and the fitness of the individual to be appointed has to be taken into consideration. It is for this reason that an individual only is to be appointed by the Court as guardian and not a charitable Society whose office bearers are liable to change. [P 400 C 1]

(c) Guardians and Wards Act, S. 39—Guardian residing outside jurisdiction should not be appointed: (*Obiter*).

In view of S. 39 it is perhaps intended by the legislature that a Court will not appoint as guardian anyone who resides outside its jurisdiction. [P 401 C 1]

(d) Societies Registration Act (21 of 1860), S. 1—Charitable purposes should be understood in wider sense: (*Obiter*).

Per *Mukerji, J.*—The expression charitable purposes in the Act should be understood in the wider sense. If relief of wants occasioned by lack of pecuniary means is charity, adoption of preventive measures, to ward off pecuniary wants is also charity. [P 402 C 1]

(e) Guardians and Wards Act, S. 4 (2)—Person—General Clauses Act, S. 3 (39).

Per *Mukerji, J.*—The word 'person' as used in the definition of 'Guardian' in S. 4, Cl. (2), Guardian and Wards Act, is not to be read in the light of the meaning given to it by S. 3, Cl. (39), General Clauses Act. [P 402 C 1]

(f) Guardians and Wards Act, S. 7—Charitable Society unsuccessfully seeking to be made guardian is not entitled to costs as expense was not for welfare of minor or protection of his estate—Civil P. C., S. 35.

Where a philanthropic Society unsuccessfully sought to be made a guardian of a minor's property and claims costs which cannot be regarded as expenses either as on account of necessaries or as having been incurred for the welfare of the minor or for protection of his estate the society is not entitled to the costs. [P 402 C 2]

Amarendra Nath Bose and *Mohimamoy Mitra*—for Appellant.

N. Barwell, and *Hem Chandra Dhar*—for Respondent.

Guha, J.—The facts leading up to and relevant for the purposes of this appeal may be briefly stated. On 13th March 1928, Srimati Ashalata Roy made an application to the Court of the District Judge, 24-Parganas, for being appointed guardian of the person and property of her minor brother Shib Ram Nandi. The minor on his own statement made on 6th December 1928 is now over 14 years of age. Notice of the application was in due course served on the relatives named in the application and consent was given to the appointment of the applicant as guardian by the four maternal uncles of the minor. The father's sister of the minor who was also served with the notice of the application filed a petition of objection, on which the application for guardianship was amended, by the inclusion of the moveable property belonging to the minor, and from the order recorded in the order-sheet on 4th July 1928, it appears that the petition of objection was not pressed further. There is, however, on the record a letter addressed to the District Judge by the minor himself which bears the date of 25th April 1928 which indicates that at that point of time, the minor was opposed to the appointment of his sister as guardian either of his person or his property. On 13th July 1928 an order was recorded that the applicant

"will be appointed guardian of the person and property of the minor on furnishing security of Rs. 6,000."

Security bond was duly filed on 28th August 1928, and the Nazir of the Court was directed to test and report.

An important development in the case, however, began from 8th September 1928, when the District Judge received a letter from the Deputy Commissioner of Police, Calcutta, informing that the minor was being prosecuted in the Juvenile Court, Calcutta, for an attempt to commit suicide. The Deputy Commissioner appears to have been supplied with the names of relatives for the purpose of enabling him to sound them as to whether any of them was willing to be the guardian, and if so

"to apply to the Court for appointment as guardian and for removal of the present guardian."

The order for testing the security bond filed by Srimati Ashalata was thereafter cancelled, and on 27th September 1928, the District Judge directed notice to issue on her to show cause why the order of appointment of guardian should not be revoked and the Society for the Protection of Children in India (hereafter mentioned as the Society) was asked to inform the Court if the society were willing to be appointed guardian of the person and property of the minor. This step was apparently taken by the learned District Judge on the letter from the Deputy Commissioner of Police, reporting on the order passed by the District Judge on 8th

September and intimating that the Society was willing to take charge of the minor and expressing the opinion that the Society will be the most suitable guardian of the minor. Thereupon on 11th October, the Secretary of the Society filed an application for being appointed guardian on behalf of the Society, and on 15th November notice was issued on Srimati Ashalata Roy and the minor. The case was thereafter heard by the learned District Judge, evidence being adduced by Srimati Ashalata Roy as the opposite party in the same. The minor was examined by the Court in detail and there was cross examination of the minor on behalf of the Society. On the evidence before the Court, the learned Judge came to the conclusion that it was impossible to hand the minor over to the care of outsiders such as the Society. The learned Judge was, however, unable to confirm the appointment of Srimati Ashalata Roy as guardian in view of the attempt at suicide by the minor, although according to the Judge's own appreciation of the evidence before him that the minor was driven to attempt suicide owing to ill-treatment he received from his sister and brother-in-law, had not been made out.

In the order passed by the District Judge on 6th December 1928, he refrained from making any order as to who was to be the guardian of the minor's person, leaving the right of the minor's relatives to be determined by the general law; and direction was given to Srimati Ashalata Roy and her husband to allow accredited agents of the Society to visit the minor at his home, while he was there, at all reasonable times. The learned Judge, however, held that Srimati Ashalata was not a fit person to be guardian of minor's property, and liberty was given to the Society to produce evidence to show that it was incorporated under its Memo. of Association and Articles to act as guardian of minor's property. Thereafter the Society, through its Secretary filed a scheme of management of the minor's property and other materials before the Court in support of the application for guardianship of property; and on 18th December 1928, the Society was appointed guardian of the minor's property. Against the two orders passed by the District Judge on 6th and 18th December 1928, mentioned above, the present appeal is directed.

Before going into the questions specifically raised in support of the appeal, I would dispose of the point that arises for consideration on the order by the learned District Judge on 6th December 1928. By the order, the learned Judge refused to appoint a guardian of the person of the minor. It seems to me on the facts and in the circumstances disclosed in the evidence before the Court, regard being particularly had to the deposition of the minor Shib Ram Nandi in Court, that it is eminently desirable that a guardian of the person of the minor should be appointed. The learned Judge had some suspicion in his mind as to the treatment the boy received from his sister and the sister's husband. We are unable to give effect to this suspicion, in the absence of any definite evidence of ill-treatment. On the other hand it appears to us that the sister was the only person who could be entrusted with the care of this boy, who requires looking after and proper control. The sister's husband, is an educated man, well able to look after the boy and give him proper guidance. That the brother-in-law is not a man of means is no reason why he should not be allowed to help the sister in bringing up her younger brother. On the facts appearing on the record, the other relations of the minor not having come forward to act as the guardian of the minor either in respect of his person or of his property, and there having been no opposition offered by any of these relations to the appointment of Srimati Ashalata Roy as guardian of the minor, the learned District Judge's order should, to my mind, be superseded hy a definite order appointing the said Srimati Ashalata Roy as the guardian of the person of the minor Shib Ram Nandi: The Society as a philanthrophic and charitable institution, willing to do good to unprotected children, will, as directed by the District Judge, be allowed to visit the minor, at his house, and take all measures necessary or expedient to protect the minor from harm, whether moral or physical, in co-operation with the guardian Srimati Ashalata Roy.

Adverting now to the grounds urged before us in support of the appeal, it has

in the first place been contended that the learned District Judge has not taken into consideration the provision of S. 17, Guardians and Wards Act, in making the orders he has made. I have already dealt with the question of the appointment of guardian of the person of the minor. I have no doubt in my mind that it will be for the welfare of the minor — his moral, bodily and intellectual wellfare to appoint his sister as his guardian. Whatever may have been his reason for writing a letter to the District Judge on 25th April 1928, the minor is now well over 14 years of age, and his wishes as expressed by his statement in Court clearly indicates a decided preference for the sister. All this cannot in my judgment be overlooked and I am satisfied on the materials placed before the Court that the welfare of the minor requires that in the absence of any other near relation Srimati Ashalata Roy should be appointed guardian of the minor Shib Ram Nandi

The other part of the case relating to the appointment of guardian of the minor's property, has now to be considered. Anyone having an interest adverse to that of the minor cannot be appointed such guardian, and for the proper management of the property the character, the capacity and the fitness of the individual to be appointed has to be taken into consideration. It is for this reason that an individual only is appointed by the Court as guardian. The provision relating to the appointment of guardian as contained in the Guardians and Wards Act are based on this principle, which has been accepted by Courts in this country and in England. The reason underlying the principle as stated above is to guide the Court, whether the Court acts under its general powers in the exercise of its general jurisdiction or applies the provision of the Guardians and Wards Act as it is done by Courts in the moffusil in Bengal, in the matter of appointment of a guardian of a minor. Some stress was laid on the definition of the word "person" as contained in the General Clauses Act, and on the meaning of that word as used in the Guardians and Wards Act; but in view of the proviso to which the definition in the General Clauses Act is subject, it cannot be said that the person to be appointed guardian whose character, capacity and special fitness in the circumstances of a particular case, have to be taken into consideration, by the Court, may be a charitable society, like the one whose claim to be appointed guardian of a minor's property has been allowed by the learned District Judge in the present case.

It has been urged before us that not only is the order of the District Judge appointing the society as guardian of the minor's property but the further order that the Secretary of the society is to administer the property is erroneous. It has been said that the Secretary was a variable person, and that there was no evidence as to the competency of the Secretary to manage property. The contention thus advanced appears to be well founded, and should be given effect to. The Secretary's Office, must of necessity be liable to change so far as the personnel was concerned; and in point of fact, there has been such a change during the progress of the proceedings before the District Judge. So far as the other part of the contention is concerned, there is nothing in the record from which one could satisfy himself that the Secretary has the necessary qualification for the purpose of management of the minor's property; nor is there anything to justify the preference given to the Secretary over the minor's elder sister who was at one stage of the proceeding considered by the learned Judge himself to be a fit and proper person to be the guardian of the minor's property. The orders passed by the learned District Judge referred to above, relating to the guardianship of the minor's property are therefore unsustainable.

In the above view of the case, it is unnecessary to examine the question raised in the appeal, as to whether the society was or was not competent to hold property as trustee for any other person, regard being had to the society's articles of association; nor would any useful purpose be served by our going into the very large question as to whether or not the society as a charitable institution could come within the purview of Act 21 of 1860, for the purpose of its incorporation. The further question raised before us as to whether a

person appointed a guardian must be resident within the jurisdiction of the Court making the appointment, need not also be discussed: although in view of S. 39, Guardians and Wards Act, under which enactment, the present proceedings have been started and carried on, it is perhaps intended by the legislature that a Court will not appoint as guardian anyone who resides outside jurisdiction.

It remains now to consider the question whether Srimati Ashalata Roy who was considered to be a fit and proper person by the learned District Judge to be the guardian of the person and property of her minor brother Sibram Nandi as indicated by the Judge's order of 11th July 1928, recorded in the order-sheet, should be appointed guardian of the property of the minor, on her furnishing security to the satisfaction of the Judge. As noticed in the previous part of the judgment, a security bond was filed and remained to be tested. A point has been made on behalf of the appellant that in view of the Judge's order referred to above, the appointment of any other person could not be legally made. The question thus raised is of a somewhat technical nature and the learned advocate for the responnent has sought to meet it by reference to another technicality. I would, however, prefer to confine myself to the merits of the question as it stands at present. The records show that some chnrges of fraudulent removal and misappropriation of the minor's property were laid against Srimati Ashalata Roy at one stage of the proceedings before tle lower Court. If these charges made on information and belief merely, are unfounded, as we are inclined to think they are, the lady should be appointed guardian of the property of the minor on the security furnished by her being tested. We are not much impressed by what has been suggested before us as to the possible incapacity of the lady to manage the minor's property, such as it is in the present case; and the fact that her husband does not earn a decent income, as a member of the medical profession, is in our opinion, no ground for holding that the lady should not be appointed guardian under proper safeguards. With reference to the argument that the lady's interest is adverse to that of her minor brother, it appears to me that the furnishing of security to the satisfaction of the Court would be ample protection of the minor's interest, and the desirability of having a very near relation like the elder sister should not be overlooked, where no adverse interest is for the present, apparent, or is made out by evidence before the Court. This view of the matter does not in any way militate against what has been said by Sir Richard Garth, C. J., in the case of *Kristo Kishore Neogi* v. *Kedar Monee Dossee* (1) and upon which reliance has been placed by the learned advocate for the respondent.

In the result therefore, the orders of the District Judge against which this appeal is directed, are set aside; Srimati Ashalata Roy is appointed guardian of the person of the minor Shibram Nandi. The case so far as it relates to the application of Srimati Asbalata Roy for appointment as guardian of the minor's property is sent back to the learned District Judge, so that it may be dealt with in accordance with law.

Mukerji, J.—My learned brother has dealt exhaustively with all the points that arose in the case and I need not do so over again. I enitrely agree in his conclusions and desire to say only a few words.

The appointment of a guardian of the person of the minor was in my opinion far more urgently called for than the appointment of a guardian for his property. The District Judge appears to have misappreciated the relative importance of the two matters, and while leaving the first one undetermined has made a definite order on the latter. He has observed that he was unable on the evidence to hold that the minor was driven to an attempt to commit suicide owing to the ill-treatment he received from his brother-in-law and his sister, and yet he has said that in view of such attempt, whatever was the reason for it, he was unable to appoint or confirm the appointment of the sister. This I am unable to approve. This sister is the only near relative of the minor and I do not see any reason to suppose that she will not treat the brother with all the care and consideration that he is in need of. Her husband may not be in affluent circumstances, but that is no reason for

(1) 2 C. L. R. 583.

suspecting that he will not help his wife in looking aftet the minor's welfare, the minor will not be a burden but rather a welcome guest so far as he is concerned. The order of the learned Judge that the sister and her husband will allow the accredited agents of the Society for the protection of children in India to visit the minor at his home, while he is there, at all reasonable times is an excellent order, and if that stands as it will, it will operate as an effective safeguard. It has been urged that the sister has a son and therefore she is disqualified or is, at any rate, undesirable, and in support of this contention the case of *Kristo Kishore Neogy* v. *Kader Monee Dossee* (1), has been cited. That case does not go to that length it only lays down that merely as the nearest relation she has no absolute right to be the guardian, or in other words, that the preference is by no means to be necessarily given to her on that consideration.

As regards the question whether the registration of the Society under Act 21 of 1860 is intra vires of the Statute, I do not think we are called upon to decide it. But personally I am inclined to think that the expression "charitable purposes" in the Act should be understood in the wider sense. In my opinion if relief of wants occasioned by lack of pecuniary means is charity, adoption of preventive measures to ward off pecuniary wants is also charity.

On the question as to whether the word "person" as used in the definition of "Guardian" in S. 4, Cl. (2), Guardians and Wards Act is to be read in the light of the meaning given to it by S. (3), Cl. (39), General Clauses Act, I am decidedly of opinion in the negative. This meaning would be inapposite so far as some of the provisions of the Act are concerned, e. g. S. 43, sub-S. (4), S. 45 etc. To obviate all difficulties we have been asked to hold that the order would be open to no objection if the appointment is made of Miss Margaret Arbuthnot, as and while Secretary of the Society. I see no point in this, so long as the Society is not held responsible to the Court as such guardian, as it cannot be, under the Act and because a change in the personnel of the Secretary may happen at any moment. In respect of the minor's property therefore the only thing reasonable to do, in the circumstances, would be to proceed in the way directed by my learned brother.

By the Court.—We have been asked to make an order in favour of the Society for the expenses that it has incurred. The only part of the expenses that we have to deal with is what relates to the proceedings in this Court, and which is said to amount to Rs. 399 9-3 pies as per a memorandum placed before us on behalf of the Society. The society is a philanthrophic body and we would have been very glad to make an order in its favour if we possibly could, but it is impossible to regard these expenses either as on account of necessaries or as having been incurred for the welfare of the minor or for protection of his estate. We accordingly feel bound to reject the prayer. As regards the other items in the memorandum the Court below will deal with them and pass proper orders if approached by the Society in that behalf.

S.N./R.K. *Order set aside.*

A. I. R. 1930 Calcutta 402

MALLIK, J.

Keshab Lal Goswami—Plaintiff—Appellant,

v.

Bhola Nath Gangoadhya and *others*—Defendants—Respondents.

Appeal No. 643 of 1928, Decided on 21st February 1930, against Appellate Decree of Addl. Sub-Judge, Burdwan, D/- 15th November 1927.

Limitation Act, Art. 144—Part of mortgage property sold to mortgagee in possession and whole mortgage satisfied—Mortgagee continuing in possession—Mortgagee's possession becomes adverse—Mortgagor and mortgagee.

A part of the mortgage property was sold by the mortgagor to the mortgagee in possession and from the consideration received the whole mortgage debt was satisfied. The mortgagee, however, continued to be in possession of the remaining part of the property even after the satisfaction of the mortgage debt.

Held : that the possession of the mortgagee after the mortgage was satisfied was adverss to the mortgagor : 34 *All.* 261 *Dist.*

[P 404 C 1]

Baidya Nath Banerjee—for Appellant.

Gopendra Krishna Banerjee—for Respondents.

Judgment.—The facts which have given rise to the present appeal are briefly these; one Kinu mortgaged 13

bighas of land to Sheik Jamit and Sheikh Chhakori in usufructuary mortgage in 1293 B. S. for Rs. 120. There was a sub-mortgage of this property to two persons Ananta and Doyal in 1295 and Ananta and Doyal were put in possession of the property. Kinu sold 8 bighas out of the 13 bighas to Ananta and Doyal in 1299 for Rs. 179 out of which Rs. 120 was paid to the mortgagee and the balance was taken by the mortgagor. Kinu had a sister Umeda by name and Umeda sold the disputed property, namely, 13 bighas to the plaintiff in 1327 B. S. On the strength of this purchase from Umeda the plaintiff brought the suit for declaration of his title to the property and for recovery of possession thereof. The plaintiff's claim was resisted on the allegations that there had been a sale of 8 bighas out of the 13 bighas to Ananta and Doyal and a subsequent sale of the remaining 5 bighas by an oral arrangement and that the defendants had purchased the entire 13 bighas in execution of a decree against Ananta and Doyal.

The Court of first instance dismissed the plaintiff's suit. There was an appeal by the plaintiff but it was unsuccessful. Against the decision of the appellate Court the plaintiff came up to this Court confining, however, his claim only to 5 bighas and not to the whole 13 bighas of the property. And this Court by an order dated 3rd December 1925 set aside the decree passed by the lower appellate Court and remanded the appeal to the lower appellate Court for disposal after a consideration of certain questions that were formulated and in the light of certain observations that were made in this Court's judgment. The directions that were given in the order of remand were in these terms :

"In the first place he (the Judge of the lower appellate Court) will have to find whether in point of fact after the satisfaction of the mortgage debt the 5 bighas of land which was not included in the kabala of 1893, came back to the possession of Kinu and thereafter Ananta and Doyal could not claim to be in possession of it."

If this question is found in the affirmative, then it will not be necessary to go into other matters ; and on a finding in the affirmative with regard to this point, the learned Judge will be right in holding that in that case the possession of Ananta and Doyal must have been either under the verbal sale or it was possession which was adverse to the mortgagor. If, however, the point is not decided in the affirmative then the learned Judge will have to find as a fact whether there was an oral sale in respect of the five bighas. If the question cannot be determined in the affirmative, then the question will arise as to whether the possession of Ananta and Doyal became adverse to that of Kinu and if so, at what point of time. It is not the law that simply because a mortgage debt has been satisfied and the mortgagee continues in possession that the possession becomes adverse from the point of time of satisfaction of the mortgage debt. If any authority is needed for this proposition, reference may be made to the case *Habibulla* v. *Abdul Hamid* (1). At p. 265 the learned Judge observed as follows :

"The possession of a mortgagee does not become adverse to the mortgagor merely because the mortgagee remains in possession after the mortgage money has been satisfied out of the usufruct or has been otherwise paid off, much more is required to get time running against the mortgagor. The question whether the possession of the mortgage after the mortgage debt has been satisfied is adverse to the mortgagor or not is always a question of animus or intention of the parties concerned. The whole of the circumstances will have to be considered in order to find out whether the mortgagees in the present case continued in possession as mortgagees or as owners in respect of the property."

The lower appellate Court after the remand has come to clear findings: (1) that after the satisfaction of the mortgage debt 5 bighas did not go back to the possession of Kinu ; (2) that the verbal sale of 5 bighas was a myth and has not been proved. The learned advocate for the appellant frankly admitted, that he could not go behind any of these two findings which were findings of fact. But his contention was that the lower appellate Court was not justified in holding that if Ananta and Doyal were in possession of the 5 bighas they were in possession as owners of the property and not as mortgagees and in support of this contention he placed a considerable amount of reliance on the case of *Habibulla* v. *Abdul Hamid* (1). The facts of the present case are very different from the facts of the *Habibulla* v. *Abdul Hamid* (1) In the

(1) [1912] 34 All. 261=19 I. C. 963=9 A.L.J. 131.

Habibulla v. *Abdul Hamid* (1) the mortgagor, unless a regular accounting was held could not be in a position to know at what particular point of time the mortgage debt had been satisfied. In the present case, however, the mortgage debt was satisfied not from the usufruct of the property but by actual cash payment made by the mortgagor from the consideration money which he obtained by a sale of 8 bighas of land to Ananta and Doyal. In the present case the mortgagor perfectly knew that the mortgage debt was satisfied and he perfectly knew also at what particular point of time it was so satisfied. The learned Subordinate Judge, as his judgment will show, appears to have considered the circumstances of the case as also the intention of the parties and it was after a consideration of all these that he came to his finding that the possession of Ananta and Doyal since 1299 was possession not as mortgagees but as owners of the property, and on that finding he held that that possession was adverse to the mortgagor Kinu. If the possession of Ananta and Doyal became adverse to Kinu in 1299 the title which Kinu had in the property could not but be held to have been extinguished long before the plaintiff's purchase in 1327 B. S.

The learned advocate for the appellant contended that the entire interest which Umeda, the plaintiff's vendor, had in the property she had not inherited from Kinu. But if Ananta and Doyal were all along in possession of the property as owners thereof from the year 1299 B S. their possession was adverse to Umeda as well and when Umeda sold the property to the plaintiff in 1327 she had no interest subsisting in it, her title to it independently of her title as heir of Kinu having been extinguished after 12 years from the date of the satisfaction of the mortgage debt, namely, 1299 B. S. The result therefore is that the appeal is dismissed with costs. There was an application for leave to appeal under the Letters Patent. I do not consider the case to be a fit one for such leave. The application is refused.

S.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 404

COSTELLO, J.

Bimalacharan Batabyal—Plaintiff.

v.

Trustees for the Indian Museum—Defendants.

Original Civil Suit No. 1068 of 1928
Decided on 15th March 1929.

(a) Government of India Act (1919), S. 96-B—Right of dismissal of persons in Civil Service still exists in Crown though it is limited as to procedure and circumstances in which it is to be exercised.

Section 96-B, so far from abrogating the prerogative of the Crown with regard to the dismissal of persons in the Civil Service, reiterates and emphasises the fact that the right of dismissal at pleasure still exists and enacts that that right is only limited in so far as there are definite and special or particular rules or regulations laying down the method by which or the circumstances in which the right is to be exercised: *Denning* v. *Secy. of State*, 37 *T. L. R.* 138, *Ref.*; *A. I. R.* 1927 *Cal.* 311, *Dist.* [P 407 C 2]

(b) Museum Act (1910), S. 13—S. 13 has no reference to tenure of service.

Section 13 is quite definite as to the mattere with which it purports to deal, and all that it provides is that so far as regards their "salary" "allowances" and "pension" and their leave of absence from duty, they (i. e. officers and servants appointed under the Act) shall be subject to the rules which under the Civil Service Regulations for the time being in force would be applicable, if their service was service under the Government. That section has no reference at all to the question of the tenure of office. [P 408 C 2]

(c) Words and Phrases—"Substantive and permanent" as applied to appointment indicate nature and character of appointment, not duration.

The phrase "substantive and permanent" as applied to an appointment is more descriptive of the nature and character of the appointment than indicative of the duration of that appointment. [P 4 9 C 2]

(d) Museum Act (1910), S. 13—Tenure of employment by trustees can be terminated by reasonable notice.

The tenure of employment of a person appointed by the trustees of a museum under Museums Act, is of such a kind that, in the absence of any regulations or conditions prescribed by the trustees under S. 9 of the Act, it can be terminated by reasonable notice. [P 410 C 1]

(e) Master and Servant—Contract of service—Annual increments — Servant is not entitled to remain till maximum is reached nor is it fresh contract every year—Service is terminable by reasonable notice.

Even where a person is employed upon a remuneration which is a starting basis, and even where there is an agreement for an increase by annual increments up to a certain sum, there is certainly no obligation or implied condition that a servant would be allowed to remain long enough to earn a maximum salary and also there is no intention, unless it were

definitely expressed on the part of the contracting parties, that each year or the beginning of each year of service should be regarded as a new contract of employment. The proper way of regarding a contract of this kind is that it is one subject to reasonable notice on either side. The question of what is reasonable notice is a question of fact, and depends largely upon the circumstances of each particular case : *Beeston v. Collier*, (1827) 4 *Bing.* 309, *Dist.* [P 411 C 1]

S. C. Bose and *Sudhish Roy* — for Plaintiff.

N. N. Sircar and *T. Ameer Ali*—for Defendants.

Judgment.—This is a suit brought by Bimalacharan Batabyal against the Trustees of the Indian Museum, in which the plaintiff is claiming a very large sum of money, which is said to represent an amount which he would have earned during the unexpired period of his service with the defendants and to be in the nature of commutation of the pension to which he would have been entitled had he completed his service with the defendants.

The plaintiff was employed by the defendants as their head clerk and it is not disputed, and indeed it appears quite definitely from the service book, that his service with the defendants was of an entirely satisfactory character. The plaintiff was formerly employed under the Geological Survey of India and at that time it may be that he was in the position of a Government servant, but subsequently, upon his own application, he was taken into the service of the defendants and became a clerk to the Trustees of the Indian Museum on 14th February 1917, at a salary of Rs. 60 a month. That salary, in the following year was increased to Rs. 63 a month and then, in November of the year 1918, his salary was again altered and he was put upon a scale of pay starting with Rs. 75 and rising by annual increment of Rs. 5 a year to a maximum of Rs. 175 a month and in Col. 2 of the service book, which the plaintiff had, his employment or the nature of his appointment is described as being "substantive and permanent." I do not think it necessary to deal with the correspondence which was put in evidence in any great detail. It is sufficient I think to say that, at the time when the plaintiff was appointed as head clerk by the defendants, the defendants at first sought the sanction of the Government of India for the making of that appointment and they were informed that no such sanction was required as they had sufficiently wide inherent powers to make an appointment of that kind of their own motion by virtue of the provisions of S. 9, Museum Act, which provides that :

"subject to such regulations and conditions as may be prescribed by them in this behalf, the trustees shall appoint such officers and servants as may be necessary or proper for the care or management of the trust-property and may assign to such officers and servants such pay as they may think fit."

It appears that the real reason why the defendants applied to the Government of India for formal sanction to the granting of the increase of pay to the plaintiff, which the trustees were desirous of making, was because the defendants were anxious that the additional sum necessary for covering this increased pay should be provided by the Government of India by way of an increase to the annual fixed grant of Rs. 18,410, which is made by the Government of India to the Trustees of the Indian Museum for the purpose of the care and maintenance of the Indian Museum. During the course of the years 1925-26 and the early part of 1927, correspondence took place between the defendants and the Government of India with regard to this matter, and the attitude adopted by the Government of India was that they did not intend to increase the amount of the fixed grant made by them to the trustees and that, as the trustees had thought fit in the exercise of their powers under S. 9 of Act 1910 to raise the pay of their clerk, that was a matter which the Trustees should provide for by means of re-adjustment of their expenditure within the limits of the fixed grant which they received. In March 1927, the defendants received a letter from the Government of India, in such unequivocal terms, with regard to their finance, that they apparently then came definitely to the conclusion that they would not get any increased grant from the Government of India and that, therefore, they would have to re-adjust their expenditure to provide for the increase which they had granted to their clerk (the plaintiff) some two years before, or else they would have to put the clerk back on a different scale

and reduce his emoluments. I am not concerned to enquire into the policy or the financial arrangements which the Trustees thought fit to adopt. The fact is that, by a resolution of the Trustees of the Indian Museum, at a meeting held on Monday, 11th April 1927, they resolved:

"We having considered the question of increase in pay of the head clerk sanctioned by resolution No. 1, dated 6th January 1925, find it necessary to revert the head clerk to the old scale, with effect from 12th April 1927."

The head clerk concerned, that is to say, the plaintiff, was duly notified of that resolution and, thereupon, he wrote to the Hony. Secretary of the Trustees a letter, in which he said:

"I have decided to exercise the option of retaining my old pay of Rs. 120-10-350 in accordance with R. 23*, of the Fundamental Rules."

and then he proceeded to quote from S. 13, Museum Act of 1910, which provides as follows:

"All officers and servants appointed under this Act shall be deemed to be public servants within the meaning of the Indian Penal Code; and so far as regards their salaries, allowance and pensions and their leave of absence from duty, they shall be subject to the rules which under the Civil Service Regulations for the time being in force would be applicable if their service was service under Government,"

and the plaintiff concluded his letter by submitting to the Trustees that the pay of a Government servant could not be reduced in contravention of the service rules. I ought to have said that, at the time when the plaintiff was put upon his scale of pay Rs.120-10-350, he was receiving under his previous rate of pay the sum of Rs. 140 a month, and, under the resolution appointing him to the higher scale of pay, he was allowed to count, for the purpose of computing his pay, the years of service which he already had to his credit (that is to say some 10 years service) and that resulted in the plaintiff starting on the new scale at an initial salary of Rs. 220 a month. So the effect of the resolution in April 1925, was to increase the actual pay of the plaintiff from Rs. 140 a month to Rs. 220 a month. By April 1927, the plaintiff had had two yearly increases in his remuneration and, therefore, at that time, his pay was Rs. 240 a month. After the plaintiff had put his case to the Trustees in his letter, to which I have referred (which was dated 23rd April 1927), a discussion ensued between the defendants and the plaintiff as to what his position was and what his rights were and, at one time, there seems to have been a suggestion that the plaintiff might be entitled to receive a compensation pension by virtue of the operation of Arts.426 and 436*, Civil Service Regulations. The plaintiff was not willing to accept a pension upon that footing and persisted in the attitude that he was entitled to remain in the employment of the defendants at his then existing remuneration and scale of pay by virtue of the provisions eithar of Art. 158,* Civil Service Regulations or R. 23, Fundamental Rules laid down by the Secretary of State for

*Rule 23 is in the following terms:

The holder of a post, the pay of which is changed, shall be treated as if he were transferred to a new post on the new pay; provided that he may at his option retain his old pay until the date on which he has earned his next or any subsequent increment on the old scale, or until he vacates his post or ceases to draw pay on that time scale. The option once exercised is final.

*Articles 426 and 436 are in the following terms:

426. A compensation pension is awarded to an officer discharged from the public service because, on a reduction of establishment, his appointment is abolished and other suitable employment cannot be found for him. An appointment, the pay of which is reduced as part of a general scheme of revision, is abolished within the meaning of this article. But in such case it may sometimes be cheaper to grant a personal allowance than a pension.

436. Reasonable notice should be given to an officer in permanent employ before his services are dispensed with on the abolition of his office. If in any case, notice of at least three months is not given, and the officer has not been provided with other employment on the date on which his services are dispensed with, then, with the sanction of the authority competent to dispense with the officer's services, a gratuity not exceeding his emoluments for the period by which the notice actually given to him falls short of three months, may be paid to him, in addition to the pension to which he may be entitled under Arts. 474 to 481; but the pension shall not be payable for the period in respect of which he receives a gratuity in lieu of notice.

*Article 158 is in the following terms:

158. The incumbent of an appointment the pay of which is changed shall be treated as if he were transferred to a new appointment on the new pay: provided that he may at his option retain his old pay until the date on which he has earned his next or any subsequent increment on the old pay or until he vacates his appointment. This option once made is final. (Edn. 2, 2nd reprint, No. 82, dated 8th Februaay 1919).

India under the provisions of the Government of India Act, 1919. Put quite shortly, the plaintiff took up the position that he was entitled, by virtue of the provisions of S. 13, Museum Act of 1910, to all the rights and privileges of a public servant and that he was in a position either identical with, or at any rate analogous to, the position of an ordinary civil servant, and the plaintiff accordingly contended that under the provisions of the Civil Service Regulations and the provisions of the Fundamental Rules, it was not competent to the defendants to terminate his employment, but that the nature of his appointment was such that he was entitled to remain in the service of the defendants on the scale of pay he was receiving in April 1927, and to proceed by yearly increment to the maximum salary of Rs. 350 a month provided for that in that scale and ultimately to earn a pension by virtue of service, for a number of years.

The case on behalf of the plaintiff was fully and ably argued and all that possibly could be said on behalf of the plaintiff has been said by Mr. S. C. Bose and Mr. S. C. Roy. Mr. Roy sought to argue that the effect of S. 13 of the Act 1910, read in conjunction with S. 96-B, Government of India Act, 1919, is to put a person, who is in the position of the plaintiff, in service under the Trustees of the Indian Museum, certainly in the same position as an ordinary Government servant, if not in an even more privileged position than an ordinary civil servant would be. It was argued and contended on behalf of the plaintiff that the effect of S. 96-B, Government of India Act, 1919, is so far to cut down and limit the right of the Crown to dismiss persons from the service of the Crown in India, that it is no longer possible in law for the Government to terminate the employment of its servants excepting for definite misconduct and that the effect of the Civil Service Regulations and the Fundamental Rules is that it is obligatory upon the Government to permit civil servants to remain in their employment until they attain such an age as entitles them to a pension on the scale laid down in those regulations. In support of that argument, various cases were cited to me, including a case in the Privy Council *Gould* v. *Stuart* (1), in which case Sir Richard Couch, who delivered the judgment of the Board, said that the provisions of the New South Wales Civil Service Act of 1884:

> "which are manifestly intended for the protection and benefit of the officer, are inconsistent with importing into the contract of service the term that the crown may put an end to it at its pleasure."

The opinion of the Judicial Committee of the Privy Council in that case was relied upon in a case, which was decided on a preliminary issue by my brother Buckland: namely the case of *Salish Chandra Das* v. *Secy. of State* (2) where Buckland, J., decided:

> "that notwithstanding S. 96-B, Government of India Act, 1915, the provisions of R. 14 of the rules regarding civil servants in India made by the Secretary of State for India in Council under Sub-S, (2), S. 96-B, Government of India Act, which are manifestly intended for the protection and benefit of the officer, are inconsistent with importing into the contract of service the term than the Crown may put an end to it at pleasure.

Buckland, J., was merely following the decision in *Gould* v. *Stuart* (1), and I think the effect of both the decisions of the Privy Council and of Buckland, J., merely comes to this that, by virtue of S. 96-B, Government of India Act, 1919, the right of the Crown, that is the Government, to dismiss a civil servant is subject to any provisions which are contained in the Act or in the rules made under the Act dealing with the procedure to be adopted or relating to any conditions precedent which must be fulfilled before a servant is in fact dismissed. In my opinion, S. 96-B, so far from abrogating the prerogative of the Crown, with regard to the dismissal of persons in the civil service, reiterates and emphasises the fact that the right of dismissal at pleasure still exists and enacts that that right is only limited in so far as there are definite and special or particular rules or regulations laying down the method by which or the circumstances in which the right is to be exercised. That view of the matter seems to me to be made clear by a decision of Bailache, J. in the case of *Denning v. Secy. of State* (3), where it was held that a Crown servant, against whom any misconduct is alleged, is

(1) [1896] A. C. 575=65 L. J. P. C. 82=75 L. T. 110.
(2) A. I. R. 1927 Cal. 311=54 Cal. 44.
(3) [1920] 37 L. T. R. 198.

liable to dismissal at the pleasure of the Crown without notice even if the form of agreement, under which he has been engaged, implies that, except in the case of misconduct the engagement can only be terminated by notice. In that case Bailache, J. reviewed the various authorities including *Gould* v. *Stuart* (1) and the case decided in the opposite sense, *Shenton* v. *Smith* (4).

In this connexion, I refer also to the case of *Hales* v. *The King* (5) which came before the Court of Appeal in England, on appeal from a decision of Avory J. and Lord Pickford J. there held that it was a term of the employment of all servants of the Crown that their employment was at the pleasure of the Crown. It was pointed out that the matter was fully covered by *Dunn* v. *The Queen* (6) There is one other case to which I desire to refer, and that is the case of *Young* v. *Wallier* (7), where Lord Watson explained the decision which the Board had previously given in *Gould* v. *Stuart* (1). He says that although it was decided by this Board in *Gould* v. *Stuart* (1) that the effect of the New South Wales Civil Service Act of 1884 was to deprive the Crown of the right to dismiss its civil servants summarily without following the procedure prescribed by the Act, it was certainly not suggested that the provisions of the Act either directly or by implication, took away the right of the Crown to abolish an office. The importance of the observations of Lord Watson is this: that he seems to say, what I have already pointed out that the real effect of the decision in *Gould* v. *Stuart* (1) was that, if the Civil Service Regulations whether embodied in a statute itself or made by virtue of the statute, or if the Fundamental Rules under the Government of India Act, 1919, for example, had contained a provision with regard to the procedure to be adopted on the dismissal of a servant of the Crown, then it is necessary that that procedure should be adopted. and, in my view, none of the cases which were cited to me on behalf of the plaintiff, nor S. 96-B itself seriously derogate from the right of the Crown to dismiss its civil servant at its pleasure. Having said that, I would only add that in my opinion, the decision in *Ram Das Hazar* v. *Secy of State* (8) is still good law in that it says that a servant of the Crown is still liable to dismissal without notice.

In my view, however, it is unncessary, for the purpose of deciding the present case. that I should deal with the matter upon the footing that the plaintiff here has the rights of a civil servant so far as the tenure of his office is concerned. In other words, I think there is nothing in S.13, Museum Act of 1910 which confers upon the plaintiff any rights with regard to the duration of service in any way whatever. S. 13 is quite definite as to the matters with which it purports to deal and all that it provides is that so far as regards their "salary." "allowances" and "pension" and their leave of absence from duty, they (i.e., officers and servants appointed under the Act) shall be subject to the rules which under the Civil Service Regulations for the time being in force would be applicable, if their service was service under the Government. I think that section has no reference at all to the question of the tenure of the plaintiff's office, nor the conditions under which he is employed, other than the conditions with regard to those specific things which are mentioned. In the ordinary way the question of the period of the plaintiff's employment would have been, or should have been dealt with by the Trustees under the powers conferred upon them by S. 9 of the Act of 1910. Apart from what is to be gathered from the entries in the plaintiff's service book, apparently nothing was said by either side (i.e., either by the plaintiff or by the Trustees of the Indian Museum as to the period for which he was taken into the service of tne Trustees. I have already said that the plaintiff relies upon the fact that in the service book, his appointment is described as substantive and permanent," and Mr. Roy invited me to come to the conclusion that the insertion of those words by the plaintiff, with the acquiesence and the consent of the defendants. indicated that the intention was that his service with

(4) [1895] A. C. 229=64 L. J. P. C. 119=43 W. R. 637=72 L. T. 130.
(5) [1918] 34 T. L. R. 589.
(6) [1896] 1 Q. B. 116.
(7) [1898] A. C. 661=67 L. J. P. C. 80=14 T. L. R. 374=78 L. T. 508.
(8) [1912] 18 C. W. N. 106=16 I. C. 9-2=17 C. L. J. 75.

the defendants should last for at least such a period as would enable him to receive a salary at the highest rate in his scale of remuneration or even for such a period as would enable the plaintiff to earn a pension at the age of 55 of such a kind as is provided for in the Civil Service Regulations in the "articles" dealing with the question of pensions. In my view, that contention on behalf of the plaintiff cannot be supported.

The position seems to be this. If by virtue of the terms of S. 13, the plaintiff acquired all the rights conferred on civil servants by the provisions of the Civil Service Regulations and/or the Fundamental Rules, it would follow that he at the same time would take upon himself all the liabilities of civil servants under these regulations and those rules, and he would be subject to such disabilities as fall on a civil servant by virtue of the operation of the prerogative of the Crown to which I have already referred. It would, therefore, seem that if the plaintiff stood for all purposes in the position of a "public servant" he would, like all other civil servants, be subject to dismissal more or less summarily, subject only to such provisions with regard to antecedent procedure and machinery as could be found in the Regulations and Rules themselves, including of course the Fundamental Rules made under S. 96-B, Government of India Act of 1919.

If, on the other hand, it is said that the plaintiff is only in the position of a public servant so far as such matters as salary, allowances, pension and leave are concerned, then it follows that, as regards matters outside those particular things, his employment, in the absence of any special provisions, was subject to the ordinary rules of law as to the duration of that service. I think that the words "substantive and permanent" as used in the service book import no more into the relationship between the plaintiff and the Trustees of the Museum than that his employment is of a permanent as opposed to a purely temporary character, and that he is the incumbent of his appointment and not merely "acting" and was entitled to the emoluments of it in such a way that, in the ordinary course, if his employment had continued he would be entitled to and subject to all the rights and liabilities incidental to the service in accordance with the Civil Service Regulations. In other words, the phrase "substantive and permanent" is more descriptive of the nature and character of the appointment than indicative of the duration of that appointment.

I, accordingly, hold that there is nothing in the plaintiff's service book which indicates that the defendants were binding themselves to employ him either for the rest of his life or for as long as he chose to remain in their service or until he attained the age of 55 or until he was entitled to receive a pension. I think the right view of the nature of the employment was that although it was with a body of quasi-Government character, this employment, so far as the tenure of it was concerned, had all the incidence of employment by private employers, and that it was only so far as salary, allowances, pension and leave are concerned, that the principles and scheme of the Civil Service Regulations were intended to apply.

It was also argued by Mr. Roy in his very able argument before me that because the plaintiff was remunerated upon a scale of pay involving regular annual increments, whereby the maximum salary specified would only be attained after a definite number of years of service, that, of itself, implied that the Trustees were binding themselves to employ the plaintiff for such a period as would enable him to obtain and enjoy a salary at a maximum rate. In other words, Mr. Roy realising the difficulty of establishing that the plaintiff was entitled, as it were, to a freehold in his office, and the difficulty of maintiaining that as a public servant, the plaintiff could not be dismissed from his employment, Mr. Roy fell back upon the argument that there was a contract of service between the plaintiff and the Trustees, one of the terms of which, either expressly or impliedly, by virtue of the expression "substantive and permanent," and by virtue of the method of remuneration, was that the plaintiff should be employed for at least such a period as would enable him to earn remuneration at the highest rate. No doubt it was open to the plaintiff to contract with the defendants with regard to the "term" of his employment

but that particular contention of Mr. Roy seems to be negatived by a decision in the case which was cited on behalf of the plaintiff on another point. I refer to the case of *Fawcett* v. *Cash* (9), where incidentally, by implication, it was held that the fact that a servant was employed on a rising scale of pay did not import that the employment should last longer than one year, and it was held, further, that there was a yearly hiring and, in effect, that, as each increment became due, there was a fresh employment at the higher rate of pay. For the reasons I have given, I hold that, in this case, so far as the duration of the plaintiff's employment was concerned, that was entirely a matter of contract, express or implied, as between him and the Trustees of the Indian Museum, and, neither by virtue of S. 13 of the Act of 1910 nor S. 96-B of the Act of 1919, was the plaintiff entitled to take up the attitude that, in no circumstances, could his employment with the defendants be terminated.

What the plaintiff in fact did was to decline to accept a lower scale of pay, and he, accordingly, refused to remain in the employment of the defendants on any scale of pay other than that which he had been receiving for the previous two years or more. Upon that, by a letter dated 20th August, the defendants gave notice to the plaintiff that he was :

"to consider himself as discharged as from Monday, 22nd August, and that he would not be allowed to attend office on that day."

I take the view, and I, accordingly, hold that the employment of the plaintiff, so far as his tenure of his appointment is concerned, was of such a kind that, in the absence of any special agreement, and in the absence of any regulations or conditions prescribed by the Trustees under S. 9 of the Act of 1910, it was of such a character that it could be terminated by reasonable notice. It is clear, and indeed it is not disputed, that the plaintiff did not receive reasonable or any notice (unless it could be successfully contended that, in effect, he had notice in April at the time when the resolution was made by the trustees to reduce his salary), that his employment would terminate either in August or at any rate on a date, representing three months after the date of the resolution, and the Advocate-General invited me to say that because the plaintiff had notice in April that it was proposed to reduce his salary, therefore, in effect, he had notice that his employment would actually come to an end, at any rate by or before the month of August 1927.

I am not disposed to accept that view of the matter, because it is clear from the correspondence, and indeed it has not been suggested otherwise, that throughout the intervening time from April until August 1927, the parties were in more or less amicable negotiation with regard to the plaintiff's position. At no time, has it been suggested by the defendants that they have any kind of animus against the plaintiff ; on the contrary, it is clear throughout that the defendants (the Trustees of the Indian Museum) were entirely satisfied with the plaintiff's work and conduct, and they regarded him in every way as an efficient and satisfactory clerk, and it was, purely by reason of the financial position, that they felt constrained to put an end to his employment. As I have said, from April to August, the position of the plaintiff was under discussion, and as late as 13th August 1927, there was a resolution of the defendants to this effect :

"As the head clerk has expressed unwillingness to accept the lower rate of pay, the Trustees, after consulting the Accountant-General, come to the conclusion that the case is covered by Art. 426 of the Civil Service Regulations and the head clerk is entitled to a compensation pension."

(That of course would have been the pension provided for in the circumstances set forth in Art. 426, Civil Service Regulation).

"The Accountant-General has given detailed reason in the note, which is filed, for taking this view. The trustees, therefore, resolve that the head clerk should immediately retire on compensation pension or express willingness, in writing, to continue on the lower rate of pay. If the head clerk had retired on compensation pension, from the date of information of the reduction of the pay to him, he would, under Art. 436, Civil Service Regulation, have been entitled to three months' pay at the higher rate. By, continuing in his post, he has waived this right. The Trustees, however, as a matter of grace, are prepared to give him his pay for three months, if he retires on compensation pension immediately. If he accepts the other alternative of continuing on the reduced pay, then the Trustees are still prepared to allow him to draw pay at that rate from 22nd April 1927, the date on which the decision re-

(9) [1834] 5 B. & Ad. 905=3 N. & M. 177=3 L.J. K.B. 113.

garding reduction of pay was conveyed to him."

That resolution was sent to the plaintiff, and a note was made of that fact by the Honorary Secretary to the Trustees, in which he said that :

"he (the head clerk) will convey to me the course he proposes to adopt before Monday, 22nd instant."

So it seems to be clear at that time that neither side regarded this employment as having been terminated, and that both sides were proceeding upon the footing that it might be continued.

That being so, I hold that no sufficient or valid notice in law was given by the defendants terminating the plaintiff's employment, and that he was to all intents and purposes summarily dismissed on 22nd August 1927.

Mr. S. C. Bose, on the authority of the case of *Beeston* v. *Collier* (10), has argued that the effect of the character of the remuneration of the plaintiff and the fact that he was on what is generally called a time scale, indicates that the hiring of the plaintiff was a yearly one, and that the effect of giving a yearly increment of Rs. 10 was to create a fresh hiring for each year of the plaintiff's employment.

I am very doubtful whether the principles laid down in *Beeston* v. *Collier* (10) ought to be applied to a case of this kind. I think the more modern authorities would indicate that even where a person is employed upon a remnneration which is a starting basis, and even where there is an agreement for an increase by annual increments up to a certain sum, there is certainly no obligation or implied condition that a servant would be allowed to remain long enough to earn a maximum salary : and I think also there is no intention, unless it were definitely expressed on the part of the contracting parties, that each year or the beginning of each year of service should be regarded as a new contract of employment. I think the proper way of regarding a contract of this kind is that it is one subject to reasonable notice on either side. The question of what is reasonable notice is a question of fact, and depends largely upon the circumstances of each particular case Had I thought it necessary to lay down a general principle applicable to employment of this character, I think I should come to the conclusion that a reasonable notice would be a three months' notice on either side. Having regard to the scope of the duties performed by the plaintiff, as head clerk of the defendants, I do not propose, however, to deal with this case solely upon that footing, because, as Mr. Ameer Ali says, so far as the question of notice and compensation to the plaintiff is concerned, the defendants are content to leave the matter in the hands of the Court.

Accordingly, I find and hold that, in the case of an appointment of this character, three months' notice is reasonable notice, and I find as a fact that no notice was given or, if notice was given, it was not acted upon by either party until 22nd August, and the position was that, on 22nd August, the plaintiff was dismissed and his employment was terminated, whereupon, he became entitled to a reasonable sum in lieu of notice. The plaintiff was accordingly entitled to such a sum as represents three months' salary as from 22nd August, together with the balance of the salary for the preceding months. At the same time bearing in mind the circumstances of this particular case I express the view that the trustees ought to pay salary up to the end of the financial year, the end of March 1928. (Judgment was then ordered for the plaintiff with costs).

V.B./R.K. *Order accordingly.*

(10) [1827] 4 Bing. 309=12 Moore 552=5 L.J. (O.S.) C.P. 180=2 Car. & P. 607.

A. I. R. 1930 Calcutta 411

RANKIN, C. J. AND C. C. GHOSE, J.

Tarakeswar Pal Choudhury—Appellant.

v.

Satish Kanta Roy and *others*—Respondents.

Appeal No. 268 of 1927, Decided on 24th March 1930, against original decree of Sub-Judge, Khulna, D/- 22nd June 1927.

(a) Words and Phrases—"Dowl kabuliyat and kistbundi" explained.

By the expression 'dowl kabuliyat' and 'kistbundi' is meant an engagement setting forth particulars of the arrangements made for the payment of revenue in respect of specified lands by fixed instalments. [P 414 C 1]

(b) Words and Phrases — "Britti" explained.

The word "britti" is of Sanskrit origin and it means literally "means of subsistence." [P 144 C 1]

(c) Words and Phrases — "Taidad" explained.

A 'taidad', is an extract from a public register or other document of authority in confirmation of a claim. [P 414 C 2]

(d) Civil P. C., S. 2 (2)—Collector or other Revenue Officer being competent to institute inquiries and to record his judgment in robokari as to the liability of lands or otherwise in manner directed by S. 20, Regn. 2 of 1819—Such decision has force and effect of decree.

It was competent to the Collector or other Revenue Officer to institute the enquiries specified in Regn. 2 of 1819 and Regn. 9 of 1825, and to follow the procedure laid therein and he was to record in a robokari his judgment as to the liability of the lands to assessment or otherwise in manner directed by S. 20, Regn. 2 of 1819 and such decision has the force and effect of a decree. [P 416 C 1]

(e) Bengal Regulation (42 of 1803), S. 2(2) —"Mehal" signifies property held under one title—"Mahalwari" is used in contradistinction to "mauzawari."

The word "mehal" which is used in the Bengal Regulations as the equivalent of the English word "estate" signifies, not the property of person, and the property held under one title, whether by one person or by many. The word "mehalwari" is used in contradistinction to "mauzawari" which defines every separate mauza or village in the revenue records. [P 416 C 2]

(f) Adverse possession—Lands incapable of occupation until recently — Possession must follow title.

In the case of lands full of jungle and incapable of occupation and until quite recently, possession must follow title in the absence of possession by anybody other than the rightful owner. [P 417 C 2]

Sarat Chandra Bose, *Sarat Chandra Basak*, *Sitaram Banerjee*, *Rupendra Kumar Mitter*, *Jnan Chandra Roy*, *Prokash Chandra Pakrasi* and *Anil Chandra Dutt*—for Appellant.

Jogesh Chunder Roy, *Nanda Gopal Banerji*, *Bhudhar Haldar*, *Nripendra Chandra Guha* and *Nagendra Kumar Dutt*—for Respondents.

C. C. Ghose, J.—Defendant 2 is the appellant before us and the apppeal arises out of a suit instituted by the plaintiffs (who are descendants of the Raja of Chanchra in the District of Jessore) as shebaits to Sree Sree Shyam Roy Thakur for a declaration of their lakheraj debuttar title to and in certain lands in Pargana Emadpur situate in the District of Khulna but included in touzi 1 of the Nadia Collectorate, for recovery of khas possession of the same and for mesne profits. The lands in question are stated to be in mouza Dearah by the side of the river Kabatakshi. It is said that the lands in question have been possessed by the family of the plaintiffs for generations as shebaits, the original grant having been made by Raja Pratapaditya, an account of whom is to be found in Westland's Jessore. 2nd Edn., p. 23 and in O'Malley's Gazetteer of Jessore, p. 25. The plaintiffs state that at the time of the Decennial Settlement of 1790, the debutter character of the lands in question was recognized and the lands were exempted from payment of Government revenue. Subsequently there were resumption proceedings in respect of the said lands, which ultimately ended in 1842 when the Special Deputy Collector by his order dated 23rd May 1842 released the said lands as being lakheraj on the ground that they were debuttar. The plaintiffs alleged that their title as lakherajdars had always been recognized and that although they had made attempts from time to time to clear the lands which were in the Sunderbuns and full of dense jungles and to settle tenants thereon, they were not successful and the lands in question had remained unfit for occupation and settlement until five or six years previous to the institution of the suit. The plaintiffs alleged that in 1320 B. S. they had been informed that the defendant had taken wrongful possession of certain lands in mouzah Dearah and that they were further informed in 1323 B. S., that the defendant had erected a kutchery bari on the said lands. In these circumstances the plaintiffs instituted the present suit in the Court of the Subordinate Judge of Khulna on 25th May 1920 praying for the above reliefs.

The defendant denied the plaintiffs' title and urged that the lands in suit were within mouza Dearah in Pargana Bagmara included within the defendant's ancestral zamindari and alternatively that if it be found that the plaintiffs had title thereto, he had acquired title by being in exclusive and adverse possession of the same for a period of more than 12 years from 1313 B. S.

The learned Subordinate Judge by his judgment dated 22nd June 1927 found

that the plaintiffs had made out a clear title to the lands in suit, that until quite recently the lands were incapable of occupation inasmuch as they were covered with dense jungle full of wild beasts and that the defendants had not succeeded in proving that he had been in possession of the said lands from 1313 B.S. adversely to the plaintiffs as alleged by him. The learned Subordinate Judge thereupon declared the plaintiffs' title to the lands in suit and gave them a decree for khas possession. He also awarded mesne profits from the date of the suit as per directions contained in his decree.

On appeal before us, the same contentions have been urged on behalf of the defendant and an elaborate argument has been addressed to us for the purpose of showing that there is no substance in the plaintiffs' contention and that they and their ancestors have been in possession of these lands under their lakheraj title from 1790 down to date. It has therefore become necessary to examine closely the plaintiffs' title; but before I do so, it may be useful to make a few preliminary observations, more or less historical, leading up to the plaintiffs' title. I will not attempt to reproduce the history of the Rajas of Chanchra, to which family the plaintiffs belong, at any length, because all the available materials are to be found in Westland's Jessore, O'Malley's Gazetteer of Jessore and Pargiter's history of the Sunderbuns. It appears that the ancestor of the plaintiffs originally had four Parganas namely, Saydpur, Amidpur, Muragacha and Malikpur. Subsequently Pargana Esafpur was acquired by the family in addition to various other parganas. About 1745 the ancestral properties were divided into two shares (a) 12-annas share which was possessed by Nilkanta Roy and (b) a 4-annas share possessed by his uncle Shyam Sundar Roy. The last mentioned share passed out of the family altogether and may be left out of account. The 12-annas share came to be known as the Esafpur estate, that being the chief pargana in it. In the possession of the Esafpur estate, Sree Kanta Roy succeeded Nilkanta Roy in 1764 and it was this Sree Kanta Roy who had possession of the estate at the time of the Decennial Settlement.

It may be stated in passing that prior to the Decennial Settlement, various settlements had been made by the East India Company from time to time and that during the currency of these settlements the District of Jessore as it then existed was comprised within the famous "Huzuri Mehals" of Warren Hastings i. e. Mehals whose revenue had to be paid into the Khalsa or Exchequer at Calcutta.

The Decennial Settlement took place in 1790 and as is well-known elaborate rules and regulations had been passed for concluding that settlement. The zamindar was allowed 10 per cent i. e. not 10 per cent of the assets, but only 10 per cent of the Government share, which left him one-eleventh in all. Before, however, this 10 per cent was calculated, all the non-revenue-paying lands the profits of which were enjoyed by the zemindars were resumed and added to the rest of the estate, subject to a reservation made in favour of lands dedicated solely to religious purposes. It was declared by the East India Company by the Lakheraj Regulations of 1st December 1790 that all grants of rent free lands made previous to 12th August 1765 should be deemed valid, provided the grantee actually and bonafide had obtained possession of the lands so granted previous to that date and the lands should not have been subsequently resumed by the officers or under orders of Government : see Colebrooke's Digest of Regulations, Supplement Vol. pp. 292. By S. 4 of the said regulations it was declared that the grantees or present possessors, until dispossessed by a decree of the Dewani Adawlat. were to by considered as the proprietors of such rent-free lands with the same right of property therein as was possessed by the other landholders paying revenue to Government. But S. 33, Decennial Settlement Regulations (it may be noted in passing that they were all included under Lord Cornwallis's orders in a Code of Regulations dated 23rd November 1791) it was provided that the assessment of revenue was to be fixed exclusive and independent of all existing Lakheraj lands and by S. 43 thereof all zemindars assessed by Government were required to distribute the total assessment on the villages, comprised in their zemindaris and to deliver a record of such distribution each year successively, specifying the

name of each village the boundaries thereof, the estimated quantity of the land in each, distinguished as malguzari and lakheraj, together with an abstract thereof : See Colebrooke'e Supplement, pp. 303 and 317.

I have already mentioned that the Decennial Settlement of the Esafur estate (the language used is Pargana Esafpur and others) was concluded with Sree Kanta Roy. It appears that he executed a dowl kabuliyat and Kistbundi on 23rd February 1791 : See Ex. 3. By the expression dowl kabuliyat and kistbundi is meant an engagement setting forth particulars of the arrangements made for the payment of revenue in respect of specified lands by fixed instalments and it appears that in accordance with the regulations referred to above, the lands forming the "Britti" of Sree Sree Shyam Roy Thakur were taken into consideration in assessing the revenue payable by Sree Kanta Roy. The word "Britti" is of Sanskrit origin and it means literally "means of subsistence." Wilson in his Glossary defines it as a grant of land or other means of support to any one. Some of the early editors of the regulations take it as synonymous with debuttar or dedicated lands. There is at any rate no doubt whatsoever that certain nishkar or non-revenue-paying lands were excluded from assessment when the said kabuliyat was taken at the time of the Decennial Settlement ; there is certainly a good deal of force in the plaintiffs' contention that these lands which were so excluded were the debuttar lands of Sree Sree Shyam Roy Thakur. There was certainly a remission of assessment of land belonging to Sree Sree Shyam Roy Thakur. There is no dispute that the plaintiffs are able to trace their descent from Sree Kanta Roy but as yet there is no mention in the dowl kabuliyat where these lands were situate. The next document relied upon by the plaintiffs is Ex. 16 and in it the lands in mouzah Dearah are mentioned as being the debuttar lands of Sree Sree Sham Roy Thakur and the area thereof is stated to be 500 bighas. Ex. 16 is a statement and the heading thereof is as follows :

"Properties consisting of minor lands forming the Britti land of the Deities Sree Sree Shyam Roy Thakur and Sree Sree Shib Thakur and others, in Pargana Esafpur and others, District Jessore, and filed in the Collectorate on 13th Bhadro 1202 B. S."

Now, the defendant has argued that there is nothing to show how this statement came to be filed in the Collectorate. The answer to that is to be found in S. 43 of the amended Code of Regulations dated 23rd November 1791 set out above and I will not repeat what that section laid down. There is therefore nothing surprising in the fact that Ex. 16 was filed in the Collectorate on behalf of the proprietors of the EsafpurEstate and I see no reason whatsoever to doubt the genuineness of the document being Ex. 16. This document is dated 29th August 1795 and we find in the next document Ex. 1, mention of mouzah Dearah with its 500 bighas in taidad No. 13788 for the year 1202 B. S. 1795-96. A taidad, according to Wilson, is an extract from a public register or other document of authority in confirmation of a claim. As will be seen later, registers were being kept in the Collectorate by 1795 : see Reg. 48 of 1793 and all persons holding rent-fee lands were required to register in the Collectorate within one year : see S. 24 of Reg. 19 of 1793. It would seem that in respect of lakheraj lands held at the time of the Decennial Settlement, a register was kept in the Collectorate of Jessore and Ex 1 is a copy of the relative entry therein. A certain amount of unreal argument was based on the fact that 'the original taidad book was not produced from the Collectorate. The defendant could have easily shown that the original did not contain any such entry. The real importance of Ex. 1 is in the continued assertion of lakheraj title by the plaintiff's ancestors. The next document on which the plaintiffs rely is the decree of the Special Deputy Collector of Jessore in case No. 710. This is by far and away the most important document in favour of the plaintiffs and as such it has not unnaturally been subjected by Mr. Bose on behalf of the defendant to much vigorous criticism. In view of the conclusion to which I have come so far as this document is concerned and the effect, thereof I willtake leave to dwell for a few moments on the circumstances under which that decree came to be made. As is well known a greater part of the present District of Jessore was

included in the territory now known as the Sunderbuns and there are indications on the record that some of the lands in suit at any rate, if not the whole, were within the Sunderbuns area. Now the Sunderbuns were for the first time declared to be the property of the State by S. 13 of Regulation 3 of 1828. The Government determined to make grants of the Sunderbuns tract and to take measures for its clearance. For this purpose a survey was decided upon and carried out. Zamindars who had encroached on the forest area or who held towfir lands began to raise objections and resumption proceedings were started in consequence. It appered that brit or the debuttar estate of Sree Sree .Shyam Roy Thakur had appropriated 7000 bighas of forest in the Sunderbuns : see Pargiter's p. 27 and suspicion that there had been encroachments also arose because of fact stated on behalf of the ancestors of the plaintifis, that in respect of 12350 bighas of Sree Sree Shyam Roy Thakur's land a sum of Rs. 1170 only had been remitted at the time of the Decennial Settlement.

According therefore to the Commissioner of Sunderbans there were usurpations and the Government decided to investigate into the whole matter. These matters appear from the recitals in the decree of 23rd May 1842. A glance of the map will show that the Sunderbuns area related to lands in three districts at least namely, 24 Parganas, Jessore, Nadia and in case No. 10 before the Special Deputy Collector all the usurpers, if I may so phrase it, were made parties. The ancestor of the plaintiffs was there ; so also some of the ancestors of the defendant. The plaintiff's ancestor was required to produce all the sanads he was relying upon for the purpose of showing what were the lakheraj lands dedicated to Sree Sree Shyam Roy Thakur. Regn. 3 of 1828 laid down what was to be done and the procedure appears to have been to depute in the first instance amins to make enquiries and measurements and upon these materials the Special Deputy Collector was to base his report. It appears that in accordance with this procedure amin Sree Nath Banerji was deputed to make enquiries ; he submitted a report see Ex. 14 on 2nd July 1840 the resumption case itself with reference to the said lands having been started on 28th January 1836. Sree Nath Banerji reported :

"Thereafter I reached Dearah : there being 500 bighas of land in that place as in the taided and the same not being found on previous enquiry I reported it to your Honour and commenced a survey of the whole mouzah in which 4,000 bighas of lands by guess surveyed thereafter the previous otbandi jotedars of the said britti lands Gole Mamud Sardar and Sadi Gazi and others came and identified the britti land and on their identification 502 bighas and 15 cottas of land was surveyed. The said land is lying patit.": see Ex. 14

This report along with other matters engaged the attention of the Special Deputy Collector and on 23rd may 1842 he came to the conclusion that he had proved before him that 8823 bighas were the britti lands of Sree Sree Shyam Roy Thakur and to be valid mishkar. He had before him among other materials a certified copy of the purwana of the Commissioner of Sunderbuns dated 5th March 1864 and he was satisfied that the profits arising out of the said lands i, e. 8823 bighas were being spent on the deb Sheba of the said Thakur. He accordingly released the said 8823 bighas from the claim of Government. No doubt had been mentioned in the taidad as being the "britti" lands ; but on enquiry the Special Deputy Collector found that the entire area amounted to 16,580 bighas. Deducting therefore from this last mentioned area the said 8823 bighas there remained an area of 7757 bighas which were not britti lands and orders were passed to the eifect that this area was to be resumed see : Ex. 4 and 2. A great deal of argument was addressed to us on the question of the identity of the 500 bighas in mouzah Dearah ; but there can be no doubt whatsoever that this area of 500 bighas was included in the said 8823 bighas : see the fuller decree of 23rd May 1842 in the separate paper-book. Now, the ancestors of the defendant were parties to the suit or case in which the said decree was made and it does not appear that (although they made various claims) they ever made any claim to the lands in mouzah Dearah with which we are concerned. Further Umesh Chandra Pal Chaudhuri who is the ancestor in the direct line of the pre-

sent defendant appealed against the decree of the Special Deputy Collector being Miscellaneous Appeal No. 172 of 1845. There is, therefore, not a tittle of evidence to show that the ancestor of the defendant was not aware of the effect of the decree of the Special Deputy Collector. I am satisfied that he must have been aware at all material times as to what was going on and that the decree in question was as much binding on him as on the plaintiffs' ancestor. Mr. Bose devoted much time for the purpose of inducing us to hold that under Regn. 3 of 1828 it was not within the province of the Special Deputy Collector to pronounce any opinion on the validity or otherwise of the lakheraj title set up by the ancestors of the plaintiffs. It is sufficient to observe that so far as the lands in suit are concerned, it must be taken that under the law in force at the time of the Decennial Settlement and to which I have already referred a proper enquiry was made and the validity of the lakheraj in question was conclusively established before the revenue authorities as otherwise no remission of revenue was admissible or would have been made. There is indeed no substance in Mr. Bose's contention, as the very words of S. 4, Regn. 3 of 1828 show that it was competent to the Collector or other Revenue Officer to institute the enquiries specified in Regn. 2 of 1819 and Regn. 9 of 1825, and to follow the procedure laid therein and that he was to record in a robokari his judgment as to the liability of the lands to assessment or otherwise in manner directed by S. 20 of the first mentioned regulation i. e., Regn. 2 of 1819, and that such decision should have the force and effect of a decree. The early regulations relevant on this question namely the Regulation of 1790 referred to above, Regn. 19 of 1793 and Regn. .37 of 1793 refer in specific terms to the question of lands held free of assessment under a valid and legal title and it is idle to contend that the Special Deputy Collector sitting in the revenue Court in 1842 and proceeding with his enquiries under Regn. 3 of 1828 had no authority to pronounce on the validity or otherwise of a lakheraj title set up before him.

We have now arrived at 1842 and it does not appear that the decree of the Special Deputy Collector was subsequently upset or modified in any way. The next document is Ex. 6 being an annexure from the Mahalwari Register, Pargana Saydpur, of measurements made by the revenue surveyor with the help of a compass in the year 1857. The word "mehal" which is used in the regulations : see Cl. 2. S. 2, Regn, 42 of 1803 as the equivalent of the English word "estate" signifies, not the property of one person, but the property held under one title, whether by one person or by many. The word "mahalwari" is used in contradistinction to mauzawari which defines every separate mouzah or village in the revenue records. Before I deal with the entries in this documents, perhaps a few words on the various registers kept in the Collectorate in or about this period may not be out of place. Now, Ss. 2 to 5, Regn. 48 of 1793, prescribed the preparation of a general register of estates to be arranged in alphabetical order, according to the English alphabet; and S. 16 of the same regulation directed that a Register of intermediate mutations should be kept in the manner therein detailed. In passing it may be noted that this general register. A subsequently became a mere list of revenue paying estates. The intention was, that, every fifth year, the general register should be re-written, and all the mutations entered intermediately in the mutation register, embodied in it.

It was found, however, that the specification in the general register of the villages necessitated voluminous details and was productive of great delay in the preparation of the registers and it was thereupon enacted by S. 2, Regn. 8 of 1800 that a "Pargana Register" showing all estates and all villages in each estate, arranged by parganas, should be prepared and that corrections should be made therein every fifth year. It was also provided by S. 11 of the said regulation that the general registers should not, any longer, contain specification of villages. The pargana register was divided into two parts. Part 1 (Register B) of lands assessed to the public revenue and Part 2 (Register C) of lands exempt from the public assessment. The maintenance of cor-

rect registers was found to be an impossibility and it was then thought that the estate and village and Mahal Registers prepared by the Superintendents of Survey after 1850 would serve the purpose and be complete records of the state of the property as ascertained by the survey. This was the state of things during the thak operations in Bengal. In passing it may be noted that the mahals entitled to direct entry on the thakbust maps were "confirmed lakheraj tenures" i. e., tenures confirmed on trial and tenures not subjected to trial, the titles being held good (see the rules of the Board of Revenue, 8th October 1850, App. 10 of Young's Revenue Hand-book). Now the entries in the Mehalwari Register refer to the decree of the Special Deputy Collector of 1842 in case No. 710 and to the fact that the lands in question in Mouza Dearah had been released as lakheraj and that the lands were then about 120 acres.

Surveys were going on in Bengal from 1850 onwards and the thak maps had to be and were being brought up to date. With this view as the lands of Mouza Dearah Pargana Emadpur relating to Khas or Resumption Case No. 710 of the District of Jessore had not been plotted on the thak map, Amin, Jogeswar Ghose was deputed in 1861 to measure the lands on the locale. He succeeded in identifying the lands and his report is Ex. 8-A. Finally, the Survey Deputy Collector directed by his order dated 6th April 1861 that the lands so measured aud identified by Jogeswar Ghose should be plotted on the thak map (see Ex. 8). This was accordingly done and the Survey Deputy Collector's order was subsequently confirmed by the Collector on 19th July 1861 (see also in this connexion Ex. 5-B). It is said that Amadpur and Bagmara were two different Parganas and there was no reason why the lands in suit should have been plotted on the thak map in Pargana Bagmara. The answer to this is that both were neighbouring parganas in the Sunderbuns. I can see nothing irregular or suspicious in what took place in 1861. The Amin Jogeswar Ghose identified the lands in the presence of the Karpardaz of the Estate of Umesh Chandra Pal Chandhuri. It is said that Umesh was dead at the time. I entertain no doubt whatsoever that Umesh's Estate was represented in the proceedings on the site held by Jogeswar Ghose. Although Umesh was dead, any one who knows the conditions which prevailed and still prevail in the moffusil would have no hesitation in agreeing that the Karpardaz would still be known as a Karpardaz of Umesh, meaning thereby the Estate of Umesh. The proceedings were all in connexion with a miscellaneous case being Miscellaneous Case No. 162 of 1861 and it is against all sense and reason to suggest at this distance of time that the plotting of the plaintiffs' lands in the thak map had been secured by irregular means. The proceedings would appear to have been forwarded to the Collector of Nadia within which district the bulk of the defendant's properties were and are. Finally we have the fact that the plaintiffs' title to the lands in question was registered under the provisions of the Land Registration Act of 1876. A glance at Ex. 21 will show at once that the successors-in-interest of the various parties before the Deputy Collector in 1842 were before the Land Registration Officer in 1904—05 when registration of the plaintiff's title was ordered to be made. The scheme of the Land Registration Act shows that nobody's name can get on to the Register until and unless due notice to all parties affected is given and is found to be served.

I must take it that in this case the usual procedure was followed and everything was rightly and properly done. As against this mass of evidence, there is really nothing of any substance on the record on behalf of the defendant. There is, therefore, in my view, no doubt whatsoever that the plaintiffs are lawfully entitled to the lands in question. I have come to this conclusion after an anxious and careful consideration of everything that has been urged on behalf of the defendant by Mr. Bose and I have throughout not been unmindful of the specific points raised by the defendant in his written statement. In my opinion the plaintiffs have produced a mass of materials from which the conclusion in law and in fact follows that they have undoubted title to the lands in

suit. This disposes of the main question which has been argued before us.

Now the lands were full of jungle and incapable of occupation until quite recently. It follows therefore that in the case of such lands possession must follow title in the absence of possession by anybody other than the rightful owner. Mr. Bose has referred us to certain portions of the evidence for the purpose of showing that the defendant has been in possessson for more than 12 years. It is unnecessary to discuss that evidence in detail. I have examined the evidence independently of what was stated by the Subordinate Judge and I am unable to say that possession on the part of the defendant for more than 12 years has at all been substantiated by the defendant. Suffice it to say that I am in entire agreement with what has been said by the learned Subordinate Judge on this point. In my view the plaintiffs have never lost possession and the defendant has never gained title by possession for the requisite period.

The defendant's appeal, therefore, fails and must be dismissed with costs. As regards the area in respect of which the plaintiffs are entitled to recover khas possession, the decree made by the learned Subordinate Judge needs correction. It is quite true that the area alleged to be comprised in Mouza Dearah and to be lakheraj consisted of 500 bighas but there is no doubt whatsoever that as early as 1857 the area in question had shrunk to about 120 acres or 365 bighas 19 cattas 12 chittaks. The result, therefore, is that the defendant's appeal fails, the plaintiffs begin declared to be entitled to recover khas posfession and to be entitled to mesne profits in respeet of an area of 365 bighs 19 cottas 12 chittaks in mouzah Dearah Pargana Emadpnr in the district of Khulna.

Rankin, C. J.—I agree.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 418

COSTELLO, J.

King—Petitioner.

v.

King—Respondent.

Matrimonial Suit No. 14 of 1928, Decided on 8th March 1929.

(a) Divorce Act, S. 13—It is not open to party in matrimonial suit to choose his own time for coming to Court and asking for relief.

It is not open to a party in a matrimonial suit to choose his own time for coming to Court and asking for relief. It is not fitting, and it cannot be tolerated that the petitioner in a matrimonial suit should delay taking proceedings until such time as he is moved to start proceedings by reason of some oblique motive. The matrimonial jurisdiction of the Court is intended to afford relief to a husband or to a wife who feels that he or she has been grievously wronged by the other party, and, therefore, desires to have the marriage dissolved and possibly to obtain compensation from the person who is responsible for the wrong which has been done. The Court is not to be used merely as an engine for enabling a husband or a wife to retaliate on the other by reason of some injury which has been done outside the matter in violation of conjugal rights of the parties as such. [P 421 C 2, P 422 C 1]

(b) Divorce Act, S. 13—Question of delay is matter of discretion for Court—Inaction and delay in bringing suit disentitles husband from asking for relief.

The question of delay in bringing matrimonial suit is always a matter for the discretion of the Court, and the Court ought not to exercise its discretion in favour of the petitioner who has slumbered in sufficient comfort for a space of a year or more, because the inaction, on the part of the petitioner, shows not that he was insincere in his complaint in the sense of not believing that his wife had committed adultery, but because there was an acquiescence by him in the injury which he knew he had suffered: *Boulting* v. *Boulting*, 3 *Sw. & Tr.* 329; *Mortimer* v. *Mortimer*, 2 *Hgs. Con.* 310; *Rickard* v. *Rickard*, 37 *T.L.R.* 26, *Rel. on.* [P 422 C 1]

H. S. Suhrawardy—for Petitioner.

R. C. Banerji and *N. C. Chatterjee*—for Respondent.

Sikkar K. Basu—for Co-respondent.

Facts.—In this suit, the petitioner, Edward Aloysius King, who was a guard in the employment of the Eastern Bengal Railway, was seeking a dissolution of his marriage, on the ground of his wife's adultery with Henry Frewin. The parties were married as long ago as 2nd January 1900, the respondent then being Esther Matilda Ryan, spinster, and the marriage took place at the Roman Catholic Church of the Sacred Heart at Dharmtalah Street in Calcutta. The petitioner and his wife were both Anglo-Indians, and professed the Christian religion and were domiciled in this country. After the marriage, the parties lived at various places, and finally in the railway quarters of the E. B. Ry. at Sealdah. There were two children of the marriage, both of whom, however, died in infancy.

The acts of adultery charged might roughly be said to relate to three definite periods of time, i. e., for a matter of convenience, the charges brought by the husband against the wife might be dealt with in three parts. It was first of all said that, between the years 1917 and 1920, the respondent habitually committed adultery with the co-respondent while the petitioner was away from home and from Calcutta being on war service or something in the nature of war service in Mesopotamia and other places. It was then said that, in the year 1924, for a period of about a month, viz., from 20th May of that year to 30th June, the respondent stayed with the co-respondent in Darjeeling and occupied the same room for that period, and there committed adultery with him. Next it was alleged by the petitioner that, from and after the time when he returned from his war service in 1920, whenever he was absent from home fulfilling his duties as guard on the railway, the co-respondent took the opportunity afforded by the petitioner's absence to visit the respondent and actually to stay with her in the quarters occupied by the petitioner and the respondent. One specific date was given by the petitioner, on which he charged his wife with having committed adultery with the respondent. That date was the 18th, or rather the night of 17th June 1926. The 18th June was the cardinal date in this case, because, admittedly on that date, the husband and wife separated and the wife left the quarters where she had up to that time been living with her husband. The petitioner said that afterhis wife left the railway quarters at Sealdah, she went and lived with the co-respondent or at any rate she was living in such circumstances that ample opportunity was afforded to her and co-respondent to continue the guilty relations which had previously existed between them.

The petitioner's story was that, on the morning of 17th June, he was the guard on a train going to Gouldna, which left shortly after midnight, and having got to Goalhuda, owing to a break-down on the railway line, he returned on a train as second guard of the train which brought him back to Sealdah and to his own quarters at an earlier hour than he would have otherwise arrived, and that thus having come back before his wife had expected him, he found the co-respondent asleep in bed with the respondent, and that, thereupon, he roughly woke him up and proceeded to beat the co-respondent in such a way that he rushed about the flat, and finally out into the street, leaving behind him his out-door attire. The petitioner went on to say that while he was engaged in chasing the co-respondent about the flat, the respondent dressed herself and left the flat more or less in company with the co-respondent, and that, subsequently, while he had gone out to obtain permission to seek the assistance of the police, someone came back to his flat and removed the co-respondent's clothes which the petitioner had locked up in almirah, thereby, removing the tangible evidence which he had become possessed, of the presence of the co-respondent in the flat The petitioner also said that the co-respondent, while being pursuaded by the petitioner, sought refuge in a kind of pantry constructed in a part of one of the verandas of the flat, where a nephew, by name Eric Ryan, was at that time sleeping.

As against the story of the petitioner, the respondent replied that so far from her being discovered in bed with the co-respondent by the petitioner the real situation was almost entirely the reverse in fact. It so happened that, on 17th June she had taken a journey by the E. B. Ry. with the intention of going to consult a lawyer in connexion with some proceedings which were at that time pending against her nephew, Rupert Ryan; on the evening of 17th June, she and this nephew Rupert took train with the intention of going to Nattore, but that, after proceeding some short distance on the way, she was overcome by indisposition, and she felt so ill that, instead of proceeding to her destination, she left the train at a place calledIshurdi, and thence returned direct to Sealdah, with the result that she arrived back in her flat at a time prior to that when her husband would have expected her, had she completed her journey to Nattore and come back from there. Having returned to the flat in that way, she discovered her husband in her bedroom with a Mrs. Abraham, who was then sitting on the bed fully dressed, but without her hat, which was

on the floor, and there was also, an empty brandy bottle by the side of the bed. Having discovered thus her husband in this compromising situation, in the early hours of the morning of 18th June, he used violence towards her and struck her forcibly on the ear, and finally drove her out of the flat.

Judgment.—(After giving the facts and on a scrutiny of evidence finding the adultery of respondent proved, the judgment proceeded). There remains, however, another matter with which I have to deal, and that is the question whether, in the circumstances of this case, the petitioner is entitled to the relief which he seeks. It is clear, to my mind that the petitioner has been guilty of considerable delay in the institution of these proceedings. The explanation which he gives amounts to this. He says that he did not take proceedings against his wife, after he had discovered her in bed with the co-respondent on 18th June, because he thought his story, without further corroboration, would not be believed, and that, after the co-respondent's garments and shoes, had been surreptitiously removed from the petitioner's premises, he found himself in the position of having no tangible evidence to support his story. I have already indicated that if the petitioner's story is accurate in every detail there was available the evidence of his nephew, Eric, who was said to be sleeping in the place which has been described as the pantry, and who was aroused by the co-respondent seeking to take refuge in that place. According to the petitioner, the co-respondent went quietly into this pantry and awakened Eric Ryan by saying quite calmly: "uncle has returned, you better get up," or words to that effect. That of itself strikes me as being a very unlikely thing for the co-respondent to have done seeing that he was being violently pursued by the petitioner and being chased through the different rooms of the flat but it does appear from the petitioner's story that the co-respondent did either go into the pantry or knock at the door or do something which must have indicated to Eric Ryan that a stranger was in the flat. That of itself would have afforded very ample and satisfactory corroboration of the petitioner's story. For some reason or other, the petitioner did not see fit to call Eric Ryan in these proceedings, even now that he has brought his affairs before the Court. The explanation given is the one I have already referred to viz., that the probability was that Eric Ryan would decline to say anything which might be of assistance to the petitioner as against the respondent who was his aunt by blood.

I am not at all disposed to accept the explanation given by the petitioner with regard to his inaction and his failure to take proceedings at or about the time when these events took place. Had he really been burning with a sense of the wrong which had been done to him by the co-respondent, I think he would have found time and made an occasion to go and take legal advice with regard to the position with a view to ascertaining whether he was likely to succeed if he took proceedings for divorce. I take the view that, at that time, the petitioner was more or less content to let his wife go, and it may be that they were living on such terms that the petitioner was rather glad to be relieved of the presence of his wife. At any rate, it seems clear to my mind that at that time he was not so righteously indignant either with his wife or the co-respondent that he had any intention of taking proceedings at all, because he admits that, for the space of a year or more, he really made no serious attempt to obtain any evidence in corroboration of his own story. It is a very significant fact that, when this case finally does come before the Court, the main evidence, on which the petitioner relies, is the evidence of persons who, one would have expected, would have been available to the petitioner from the very outset, viz., Mr. Dunn and the three servants. It seems to me that if the petitioner could obtain the evidence of these four persons in the year 1926 or 1928, he could just as easily, or possibly more easily, have obtained that evidence in the year 1926. To some extent, the same observation applies with regard to the evidence in connexion with the events at Darjeeling. It is quite true that the petitioner says that what put him on enquiry with regard to Darjeeling was the fact that in October 1927, he received a letter from Mr. Wallace, but

even that did not have the effect of causing the petitioner to institute proceedings. Indeed he does not seem to have pursued the matter, because right up to the very moment when this case was coming for trial, he had not, as far as I can see, obtained any proof either from Mrs. Wallace or from Mr. Singh, and actually an application was made to me that this case should be postponed in order that the petitioner might get the evidence of these witnesses from Darjeeling. It is a significant and curious feature of the case, therefore, that the petitioner really did not get any of the evidence with which he now establishes his contentions, until just before this case had come for trial. I cannot help feeling, therefore, that had no other proceedings taken place between the parties this husband would have been quite content to go on living apart from his wife and to continue to permit her to live in adultery with the co-respondent. It appears that the husband was finally aroused to action by reason of the fact that the respondent removed certain articles of furniture and he was so incensed at his wife's action that he promptly took proceedings against her in the police Court with regard to the removal of the furniture and then for the first time publicly made a charge against his wife of having committed adultery with the co-respondent.

After those proceedings, his wife instituted civil proceedings in this Court, as I understand, in respect either of some of the same articles of furniture or some other articles of furniture, which were in the flat at Sealdah, and it is only after she had retorted upon the petitioner by taking civil proceedings as a sort of quid pro quo for the criminal proceedings which he himself brought that at last he was stung into instituting proceedings for a dissolution of his marriage. It does not really matter which of these persons first made accusations against the other with regard to the morning of 18th June 1926, having regard to the fact that I have come to the conclusion that the petitioner's story is substantially the correct story. What does matter is that the husband should have remained quiescent with the knowledge of his wife's infidelity and misconduct and have taken no steps to vindicate his honour until the wife had aroused his indignation by reason of her action in regard to the furniture. I cannot help coming to the conclusion, therefore, that the petitioner seems to have set a higher value on his furniture than upon his wife's honour.

Those are the circumstances in which this case comes before the Court and Mr. Banerjee has invited me to say, upon the authorities, that there has been such delay and neglect upon the part of the petitioner as disentitles him to the relief he seeks. Mr. Banerjee referred me to the leading cases on this point, e. g., the case of *Mortimer* v. *Mortimer* (1), which contains the well-known dictum of Lord Stowell that the Court :

> " will be indisposed to relieve a party who appears to have slumbered in sufficient comfort. . . . . and it will be inclined to refer either insincerity in the complaint, or an acquiescence in the injury whether real or supposed, or a condonation of it."

That dictum of Lord Stowell was quoted with approval and emphasised by Sir C. Cresswell in the case of *Boulting* v. *Boulting* (2), where he said delay is not of itself a bar to the suit:

> " but it is a most material matter, which unexplained would lead the Court to conclusions fatal to the petitioner's relief."

The same point was dealt with by Horridge, J., in the Divorce Court in England in the case of *Rickard* v. *Rickard* (3), where in effect, Horridge, J., said that it is not open to a party in a matrimonial suit to choose his own time for coming to Court and asking for relief, and I, on my part, desire to say that it is not fitting, and it cannot be tolerated that the petitioner in a matrimonial suit should delay taking proceedings until such time as he is moved to start proceedings by reason of some oblique motive. The matrimonial jurisdiction of the Court is intended to afford relief to a husband or to a wife who feels that he or she has been grievously wronged by the other party, and therefore desires to have the marriage dissolved and possibly to obtain compensation from the person who is responsible for the wrong which has been

(1) [1820] 2 Hags. Con. 310.
(2) [1864] 3. Sw. & Tr. 349=12 W. R. 389= 10 Jur. (N. S.) 182=33 L. J. Mat. 33 = 9 L. T. 779.
(3) [1920] 37 T. L. R. 25.

done. The Court is not to be used merely as an engine for enabling a husband or a wife to retaliate on the other by reason of some injury which has been done outside the matter of violation of conjugal rights of the parties as such. In this particular case, one cannot help feeling that these proceedings would never have been instituted by this petitioner if the wife had not irritated him by the action which she took in connexion with his furniture. It does seem to me that this husband, so far as the wrong done to him by the co-respondent and respondent is concerned, by reason of their having committed adultery, that this petitioner, in the words of Lord Stowell, has "slumbered in sufficient comfort." He continued his ordinary mode of living and went to football matches and other places of amusement, and went on living his life for a considerable period just as he had lived it before, and, as far as I can see, he made no attempt to provide himself with corroboration of his own story of the events of 18th June, nor to obtain other evidence directed to show that his wife had been carrying on an adulterous association with the co-respondent.

In these circumstances, and because this Court should not allow itself to be resorted to at the mere whim and pleasure and at the convenience of a petitioner, I think I ought not to grant the relief which is claimed in this case. The question of delay is always a matter for the discretion of the Court, and I consider, on the whole, this is one of the cases where the Court ought not to exercise its discretion in favour of the petitioner, because the inaction on the part of the petitioner shows not that he was insincere in his complaint (to use the words of Lord Stowell) in the sense of not believing that his wife had committed adultery, but because there was an acquiescence by him in the injury which he knew he had suffered. Although he knew, as he says, that his wife had committed adultery on or about 18th June, although he had good reason for supposing that she was continuing to live in adultery with the co-respondent, he took no steps in the matter for a very con iderable period, and that leads me to think that there was an acquiescence in the situation of such a character as disentitles him to the relief which he claims. The suit is accordingly dismissed.

I shall make an order that the respondent's costs must be paid by the petitioner in the ordinary way and the petitioner's costs must be paid by the co-respondent.

V.S./R.K. *Suit dismissed.*

A. I. R. 1930 Calcutta 422

B. B. GHOSE AND PANTON, JJ.

Janakinath Singha Ray—Plaintiff—Appellant.

v.

Nirodbaran Ray and *others*—Defendant—Respondents.

Appeal No. 76 of 1928, Decided on 6th March 1929, from order of Sub-Judge, Burdwan, D/- 11th November 1927.

(a) Interpretation of Statutes—Law of procedure changed during pendency of Suit—Changed law applies.

No person has any vested interest in procedure. Matters of procedure apply to a pending suit if the law is changed during the pendency of suit. *A. I. R.* 1925 *P. C.* 117, *Dist.* [P 423 C 2]

(b) Civil P. C., O. 22, R. 9 and O. 20, R. 12—Suit for possession before 1908—Decree as contemplated by O. 20, R 12, in 1918—Death of defendant in 1920—Application for substitution more than six months later—Application not stating time of death, nor particulars entitling extension of time—Held that mesne profits were to be ascertained in suit and not in execution proceedings—That application for substitution could not be treated as one for setting aside abatement.

A suit for possession and for mesne profits was intituted before the Code of 1908 came into force, and was finally decreed in 1918, the decree directing that the amount of mesne profits be subsequently ascertained and decreed under O. 20, R. 12. The defendant died in December 1919 and applications for ascertaining the mesne profits and for substitution of the heirs of the defendant were made in December 1920.

Held: that the parties were governed by the Code of 1908 and profits were to be determined in the suit and not in the execution proceedings and rules of abatement of suit were to apply. The suit therefore had abated.

That inasmuch as, in the application for substitution filed in December 1920, no dates were given of the death of the defendant, nor when the plaintiff came to know of it, nor were any grounds given entitling the plaintiff to an extension of the period of limitation, the application for substitution could not be treated as an application for setting aside the abatement under O. 22, R. 9. Hence the application for setting aside the abatement was barred by time. [P 424 C 1]

Sitaram Banerji, *Bijiayprasad Singha Ray* and *Suryakumar Aich*—for Appellant.

Brajalal Chakravarti, *Nalinikuma Mukerji* and *Byomkesh Basu*—for Respondents.

Judgment.—This is an appeal by the plaintiff against the order of the Subordinate Judge, dated 11th November 1927, refusing to set aside an abatement of the suit with regard to the ascertainment of mesne profits, as directed by the Court under O. 20, R. 12, Civil P. C. The first contention on behalf of the appellant is that the procedure which governs this case should be according to the rules laid down in the repealed Code of Civil Procedure of 1882 and not by the Code of 1908 and the reason given in support of this contention is that the suit for possession and for mesne profits was brought on 7th April 1908, when the present Code had not come into operation. The suit was decreed in the trial Court on 29th June 1909, and dismissed on appeal by the defendant. That decree was set aside by the High Court on 14th March 1916, which remanded the case for fresh trial to the first Court and, on such retrial, the suit was finally decreed on 14th September 1918. In the decree, it was directed that proceedings with regard to the amount of mesne profits will be taken later on under O. 20, R. 12 of the Code of 1908. The learned advocate for the appellant relies upon the case of *Kedarnath Goenka* v. *Anant Prasad Singh* (1) in support of his contention that, in this case, the proceedings for ascertainment of mesne profits should be considered as a matter in execution, as it used to be done under the Code of 1882. That being so, the rules as regards the abatement of a suit would not apply to these proceedings. The case relied upon by the appellant does not seem to us to support the proposition put forward. In that case the decree of the trial Court was made under the old Code of 1882, by which it was directed that the mesne profits should be ascertained in execution. That decree was affirmed on appeal and finally by the Judicial Committee after the Code of 1908 came into operation, but there was no alteration in the terms of the decree. In that case their Lordships held that the ascertainment of the mesne profits was a matter to be proceeded with in execution, and the rules laid down for abatement of suits do not apply to those proceedings. In the present case the decree was as contemplated under O. 20, R. 12, Civil P. C. of 1908 and it was rightly so. No person has any vested interest in procedure and it is well settled that matters of procedure apply to a pending suit if the law is changed during the pendency of the suit. The rules as regards abatement of a suit will, therefore, apply to the present case, as provided in the Code of 1908. It is not disputed that, if that is so, the suit abated in the present case as against defendant 1. Defendant 1 died on 18th December 1919. The plaintiff took possession of the property in execution in 1918. One of the sons of the original defendant 1 died on 3rd March 1920. On 17th December 1920, the plaintiff made an application to the Court for substitution of the heirs of the deceased defendant 1 and also that of his deceased son Manmathanath Ray. In that application the petitioner did not state the date of the death of either of those persons and he simply prayed for substitution of the heirs of the deceased persons without stating any fact that the suit had abated or that the application for substitution was made beyond time or that on account of any fact the petitioner was entitled to an extension of the period of limitation for making the application under S. 5, Lim. Act.

The Munsif apparently made an order substituting the heirs of those deceased persons, some of whom were minors represented by their guardians appointed by the District Court. Then it was found that the claim was beyond the pecuniary jurisdiction of the Munsiff and the case was transferred to the Subordinate Judge. After a considerable lapse of time it was objected on the part of the defendants that the suit had actually abated as against defendant 1. Thereupon, on 22nd July 1922, an application was made by the appellant purporting to have been under O. 22, R. 9, of the Code for setting aside the abatement. Even in that petition, no prayer was made for extending the period of limitation for making such an applica-

(1) A. I. R. 1925 P. C. 117=4 Pat. 507=52 I. A. 188 (P.C.).

tion, nor were there any facts stated which would entitle him to ask for such an indulgence from the Court. The only thing that was stated in this petition of 22nd July 1922, was that the plaintiff came to know of the death of defendant 1 on 2nd December 1920. On these facts, the learned Subordinate Judge refused to set aside the abatement and the appeal is against that order. The Subordinate Judge held that the application under O. 22, R. 9, was timebarred, as it undoubtedly was and there was no ground for extending the period of limitation under S. 5, Lim. Act. It is contended, on behalf of the appellant, that, in some cases in this Court, the application for substitution has been taken as an application for setting aside an abatement. That might have been with reference to the facts stated in those particular cases in the petition for substitution. In this case, the petition cannot be taken to have been a proper application at all. No dates were given either of the death of the persons whose heirs were sought to be substituted or the date when the plaintiff came to know about their death or any ground which might induce the Court to extend the period of limitation. At first sight, the Court might consider that the petition of 17th December 1920 was quite in order and the application for substitution was made on account of the death of the persons mentioned there within three months of their death. This does not seem to be a bona fide application at all. Under such circumstances, we agree with the learned Subordinate Judge that the abatement should not be set aside and the application was barred by limitation and that no grounds have been shown why the period of limitation should be extended under S. 5, Lim. Act. This appeal must, therefore, stand dismissed with costs, hearing fee, five gold mohurs.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 424

B. B. GHOSE AND BOSE, JJ.

Saherjan Bibi—Appellant.

v.

Gopal Chandra and *others* — Respondents.

Appeal No. 47 of 1928, and Rule No. 183 of 1928, Decided on 28th June 1929.

(a) Civil P. C., O. 47, R. 7—Appeal from order granting review — Appellate Court cannot consider whether fresh evidence is important or not—Court deciding application for review can only do it.

Whether a new evidence is important or not, is not a question which an appellate Court, on an appeal from an order granting review on the ground of discovery of fresh evidence is free to decide. The question must be left to the judgment of the Court which decides the application for review : 45 *Cal.* 60, *Dist.* [P 425 C 2]

(b) Civil P. C., S. 115 — Appellate Court setting aside its judgment on review and allowing withdrawal of suit without liberty to bring fresh one on same cause of action —That defendant is deprived of advantage of using judgment in his favour in subsequent cases is no ground for interference under S. 115.

Where an appellate Court sets aside its judgment on review and then permits withdrawal of the appeal as well as the suit without granting permission to bring a fresh suit on the same cause of action, then although the effect of this order may be to deprive the defendant of the advantage of using the judgment in his favour as res judicata in subsequent cases and although the High Court may not approve of the order still it would be no ground for interference under S. 115 : 29 *Bom.* 13 and *A.I.R.* 1929 *Bom.* 425, *Dist.* [P 425 C 2]

Abinash Chandra Guha, *Bhupendra Nath Das* and *Pramatha Nath Mukerji* —for Appellant.

Jatindra Nath Sanyal — for Respondents.

B. B. Ghose, J. — This is an appeal against an order granting review of a judgment by the Subordinate Judge which was passed on appeal. The application for review was made on the ground of discovery of fresh evidence. The learned Subordinate Judge allowed the application and after allowing the application for review he set aside his previous judgment and then allowed the plaintiff-appellant to withdraw his suit. He, however, did not grant the plaintiff any permission to bring a fresh suit upon the same cause of action. The appeal is by the defendant under O. 47, R. 7, Civil P. C. The first objection that is taken to the order granting the review is that although the learned Judge has held that there was new evidence discovered, it is contended that the new evidence is not important evidence as mentioned in O. 47, R. 1, Civil P. C. It has been pointed out in a series of cases that the grounds of appeal to which the appellate Court must be confined in an appeal against an order granting a review are limited to those

provided in R. 7, sub-R. (1), O. 47 of the Code. It is contended that the order now appealed against is in contravention of the provisions of R. 4 : First, it is said that the application was granted without a previous notice on all the opposite parties. That is a question of fact which does not appear to have been raised before the learned Subordinate Judge and no materials were brought to our notice on which we can hold that there was a contravention of that proviso.

The next point urged is that there was a contravention of proviso (b), R. 4, sub-R. (2), inasmuch as the new evidence is not important evidence. In my judgment whether a new evidence is important or not is not a question which an appellate Court on appeal from an order granting a review is free to decide. Our attention was drawn to the case of *Nandalal Mullick* v. *Panchanon Mukerji* (1), by the learned advocate for the appellants in his careful argument. It seems to me, however, that it was not decided in that case that a Court on an appeal from an order granting a review can decide the question whether the new evidence is an important matter or not. The only question that was decided in that case was what the meaning of the words "strict proof" in proviso (b), R. 4, sub-R. (2) is. That was an appeal from a final decree made upon a review of the previous decree and the learned Judges were quite free to give their opinion with regard to the value of the new evidence that was alleged to have been discovered. But it seems to me that the question whether a new evidence which has been discovered is important or not must be left to the judgment of the Court which decides the application for review. In my view there is no good ground for the appeal and the appeal must, accordingly, stand dismissed with costs, hearing fee being assessed at two gold mohurs.

There is also an application for revision of the order which was made by the Subordinate Judge after granting the application for review and restoring the appeal to its file. He made the order to the following effect : that the appeal along with the suit is allowed to be withdrawn without any permission to bring a fresh suit on the same cause of action. The learned advocate for the petitioner takes strong exception to this order on the ground that the leave to withdraw was granted without any reason whatsoever and that the effect of the order is that the petitioner would not be able to rely upon the decision arrived at both by the trial Court and the appellate Court on first appeal in any subsequent suit between the parties ; or in other words his contention is that the judgment passed between the parties would have operated as res judicata in any future suit which the plaintiff may be advised to bring against the defendants petitioners. The result of the order of the Subordinate Judge is that the decision of both the Courts is wiped out and he would not be in a position to raise the plea of res judicata in a future suit. In support of his contention two cases have been cited by the learned advocate. One is the case of *Satyabhamabai* v. *Ganesh Balkrishna* (2). In that case a preliminary decree for partition was passed on an agreement between the plaintiff and the defendant. The plaintiff then appealed against the decree made by the trial Judge and then when the appeal was pending he withdrew the suit in the trial Court. The withdrawal by the plaintiff was without the leave of the Court. By this action of the plaintiff the appellate Court appears to have been considerably embarrassed and in the result it dismissed the appeal, but determined that the effect of the withdrawal was to set aside the decree of the first Court.

The contention before the High Court was that there was no right of second appeal. The High Court restored the decree of the trial Court ; nothing was said in the judgment as regards the power of the Court to grant leave to withdraw a suit at the appellate stage. The next case that was cited was that of *Tukaram Mahadu* v. *Ram Chandra Mahadu* (3). That case also arose out of a suit for partition and there was an adjustment of the suit. After the plaintiff entered into an agreement to adjust the suit he applied for withdrawing the suit. The defendant put in the compromise and asked for the compromise being re-

(1) [1918] 45 Cal. 60 = 26 C. L. J. 187 = 42 I. C. 484=21 C. W. N. 1076.

(2) [1905] 29 Bom. 18=6 Bom. L. R. 533.

(3) A. I. R. 1925 Bom. 425=49 Bom. 672.

corded. That was done by the trial Court and a decree made in terms of the compromise. The trial Court held that the plaintiff could withdraw from the suit if he wished, but that his withdrawal would not deprive the Court of jurisdiction to enquire into and record the compromise. In that case also it does not appear that the Court permitted the plaintiff to withdraw his suit either in the trial Court or in the appellate Court. Those cases are, therefore, no authority for the proposition that where the Court gives permission to the plaintiff to withdraw his suit either in the trial Court or in appeal in the exercise of its discretion, that order can be revised by this Court under S. 115, Civil P. C. It may be that by reason of the order allowing the plaintiff to withdraw, the advantage which the defendant might have gained in any subsequent suit that the plaintiff might bring against him, is lost to the defendant, i. e., the advantage of using the judgment in the case in his favour. But that is a matter which the Court which gave the permission should consider. The effect of the order simply is, as if the plaintiff did not bring the suit he brought ; but he cannot bring a suit on the same cause of action. Whether the judgment which has been passed in this case would have operated as res judicata in a suit brought by the plaintiff for establishing his title to the property for which this rent suit was brought, is a question which we need not go into. But as I have already stated the only effect is that the defendant is deprived of the advantage of using this judgment in his favour. I doubt very much whether that is a sufficient ground for interference with the discretion of the Court below in making the order that it has made. It may be that we may not approve of the order made by the learned Subcrdinate Judge ; but that would not be sufficient for interfering with that order. This rule is, accordingly discharged but without costs.

Bose, J.—I agree.

R.M./R.K. *Rule discharged.*

A. I. R 1930 Calcutta 426

SUHRAWARDY AND GARLIK, JJ.

Jnanada Prosad Mukherji—Petitioner,

v.

G. M. Falkner—Opposite Party.

Civil Revn. No. 748 of 1928, Decided on 16th July 1928, from order of Dist. Judge, Burdwan, D/- 17th March 1928.

Civil P. C., O. 11, R. 21—Order refusing to strike out defence under O. 11, R. 21, is appealable.

Order passed by a Court refusing to striks out the defence in consequence of a party failing to comply with an order for discovery, is an order appealable under O. 43, R. 1. When the legislature has not specified the sort of order which is made appealable, an appeal will lie from an order made under that provision of the Code or from an order refusing to make an order under it. [P427 C 1 2]

Bijan Kumar Mukerji—for Petitioner

Sarat Chandra Basak and *Hari Prasanna Mukerji*—for Opposite Party.

Judgment.—This Rule is directed against an order of the District Judge of Burdwan dated 17th March 1928. The petitioner who is a pleader at Burdwan brought a suit against the opposite party for recovery of his professional dues. During the progress of the suit he made an application under O. 11 for discovery of certain documents and order was passed by the Subordinate Judge before whom the case was pending for the production of some of those documents in Court. After a great deal of fight over this matter on both sides the documents were not produced and the petitioner applied under O. 11,R. 21, to have the defendant's defence struck out for not complying with the order of the Court. The learned Subordinate Judge who had passed the order for the production of the documents refused to strike out the defence on the ground that the documents were not very material and that they could be proved otherwise. From that order an application in revision was filed in this Court under S. 115 and a rule was granted. At the hearing of the rule it transpired that the order passed by the lower Court might be an appealable order and therefore the rule should not have been issued. An appeal from the order of the Subordinate Judge was then lodged in the Court of the District Judge of Burdwan. The learned District Judge has held that the appeal ought to be dismissed on two grounds: first, that no appeal lay against the

order complained of under O. 43, R. 1 (f) inasmuch as no order was passed under O. 11, R. 21. In other words the order refusing to strike out a defence was not an order under O. 11. R. 21; secondly, that the appeal before him was timebarred and no sufficient cause had been made out under S. 5, Lim.Act, to extend the period for appeal before him. with regard to the first point, I do not agree with the learned Judge as in my judgment the order passed by the Subordinate Judge refusing to strike off the defence is an order appealable under O. 43, R. 1 (f). O. 11, R. 21 says that;

"where any party fails to comply with any order to answer interrogatories or for discovery the party interrogating or seeking discovery may apply to the Court for an order to that effect (strike out defence or plaint) and order may be made accordingly."

The learned Judge seems to think that the only order that can be passed under O. 11, R. 21, is an order striking out the defence; and that an order refusing to strike it out is not an order under that rule. This is not the way in which the wording of O. 43 with reference to other matters has been understood by Courts. Cl. (l) O. 43, R. 1, only says "an order under O. 11, R. 21." It does not specify the nature of the order which is made appealable under that rule. In allowing an appeal from an order either refusing or admitting, O. 43 has specifically mentioned such order when it was intended to give the right of appeal from one sort of order and not from the other. In Cl. (e) an order under R. 9, O. 9, rejecting an application has been made appealable, thus indicating that an order admitting an application is not appealable- Similarly in Cls.(h) (k) and (n). In some clauses under O. 43, the legislature has expressly allowed appeal from an order rejecting or granting an application. Under Cl. (j), O. 43 .an appeal is allowed from an order setting aside or refusing to set aside a sale. Under Cl. (l) similarly a right of appeal is given against an order giving or refusing to give leave under R. 10, O. 22 , so also under Cl. (m). In interpreting clauses of O. 43, R. 1 which are worded as Cl. (f), the Courts are agreed in holding that an appeal lies from an order made under .that special provision and also from the order refusing tc make such an order. For instance, Cl. (r) gives a right of appeal from an order passed under Rr.1, 2,4 or 10, O.39. O.39, R.1 is almost similarly worded as O. 11, R. 24. It says that when in any suit it is proved by affidavit or otherwise the Court may by order grant a temporary injunction. Similarly in R. 2 (2), O. 39, the Court may by order grant such injunction. An order made under O. 40, R. 1 is, appealable under O. 43, R 1 (s), that is an order relating to the appointment of a receiver. It has been held, and the question is so well settled that it is beyond controversy, that an appeal also lies from an order refusing to grant an injunction or appoint a receiver. It is useless to pursue this matter further for on a plain reading of the several clauses of O. 43, it must be held that where the legislature has not specified the sort of order which is made appealable an appeal will lie from an order made under that provision of the code or from an order refusing to make an order under it. The learned advocate who appears for the petitioners has not seriously contested this view.

The next question that we have to consider is if the second ground on which the learned Judge has based his judgment, namely, that the petitioner's appeal before him is barred by limitation is correct; and if incorrect, if he has committed such an error in procedure as justifies our interference with it under S. 115, Civil P. C. The ground for extension of time under S. 5, Lim. Act, is given as the mistake of the lawyer in applying in revision in this Court instead of filing an appeal before the District Judge. Such a ground can under some circumstances be a good ground under S. 5, Lim. Act. But in this particular case the petitioner's lawyers are streneously contending that the order of the District Judge that no appeal lies in this case is wrong in law. I should have thought that in view of the working of O. 43, R. 1 (f) there could be no ground for doubt with regard to the right of appeal. But the learned District Judge's judgment shows that reasonable doubt may be entertained on this point. However justified the petitioners may be on relying upon the advice of the legal advisers, we cannot say that this is a point which can be

investigated by this Court under S. 115 Civil P. C. The Court of appeal below has certainly discretion in this matter and it has held that the petitioner's vakil has failed to make out a case under S. 5, Lim. Act.

We have looked into the merits of the case in order to do substantial justice and we are of opinion that it is not a case in which in the interest of justice we should interfere under S. 115, Civil P. C. The rule is discharged with costs 3 gold mohurs. Let the record be sent down at once.

R.M./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 428

RANKIN, C. J., AND BUCKLAND, J.

Nilmoney Auddy —Appellant.

v.

Dinendra Nath Das and *others*—Respondents.

Appeal No. 79 of 1929, Decided on 27th November 1929, against original order of Panckridge, J., D/- 5th July 1929.

Mortgage — Equitable mortgage— Mortgage by deposit of title deeds—Sale by Registrar in execution of it under condition that purchaser to make requisition as regards title and objection to it within certain period of delivering abstract of title to purchaser—Purchaser not barred from raising objection subsequently if objection went to the root of title—Meaning of the stipulation explained.

A certain property was purchased by a person at a sale held by Registrar of the High Court at Calcutta under a final decree for sale for the enforcement of an equitable mortgage by deposit. The sale was held under certain conditions of which the important one required the party having the carriage of the proceedings to deliver to the purchaser an abstract of the title, subject to further stipulation that the purchaser would within a specified period after the delivery of the abstract deliver at a particular place specified therein a statement in writing of his objections and requisitions (if any) to or on the title as deduced by such abstract and to and in respect of the description of the property and upon the expiration of such last mentioned time (and in this respect time was to be deemed of the essence of the contract) title was to be considered as apppoved and accepted by the purchaser subject only to such objections and requisitions if any.

Held: that the time within which the purchaser was to deliver his statement of objections and requisitions was to date from the day of the delivery of a perfect abstract. *Hobson* v. *Bell*, (1839) 2 *Beav.* 17; *Blacklow* v *Laws*, 2 *Hare* 40.

Held also: that the perfect abstract meant an abstract which contained with sufficient fulness the effect of every instrument which constituted the title of the vendor and contained all facts upon which the title of the vendor depended, such facts for example as the death of the father where the title has to be shown to have devolved upon the son i. e., the facts of that character upon which devolution of title depended.

Held further: that the stipulation was not to be used to thrust upon the purchaser a property to which there was no title at all and even if the abstract be perfect, the stipulation could not debar the purchaser from enquiring into the title or from making an objection to it, if such an objection goes to the very root of the title. [P 429 C 2; P 430 C 1, 2]

S. M. Bose and *N. C. Chatterjee*—for Appellant.

S. C. Bose and *S. C. Ghose*—for Respondents.

Rankin, C. J.—In this case, the appellant is one Nilmoney Auddy a person who purchased at a sale held by the Registrar of this Court under a final decree for sale dated 8th February 1928 for the enforcement of an equitable mortgage by deposit. The mortgagor was one Banku Behary Dhar and the mortgagee was Dinendra Nath Das and the deed deposited was a conveyance dated 22nd December 1893: and the deed was deposited with a view to create an equitable charge on the one-third share claimed to belong to Banku Behary Dhar, the mortgagor. The sale was held on 15th March 1929 and that sale was held under certain conditions of sale of which the sixth is important for the present purpose. That condition required the party having the carriage of the proceedings to deliver to the purchaser an abstract of the title, subject to the stipulations contained in those conditions. It went on to provide as follows:

"The purchaser shall, within seven days after the actual delivery of the abstract, deliver at the office of Mr. S. K. Dutt the attorney of the plaintiff at No. 2, Hastings Street in the town of Calcutta a statement in writing of his objections and requisitions (if any) to or on the title as deduced by such abstract, and to and in respect of the description of the property, and upon the expiration of such last mentioned time (and in this respect time is to be deemed of the essence of the contract) title shall be considered as approved of and accepted by the purchaser, subject only to such objections and requisitions, if any."

Now, the abstract as to which I shall say something in a moment was delivered on 19th March 1929 and that document was shortly as follows: The root of title was the instrument of 22nd

December 1893 and that was a registered kabala whereby Sreemati Abhoy Kally Dassey and her husband Digambar Dey transferred the property in question to Sreemati Prosad Dasi Dassey —wife of Brojo Nath Dhar. The next instrument abstracted is the equitable mortgage which is being enforced in the present proceedings, namely of 2nd September 1924. This is a letter from Banku Behary Dhar to the plaintiff Dinendra Nath Das depositing the deed of 22nd December 1893 which was in the name of Srimati Prosad Dasi Dassey mother of Banku Behary Dhar by way of further security for a loan of Rs. 5,000 on the mortgage of some of the trust properties of Prem Lall Mullick. On the same date, there was a letter from the mortgagor Banku Behary Dhar and one Sreemati Radharani Dassey to the plaintiff stating that an order for sale made in a certain suit had been cancelled and that any claim on the property in respect thereof had come to nothing. The documents that are further contained in the abstract are the preliminary decree in this suit, the Registrar's report and the final decree.

Now, with reference to this abstract, two questions arise. One is whether it is a perfect abstract in the sense that it contains with sufficient fulness the effect of every instrument which constituted the title of the vendor and in the sense that it contains further a statement of all the facts necessary to deduce a title in the vendor. That is the first question. Assuming that it is a perfect abstract, the second question arises, namely, whether the objections to the title which we have now to consider are objections which go to the root of the title and which show that the purchaser would be getting a bad title or are objections not discoverable on the face of the abstract. These two questions arise because on 11th April 1929 the purchaser took an objection to the effect that the abstract contained nothing to show why the property of Srimati Prosad Dasi Dassey was supposed to have come to the hands of Banku Behary Dhar. As a matter of fact, the purchaser inspected the documents mentioned in the abstract on 20th March. A claim was sent in on behalf of Banku Behari's sons on 11th April 1929 to the effect that they inherited the property under their paternal grandmother's will, namely the will of Srimati Prosad Dasi Dassey. Thereupon, the purchaser took out a summons before the learned Judge asking for an enquiry into the title and for certain other reliefs. The learned Judge has refused to order an enquiry into the title on the ground that, by virtue of Cl. (6) of the condition of sale, the purchaser is precluded from making any of his present objections to the title.

The first question is whether this is a perfect abstract. In my opinion, it is plainly imperfect. The facts upon which title depends, such, for example, as the death of a father where the title has to be shown to have devolved upon the son are important parts of an abstract of title. Nobody supposes that an abstract would be even reasonably complete, if it left out facts of that character upon which devolution of title depends. It would be idle to abstract a document showing a transfer by *A*, if facts are not recited showing that the property had vested in him. In my judgment, this abstract, on the face of it, is imperfect by reason that it alleges none of the facts upon which the vendor relies for the purpose of showing that the property, prima facie the property of Prosad Dasi Dassey, became the property of Banku Behary Dhar. But the abstract is not only defective in that respect. It appears that one of the letters of 2nd September 1924 is insufficiently abstracted and that the insufficiency is extremely important. It appears that the letter of deposit goes on to use words which show or at least suggest that, in 1924, the mortgagor Banku was professing to have been for twenty years in separate possession of his one-third share with a separate realization of rents in respect thereof, a claim which points to his right in this property having derived not from his mother who was alive but in some other way. Now, this portion of the letter which purports to be abstracted was most improperly left out. An abstract which treats a letter in that way departs by a very long distance from being a proper or even a fair abstract and, on that ground alone, I should be of opinion that this abstract does not

sufficiently contain the contents even of the documents which it purports to give. It is quite true that the vendor in this case does not purport to make title through any will of Prosad Dasi Dassey and it would be entirely a bad criticism of this abstract to say that it was bad because that will was not abstracted. The abstract is a hopeless one because it fails to set forth the facts necessary to disclose the title which the vendor at the time was asserting and in my judgment, it is not necessary in point of law, to go further.

The case law which has been cited to us is, I think, clear. We have been referred to the cases of *Hobson* v. *Bell* (1), *Blacklow* v. *Laws* (2); *Want* v. *Stallibrass* (3) and *Pryce-Jones* v. *William* (4). The effect of the case law, in my judgment, is that the time within which the purchaser would be barred under such a stipulation as this dates from the delivery of a perfect abstract in the sense which I have described, not an abstract necessarily which shows a perfect title (which is an entirely different thing) but an abstract which sufficientiy shows all the documents and gives all the facts upon which such title as the vendor is professing is based. Even if in this case it could be said that the absence of the facts as to the devolution of title to Banku Behary Dhar could be ignored, it is to my mind quite impossible that the purchaser should be held in a matter of this sort to be bound by the stipulation as to time when one finds that this abstract in dealing with the letter of 2nd September 1924 deliberately conceals a part of the document which would call the purchaser's attention to the very question whether or not this mortgagor could make a title through his mother or whether such title as he had had come to him in another way e. g., by devolution from his father or by mere adverse possession. It is quite out of the question that the purchaser should be bound by the stipulation as to time when the abstract does not even deserve the epithet of being candid as regards the document with which we are dealing.

(1) [1839] 2 Beav. 17 = 3 Jur. 196 = 8 L. J. Ch. 241.
(2) [1842] 2 Hare 40.
(3) [1873] 8 Ex. 175=42 L. J. Ex. 103 = 21 W. R. 685=29 L. T. 293.

Assuming that these points could be got over, there would remain the further question whether, if this abstract could be treated as a perfect abstract, Cl. (6) of the condition of sale would debar the purchaser from an enquiry into the title. It seems to me that, if the purchaser is asking for an enquiry into the title, when that enquiry has taken place, the Court will be in a better position to say whether the position here is that the vendor has got a good title which requires to be strengthened or supplemented in various ways. If it be true that there is no proper devolution of the title from the mother, then, of course, no title at all his shown and the cases seem to show that such a stipulation as this is not to be used to thrust upon the purchaser a property to which there is no title at all. The case before Joyce J., *Pryce-Jones* v. *Williams* (4), has been relied upon for the proposition that, unless the objection is as to the document which is the "root of the title," the clause will prevent the purchaser from asserting his objection. I doubt extremely whether that is the correct distinction. The case itself was one in which the equitable title was clear but by reason of the absence of a formal assignment the legal estate was technically on the Crown and the Court was satisfied that it could be got in.

In these circumstances, I am of opinion that this appeal should be allowed with costs and that we should direct an enquiry into the title. Any further relief that the purchaser may desire in the matter, he will obtain on the original side. We set aside the order of costs made by Panckridge, J., and the costs of both parties in the application before Panckridge, J., will be dealt with under Chap. 27 of the rules of this Court and will depend upon the result of the application.

Buckland, J.—I agree.

v.B./R.K. *Appeal allowed.*

(4) [1902] 2 Ch. 517 = 71 L. J. Ch. 762 = 50 W. R. 586=87 L. T. 260.

A. I. R. 1930 Calcutta 430

PEARSON AND MALLIK, JJ.

Monohar Mandal & another—Accused.

v.

Emperor—Opposite Party.

Capital Sentence Case No. 6 of 1929 and Appeal No. 918 of 1929.

(a) Evidence Act, S. 114, Illus. (b)—Case against accused depending upon whether approver's story is corroborated in material particulars — Most careful investigation is required with regard to identity of accused person.

Where the case against accused depends on the view taken as to the corroboration of the approver's story in material particulars, and whether it is such, taken along with the other facts and circumstances, that it can be relied upon as bringing home the guilt for the crime, the corroboration of the approver's story requires most careful investigation upon the question of the identity of the accused persons as participators in the occurrence.

[P 432 C 1]

(b) Criminal P. C., Ss. 297 and 298—Simple language should be used by Judge while charging jury—If opinion is expressed by him jurors should be made aware that they are sole judges of facts.

The duty of a Judge is to help the jury to arrive at a proper verdict of the facts, and with that in view it is far better to use the plainest and simplest language in his charge. Also if he does express his opinion on the facts he should do it in such a way as makes it quite clear to the jurors that he is not in any way seeking to usurp their functions or to interfere in matters the decision of which is exclusively within the competence of the jury itself.

[P 432 C 2]

S. C. Taluqdar and *Nakulsswar Shome*—for Accused.

Khundkar and *Anil Chandra Roy Chaudhuri*—for the Crown.

Judgment.—This is a reference under S. 374, Criminal P. C., in the case of accused 2, Monohar Mandal and Kalicharan Mandal; the former was charged with the offence of murder of one Ratikanta Biswas under S. 302, I. P. C., and Kali Charan under S. 302/114, I. P. C. The jury found unanimously that both Monohar and Kalicharan instigated the murder and were present at the place of occurrence: a majority of 5 found that Monohar actually shot at and committed the murder of Ratikanta while the minority of 4 gave him the benefit of the doubt as to whether he actually fired the shot which caused the death. The occurrence took place after nightfall somewhere about 8 or 8.30 p. m. on 11th May 1929. For the details the prosecution must needs depend on the statement of the approver one Santosh Bain who was present.

According to Santosh, Monohar had approached him in Magh with information that Kalicharan was offering 60 for obtaining a gun and Rs. 140 for the murder of Ratikanta. Accordingly one Carekrista of Bhalua was approached but he declined to make over his gun and a similar attempt from one Sukhlal came to nothing. Then the approver goes on to say that in Falgoon he accompanied Monohar to the house of one Ram of Barakhalsi, and from him stole a gun which they proceeded to conceal in a hay stack of one Hiralal Bairagi. Monohar then gave Santosh 6/. Thereafter powder was purchased and three lead bullets prepared by Monohar. Then one day they set off to effect their purpose but on the way Monohar thought the gun was overloaded and the head of the ramrod broke off in the barrel, so it had to be fired off to clear it and the result was a crack in the stock. Nothing was done on that occasion and the gun was hidden in the old place. Then Monohar made two more bullets and put a new head on the ramrod. On two other occasions they set out with the gun powder and bullets but nothing came of it.

Then on Saturday the day of the occurrence Santosh says he was summoned by Monohar and found Kalicharan there. A little after sunset they two went to Hiralal's bari, got the gun and set out, they crossed the Khal by a bamboo bridge and met Kalicharan near the house of one Nim Chand. Monohar loaded the gun, while Santosh spent 3 or 4 matches trying to light a cigarette, Then the three of them went to Ratikanta's bari near by. Ratikanta was at the time busying himself about the needs of his guest in the outer house. Then Ratikanta returned and sat on the floor of his hut with his feet on the verandah. He began to smoke and a lamp was near by. Then the three advanced to the cover of a ruined hut with a mat screen distant only 5 or 6 cubits from where Ratikanta was. Then Monohar fired the gun and shot Ratikanta who died practically at once. The three then fled. Kalicharan going off towards his house, while Manohar and Santosh taking the gun swam over the khal and hid the gun in the stack of one Harobola and also buried the powder flask in Santosh's bari. The neighbours collected on the spot and the first information was given at the thana, 2 miles away, at 10 p. m. that evening by a man named Mandar Tarafdar. The case against the accused depends on the view taken as to the corroboration

of the approver's story in material particulars and whether it is such taken along with the other facts and circumstances that it can be relied upon as bringing home the guilt for the crime to the two accused persons.

As regards some particulars there is undoubtedly corroboration. The gun and powder flask were produced following the statement of Santosh. There is a crack in the stock which had become larger, according to the owner, since the gun left his possession. There was the new ramrod head. The bullets were recovered in and just outside the hut, and the gun expert says they must have been fired from a close range of about six yards from a single barrelled gun. We have also the F. I. R. dated 5th March 1929, given by Ramcharan Mandal about the theft of his gun: some pieces of lead discovered in Monohar's house: and some matches picked up where Santosh said he had lighted a cigarette.

It is upon the question of the identity of the accused persons as participators in the occurrence that the corroboration of the approver's story requires most careful investigation. In one matter regarding dates there are certain inconsistencies or contradictions in his statements. (Here the judgment discussed evidence and then proceded). As presented to us in the argument, the case against the accused really turns upon whether there should be considered to be sufficient corroboration of the approver upon the question of identity of the accused, and upon a careful weighing of the matters above mentioned we are of opinion that the proof is not sufficient to exclude a reasonable doubt. Both the accused are acquitted and we direct that they be forthwith set at liberty.

We cannot leave this case without pointing out to the learned Judge that in some particulars his charge has laid itself open to attack in this Court. It has been described to us as dogmatic, as couched in highflown language and as calculated to prevent the jurors from performing their duty as Judges of fact. In certain passages it reads more like a judgment than a charge, and in others appears to be a downright imposing of the Judge's opinion upon the mind of the jurors. For instance upon the question of the variations in the evidence as to the time when the attempt to bring in Harekristo was first made a difference of two months the learned Judge says:

"It serves to demonstrate how confused persons of the rank and status of Santosh and Harekristo may be in respect of time."

Again, some point was made by the defence that the two mistresses of Monohar and Santosh were not called as witnesses : the learned Judge in dealing with this does not refer to the presumption that the jury might draw if witnesses were not called who ought to have been called, but puts it to the jury in this way:

"If it is true that the former were the mistresses of Santosh and Monohar and that Hiralal tolerated the visitations at his house the presumption surely is that they would be hostile to the prosecution and not likely to support any case tending to cause restriction of the liberty of the two persons."

Then again there are portions of the charge where the language is, to say the least, imaginative and fanciful. That appears in the opening portion of the charge and in charging the jury as to the benefit of the doubt, the learned Judge concludes his remarks by saying:

"You will notice the use of the term . . . "reasonable." It is possible, gentlemen, to doubt anything, the revolution of the earth around the sun or on its own axis, that life itself is nothing more than a vain chimera, or that a deity exists, but the doubt contemplated in this principle of law is one that is reasonable, that is, where definite choice after due meditation is not possible, the doubt which is akin to the conclusion arrived at in a syllogistic dilemma."

That is more likely to confuse the jury than to assist them, even if it was properly translated to them. The learned Judge should bear in mind that his duty is to help the jury to arrive at a proper verdict of the facts, and that with that in view it is far better to use the plainest and simplest language; also that if he does express his opinion on the facts he should do it in such a way as to make it quite clear to the jurors that he is not in any way seeking to usurp their functions or to interfere in matters the decision of which is exclusively within the competence of the jury itself. The reference is, accordingly, rejected und the appeal allowed,

S.N./R.K. *Conviction quashed.*

A. I. R. 1930 Calcutta 433

C. C. GHOSE AND GUHA, JJ.

Mahammad Jalaluddin Mandal and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 850 of 1929, Decided on 1st April 1930.

Penal Code, S. 366 — Judge charging jury under S. 366 and explaining whole section to them need not suggest that if they find girl not compelled by force to leave father's house, they should proceed to consider whether deceitful means were practised upon her and thereby induced to leave father's house.

Seduction is a comprehensive expression and it does not exclude the possibility of deceitful means being used in order that seduction may be practised with effect. Where, therefore, a Judge charges the jury under S. 366, and explains the whole section fully to them, he need not suggest that if they find that the girl was not compelled by force to leave her father's house they should next proceed to consider whether deceitful means had been practised upon her by the accused and whether by such means she was induced to leave her father's house. [P 434 C 1]

Mrityunjoy Chatterjee — for Appellants.

M. Banerjee—for the Crown.

Judgment.—The appellants in this case have been convicted under Ss. 366 and 368, I. P. C., in manner following, that is, appellant 1 Md. Jalaluddin Mandal has been convicted under S. 366 and sentenced to rigorous imprisonment for five years and to pay a fine of Rs. 200 or, in default, rigorous imprisonment for six months and appellant 2, Kazi Md. Anwarul Huq, has been convicted under S. 368 and sentenced to rigorous imprisonment for five years and to pay a fine of Rs. 200 or, in default rigorous imprisonment for six months. The point taken on behalf of the appellant is a short one and in order to understand Mr. Chatterji's contention, it is necessary to set out at some little length the facts.

It appears that one Tarapada had a widowed daughter, the age of whom, according to the medical evidence, is under 16. Her name is Lilabati. She was married when she was only nine years old but became a widow within a year of her marriage. Since then she had been living at the house of her father under his care and guardianship. The accused Jalaluddin and another person named Badaruddin who was acquitted by the jury were of the same village. It appears that Lilabati complained to her parents of Jalaluddin having cut jokes with her. This was brought to the notice of the village gomasta, as the result of which Jalaluddin was remonstrated with and he kept quiet for some time. But he commenced after an interval cutting jokes at the girl. On the night of the occurrence at about 8 or 9 p. m. Lilabati came out of her father's house to ease herself in a lane between that house and the house of her uncles. The girl's story is that as soon as she had eased herself, the accused Jalaluddin suddenly fell upon her and gagged her mouth with one hand and caught hold of her arms with the other and began to drag her along the lane towards the other end of it which opened into the garden of a doctor named Rasik Sheikh. When she had been dragged by Jalaluddin along the lane a few cubits, the accused Badaruddin joined and both the accused then dragged her to Jalaluddin's house.

There she was pushed into a room and ravished by Jalaluddin on threat of death if she cried. Later on, she was taken by Jalaluddin and Badaruddin to a village called Bamanpara where she was made over to the accused Anwar at about midnight. Anwar was asked to keep the girl in his house. It is further alleged that on the way to Bamanpara the girl was asked by Jalaluddin to say to the police if they would enquire iuto the matter that she had become a convert to Mahomedanism and would marry Jalaluddin of her own accord in nika form. It appears that the girl was kept in Anwar's house during the night and the following day. On Tuesday night following she was taken outside Anwar's house where she met Jalaluddin and Badaruddin. Jalaluddin told her that the nika marriage had to be postponed and he reminded her again what she was to tell the police if they should arrive at the scene. On Thursday the police recovered the girl from Anwar's house and she went home. On these facts, the accused, namely, the two appellants before us and the said Badaruddin were sent up for trial before the Sessions Court under Ss. 363, 366 and 368, I. P. C. Now, the learned Judge, after explaining the ingrediants which had to be proved under S. 363, reminded the jury that

the case could only be proceeded with if the jury found affirmatively that the girl was below 16. If, on the contrary, upon the evidence before them they came to the conclusion that the girl was above 16, then there was no case under S. 363 but the jury would have to consider whether the girl had been abducted under S. 366.

It is with reference to the charge under S. 366 that the present complaint by Mr. Chatterjee has been made. He says that the whole case under S. 366, according to the prosecution, was that the girl had been compelled by the accused by force to leave her father's place and that there was no suggestion whatsoever in the evidence on behalf of the prosecution that she had been led to leave her father's house by deceitful means being practised upon her by the accused. Now, it is perfectly true that the prosecution case at first sight would seem to indicate that the case, if it had to be brought under S. 366, was one of the girl being compelled by force to leave her father's house. But the entire case was put before the jury and it is not suggested that in the presentation of the facts relating to the occurrence in question, the learned Judge has not been particularly fair and scrupulous. There is no complaint made on that score. The complaint is that it should have been suggested to the jury that if they found that the girl had not been compelled by force to leave her father's house, then they should next proceed to consider whether deceitful means had been practised upon her by the accused and whether by such means she had been induced to leave her parent's house. The section speaks of force being used and of compulsion under force. The section also speaks of a girl having been seduced to leave her parents house with a view to illicit intercourse. Seduction is a comprehensive expression and as one understands the matter, it certainly does not exclude the possibility of deceitful means being used in order that seduction may be practised with effect.

In that view of the matter, can it be suggested that the learned Judge in his charge to the jury in respect of this particular portion has used words which amount to misdirection. In our opinion, the learned Judge was bound to explain the section to the jury comprehensively and fully after presenting the facts to them for consideration. The jury were the masters of the situation and they were to consider whether under all the circumstances, the accused were guilty under the sections charged. We think there is no substance in Mr. Chatterjee's contention. The appeal, accordingly, fails and must stand dismissed.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 434

SUHRAWARDY AND PAGE, JJ.

Jabanullah and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 390 of 1929, Decided on 11th December 1929.

(a) Criminal P. C., S. 297—Charges to jury must be few, simple and easily capable of explanation to jury — Multitude of charges confuses jury and causes mistrial.

In a case triable by a jury, the charges should be few and simple, and so readily capable of explanation by the Judge that the jury will have no difficulty in appreciating the law which they have to apply to the facts of the case before them. The charge should shortly state the salient points in the case, the evidence adduced in it and the points for determination to the jury with reference to the law. A multitude of charges covering offences subtly distinguished from one another is enough to confuse a jury and cause a mistrial. [P 435 C 1 ; P 436 C 1]

(b) Criminal P. C. S. 298—It is the duty of Judge to place facts clearly before jury and explain law with reference to points of determination—Merely reading out headnotes or portions of reported cases is dangerous—Plea of private defence — Merely indicating argument is not sufficient—Law about must be explained.

It is the duty of the Judge in his charge to the jury to place the facts clearly and explain the law with reference to the points for determination. The Judge must tell the jury how they should apply the law to the facts found by them. The practice of reading out headnotes or other portions of the reports of a case is a dangerous practice likely to confuse the jury. But the Judge may tell the jury how to apply the law laid down by the decisions of the High Court to the facts of the particular case.

When the defence takes up a plea of private defence, it is a serious defect if the charge merely indicates the argument but does not direct the jury how they are to apply the law in deciding the guilt or otherwise if they find facts giving rise to the right of private defence. [P 435 C 2]

Camell and *Hemendra Kumar Das*—for Appellants.

Satindra Nath Mukerjee — for the Crown.

Suhrawardy, J.—In this case the appellants who are 18 in number were tried along with another accused on various charges which are too numerous to mention. They were convicted by the unanimous verdict of the jury and sentenced to different terms of imprisonment by the Judge. The accused who has not appealed before us was sentenced to pay a fine which has been paid. There are various grounds taken before us on behalf of the appellants, but it is necessary to refer to a few of them in order to show that the trial has not been conducted in the way in which it should have been. The first is with regard to the charges framed against the accused. There were 11 charges framed in this case and each accused was charged with not less than eight of the offences covered by some of the charges. The charges were under Ss. 304, 147, 148, 323, 324, 304/149, 304/109, 323/109, 324/109, 304/114 and 147/114. This impressive array of charges is enough to confuse any jury.

The case for the prosecution was that the accused in a body attacked the party of the deceased who were said to have been in possession of the land in dispute, and in the course of the riot accused 1 struck a blow on the head of the deceased which ultimately proved fatal. The case as made out by the evidence was a simple one and it was not necessary to charge the accused with so many offences some of which it is difficult to distinguish from some others. We have on several occasions condemned the practice of having a long series of charges in a case triable by jury as it is likely to confuse them. In the present case the learned Judge has devoted eight pages of his charge to the explanation of the several sections of the Penal Code. Now to refer to some of those charges, the accused have been charged under S. 304/109 and they have also been charged under S.. 304/114. There is not enough explanation of the fine distinction between Ss. 109 and 114 with the result that the jury have convicted one of the appellants accused 2 under S. 147/114. The case against that accused is that he is the landlord of the deceased and he took men with him to the place of occurrence and gave order to beat the deceased and his party. On these facts he could either be convicted under S. 147/109 or under S. 147 being member of an unlawful assembly. This indicates that the jury were not able very well to appreciate the law as propounded by the Judge.

Then there is the more serious defect in the charge which it is difficult for us to overlook. The defence argued that if the jury believed that the deceased was dispossessed the day previous to the occurrence and the accused reaped the paddy on the field and stacked it and on the day of occurrence the deceased with a number of men came to snatch the paddy away, the accused had the right of private defence to resist force by force, and the offence they would have committed would be one of trespass but not of rioting. The learned Judge in his charge mentioned this argument on behalf of the defence and then it appears he referred to some decisions of the High Court which are not before us and which we cannot say are how far applicable to the facts of this particular case. He gives no further directions on the question raised by the defence. It is the duty of the Judge to tell the jury how to apply the law to the facts found by them. In a case like this he would be wanting in the proper discharge of his duty to the jury if he places the proper facts to the jury without telling them how they should decide the guilt or otherwise of the accused on the law. In the case of *Meher Sardar* v. *Emperor* (1) the practice of referring to reported decisions has been condemned. It is not necessary for me to go so far as to say that there is any bar to the Judge in explaining the charge to the jury what particular view was taken by the highest Court of the land, but he must tell the jury how to apply the law laid down by the decisions of this Court to the facts of the particular case. The learned Judge in the case before us has not helped the jury to apply the law if they found that as a matter of fact the deceased was dispossessed the day previous to the date of occurrence. This seems to me to be a very serious matter because we do not know what view of the facts the jury took. It may be that they believed that the deceased was all

(1) [1912] 16 C. W. N. 46=13 I. C. 218=13 Cr. L. J. 26.

along in possession in spite of the rent decree. It may be that they believed that the landlord who had obtained this decree against the deceased, by getting symbolical possession through the civil Court had succeeded in dislodging the deceased from the land previous to the occurrence or some day previous to it, but still as the accused in a body attacked the deceased and committed murder, they should be convicted of the offences with which they were charged.

We should also refer to the way in which the charge was delivered to the jury. As we have observed the case is not a very difficult one though the evidence is voluminous. The charge should have shortly stated the salient points in the case, the evidence adduced in it and the points for determination to the jury with reference to the law. The learned Judge it seems delivered a very long charge which, though a careful one, may have the effect of confusing the jury as to the way in which the law should be applied to the case. We find that the trial was a very protracted one and entailed a great deal of time and expense but we regret that we have to interfere in this case because of the defects in the charge we have pointed out.

We accordingly set aside the convictions and sentences of the appellants and direct that they be retried. The appellants will remain on the present bail until further orders from the Sessions Judge.

Page, J.—I am of the same opinion, and I think that it is desirable to emphasise one aspect of this case. From an examination of the proceedings it appears that the ultimate cause of this mistrial was the multiplicity of charges upon which the accused were put on their trial. The mere enumeration of the offences with which the accused were charged, and which the jury had to take into consideration, is in itself sufficient in my opinion, to justify this Court in holding that a summing up such as that delivered by the learned Judge was bound to confuse the minds of the jury as to the issues which they had to determine before they could bring in a verdict in respect of the accused or any of them. It is of the utmost importance that proceedings in a criminal trial should be as simple as possible, and that the Judge and the jury should not be compelled to wade through a morass of confused and varied charges. The practice in the moffusil appears to be to lump together and to try the accused upon as many charges as the ingenuity of those whose duty it is to frame them can devise. This practice has repeatedly been condemned, and for the reason that where an accused person is put upon his trial the charges against him should be so clear and so readily capable of explanation by the trial Judge that the jury will have no difficulty in appreciating the law which they have to apply to the facts of the case before them. In this case the nature of charges against the accused has been referred to by my learned brother, and the trial Judge in his summing up proceeded apparently to give an exposition of the law of inordinate length upon each of these intricate and confused charges.

Having regard to the nature of the charges and the manner in which the learned Judge endeavoured to explain their meaning I do not believe that the jury could have understood the law which was to be applied to the facts of the very simple case before them. It would be a much better practice, I think, that those responsible for framing charges against an accused person should make them not as numerous, but as few, as possible, for such a course would obviate what otherwise must often result in a misunderstanding of the law on the part of the jury. The learned Judge in this case, however, notwithstanding his lengthy exposition of the law does not appear adequately to have discriminated between the different charges preferred against the accused, and not content with leaving to the jury all these charges with an insufficient explanation of their meaning, the learned Judge, after expounding what he himself stated to be an intricate matter of law relating to the right of private defence, proceeded to read to the jury head notes of a number of cases decided in this Court with a view apparently to enable the jury the better to appreciate the meaning of the doctrine of the right of private defence in relation to the particular facts of the case before them. Of course, it is often useful to illus-

trate the meaning of a legal doctrine by relevant example culled from the books or stated by the learned Judge in his own words, but the practice of reading out head notes or other portions of the report of a case not before them to the members of the jury is a dangerous practice which is to be discouraged as more likely to mystify than enlighten the jurors. In the present case the effect of so doing must have been to plunge the facts of the case still more deeply into a legal morass, and make confusion worse confounded.

The result is that the time spent upon this case has been wasted, and it is to be hoped that when the retrial takes place this simple case will be placed before the jury in a manner and in a proceeding where the issues before them are clearly defined and the jury need have no difficulty in applying their minds to the facts of the case in order to ascertain whether the accused are guilty or not guilty of the charges which are framed against them.

R.M./R K. *Order accordingly.*

A. I. R. 1930 Calcutta 437

C. C. GHOSE AND GUHA, JJ.

Mohiuddin and *another*— Appellants.

v.

Emperor

Criminal Appeals Nos. 2 and 3 of 1930, Decided on 8th April 1930, against order of Sess. Judge, Bakargunge.

Criminal P.C., S. 423 (2)—Powers of High Court in appeal from verdict of jury are limited to charge and misdirection.

The High Court's powers of interference in an appeal from the verdict of the jury are strictly limited and can only arise if the accused succeed in showing that there are misdirections in the Judge's charge to the jury. [P 439 C 1]

(b) Penal Code, Ss. 366 and 376 — Question of age of girl very material and if girl below 14 that she was love smitten, wrote love letters and consented is immaterial in law.

On a charge under Ss, 366 and 376, the question of the age of the girl is very material and if the girl is less than 14 years of age, although she may have been love simitten and wrote love letters, her consent to acts referred to in Ss. 366 and 376 is in law immaterial. [P 441 C 1]

(c) Criminal P. C., S. 278—Provided there is lottery mere fact that jury were chosen from amongst those able to read English where identity of handwriting was fact in issue does not vitiate constitution of jury.

Provided there is lottery, the mere fact that the Court proceeded to choose jury from amongst those able to read English, on the suggestion of the Public Prosecutor to which the counsel for the accused consented as there were certain documents in English and identity of handwriting of which was fact in issue, does not in any way vitiate the constitution of jury and amount to excess in exercise of inherent powers that the Court has in ensuring a fair trial or infringe in any way the provisions of S. 278. [P 440 C 1]

W. Gregory, *C. Bagram*, *E. Mingail*, *Nurul Hug*, *Amiruddin Ahmad* and *Atikulla*—for Appellants.

D. N. Bhattacharyya—for the Crown.

S. C. Talukdar and *Radhikaranjan Guha*—for Complainant.

C. C. Ghose, J. — In appeal 2 of 1930 the appellant is one Mohiuddin Ahmed and in appeal 3 of 1930 the appellant is one Hemayetuddin Mukhtear. They have been found guilty by the jury in the proportion of 3 to 2 in manner following: the accused Mohiuddin and the accused Hemayetuddin have both been found guilty under S. 120-B read with S. 366, I. P. C., the accused Mohiuddin guilty under Ss. 366 and 376, I. P. C. and the accused Hemayetuddin guilty under S. 366/114 I. P. C. The learned Sessions Judge, agreeing with the verdict of the jury, has convicted both the accused under the sections referred to above and he has sentenced them as follows: the accused Mohiuddin to suffer rigorous imprisonment for a period of two years on each of the three charges, namely under Ss. 366 and 376 (two counts) and to suffer rigorous imprisonment for a period of 18 months under Ss. 120-B/366, I. P. C,. the sentences to run concurrently: the accused Hemayetuddin to rigorous imprisonment for a period of 18 months on each charge under Ss. 120-B/366 and 366/114, I. P. C., the sentences to run concurrently.

Against this conviction and sentence the above appeals have been preferred to this Court. They have been separately argued before us by Mr. Bagram and Mr. Mingail on behalf of the accused Mohiuddin and by Mr. Gregory on behalf of the accused Hemayetuddin and the main point that has been argued in these appeals is that the selection and empanelment of the jury in this case were irregular and unwarranted by law. Various other points were taken and in order to understand these other points, which will be indicated later on, it is necessary to set out the facts shortly.

Babu Charu Chandra Roy is a pleader at present, practising at Barisal. From September 1928 to 22nd December 1928 he used to occupy a house at Barisal which was next door to the house of a Deputy Magistrate named Moulvi Panaulla. With him were his wife and his daughter named Sovana, an unmarried girl aged about 13 years and odd months. The adjoining house which was occupied as stated above by Moulvi Panaulla, was only a few cubits off. Moulvi Panaulla had with him his wife named Latifa, and there used to live in Moulvi Panaulla's house the accused Mohiuddin who is said to be a cousin of Latifa. It is stated that Latifa, who is a young lady aged about 16 or 17 years, used to come to Babu Charu Chandra Roy's house and visit the latter's wife and daughter and Sovana used to visit Latifa at the latter's house. The ladies of the two houses apparently became very friendly and Sovana was introduced by Latifa to Mohiuddin and to one Golapjan who is Moulvi Panaulla's sister-in-law. On one occasion Mohiuddin, Latifa and Golapjan took Sovana to see an exhibition which was being held in Barisal. On two other occasions these four persons went to a local theatre in the evenings, all four of them going in the same carriage, They returned from the theatre shortly after midnight. It is said that on all these occasions Sovana had her mother's permission to go with Mohiuddin and his party. Be that as i may, Mohiuddin and Sovana fell in love with each other and there followed exchange of letters between Sovana and Mohiuddin. These letters, at any rate, a large number of them, are exhibits in this case and have been marked Z. The letters written by Sovana are addressed "Praner Mohi," "Praner Swami" and in such like terms and they breathe ardent and passionate love. Some of these letters ultimately came to the knowledge of Sovana's father: but before that he had apparently noticed that Mohiuddin was paying undesirable attentions to his daughter Sovana. He thereupon brought the matter to the notice of Moulvi Panaullah and asked him to send Mohiuddin away,

This, however, Moulvi Panaullah was for various reasons, not in a position to agree to; and Babu Charu Chandra Roy thereupon removed to a house, a short distance away, near the house of one Bazlur Rahaman, River Police Inspector in Barisal. Meanwhile Mohiuddin used to come and peep through a window into the inner apartments of Charu Babu's house and he renewed sending letters to Sovana through Bazlur Rahaman's servant Hariz. It appears Mohiuddin on one occasion sent a gold ring to Sovana which, however, was made over by Sovana to her mother who again made it over to Charu Babu. This fact was brought to the notice of Moulvi Panaulla and the latter eventually i. e., by the middle of April 1929, sent Mohiuddin away to his home in Kuligram in the District of Rangpur. On 30th April 1929 Sovana's father had to leave Barisal on urgent professional work and Sovana and her mother stayed in Barisal. The accused Mohiuddin had returned meanwhile to Barisal and it is alleged that he kidnapped and abducted Sovana on the night of 30th April 1929. At noon on that date Sovana got a letter from Mohiuddin through Hariz saying that he would take her away that night and asking her to be ready. This letter is not forthcoming and a detailed account of how it was got hold of and burnt by the accused Hemayetuddin is given by the witness Sisir Kumar Guha.

To continue the story. Sovana describes how she awoke on hearing a noise near her window and how she came out after opening the door of her room. She apparently occupied the room in question by herself. Mohiuddin joined her and there was also a young man named Khaleq, They, i. e. Mohiuddin and Khaleq took her to the house of a constable named Gani. At Gani's house there was present, apparently by previous arrangement the appellant Hemayetuddin. The three, i. e., Mohiuddin, Hemayetuddin and Khaleq left Sovana in the constable's house and went to buy tickets for the steamer journey to Chandpur. Thereafter Mohiuddin and Khaleq came back and took Sovana to the steamer ghat, Hemayetuddin accompanying the party to the steamer ghat. Mohiuddin and Khaleq and Sovana went to Chandpur by steamer. At Chandpur they got down from the steamer and went by boat to the house of Khaleq's aunt. Mohiuddin and Sovana got into

one boat and Khaleq into another. It is alleged that Mohiuddin ravished Sovana in the boat. After a short rest at Chandpur, Mohiuddin and Sovana proceeded to Goalundo by steamer. From Goalundo, they went by train to Niahati and thence to Bandel and Howrah. They then went to Balasore and from Balasore to Waltair and Vizagapatam. From Vizagapatam they went to Hyderabad and thence to Bombay. It is not denied that while Mohiuddin and Sovana were together they had sexual intercourse. The father Charu Babu returned to Barisal several weeks after at the conclusion of his professional business and complained before the Magistrate. We will not pause to comment on the extraordinary conduct of the father and we would fain hope that such conduct is rare. However, there was a full and complete investigation by the police with the result that the two accused before us were committed on 30th September 1929 to take their trial in the Sessions Court on the charges mentioned above.

I will deal with the question of the constitution of the jury in a few moments but before I do so I desire to say at once that I have perused and reperused the learned Sessions Judge's charge to the jury and I am satisfied that it is an eminently fair, impartial and dispassionate summing up of the whole case and that everything that could be urged in favour of the accused has been placed before the jury in a thoroughly satisfactory manner. I have listened with very great care to the earnest and vigorous addresses of learned counsel for the two accused; I was then of opinion and I am still of opinion that many of their points would only be admissible if we were hearing an appeal on facts; that is not the position with reference to these appeals at present and our powers of interference with the verdict of the jury are strictly limited and can only arise if the accused succeed in showing that there are misdirections in the learned Judge's charge to the jury.

Now, as regards the question of the constitution of the jury. The accused have raised this question in an affidavit which was put in at the time of the admission of these appeals; they have also taken this point in their grounds of appeal. That affidavit must have been allowed to be put in per incuriam. The deponent of the affidavit does not say that he knows the English language or he understands the same; indeed, there is internal evidence in the affidavit itself that he does not know English; in these circumstances, the statements in the affidavit in question cannot be relied upon for the purposes of this judgment and we have accordingly excluded the same from our consideration.

Mr. Mingail stated before us that he was one of the counsel who appeared before the learned Sessions Judge on behalf of the accused Mohiuddin and that he was in a position to state before us what happened in the Court below at the time of the empanelment of the jury. The matter is of very great importance and we have allowed Mr. Mingail to make a statement from his place at the Bar. Mr. Mingail stated as follows:

"Fifteen jurors attended, Charges were read out and the pleas of the accused taken. Before the selection of the jury actually commenced, the learned Public Prosecutor observed to the Court that he would rather have a jury composed of English-knowing people, inasmuch as some of the documents were in English and they would need to be shown to the jury. The learned Judge agreed to this and on asking me, I said that that course would certainly be desirable from my point of view. One juror was then called. The learned Public Prosecutor objected to this juror being empanelled on the ground that he did not know English, basing his objection on S. 278, Cl. (g), Criminal P. C. I protested against this objection maintaining that it could not be sustained under that section, as Cl. (g) provided that the objection could only be made if the juror neither understood English nor the language into which it was interpreted. The learned Judge did not pass any order on this at the time. He called out the name of another juror. He said he knew English and he was empanelled. He then called out the names of all the remaining jurors and each one was asked if he knew or could read English. Some said they knew a little, some said they did not know at all. They were all made to sit in the body of the Court. The learned Judge then called out four names from amongst those who were sitting in the body of the Court and put them in the jury box. I believe that the four other jurors who were selected were taken out of those who had said that they knew English."

It is important in this connexion to look into the order-sheet of the learned Sessions Judge.

The learned Sessions Judge in his order-sheet notes as follows :

"When the Court began the selection of the jurors, the learned Public Prosecutor pointed out that there were certain documents in English the identity of the handwriting of which was a fact in issue. The prosecution purpose to examine a handwriting expert, and the jury have to decide on such a question of fact, with the assistance of the evidence of such a witness. It was suggested by the learned Public Prosecutor, and agreed to by the Court, and to the best of my belief by learned counsel for accused, that it was desirable that the jurors should be able to read English. Amongst the jurors present were a number who could do so. The learned Public Prosecutor actually objected to an individual juryman on the ground that he was unable to read English, basing his objection on S. 278 (g), Criminal P. C. This was objected to by learned counsel for the accused, and the Court agreed with his view that objection on these grounds could not be raised under that section. That is as far as the defence objection went, and it was agreed to by the Court, who proceeded to choose the jury from amongst those able to read English."

"The defence objected against three jurors individually. One is a Head Master of a School at Sadar, and was said to have stayed with a Hindu pleader of the local Bar. This objection was allowed. Another was said to have had a discussion on the case with another Hindu pleader; this objection was considered distinctly weak and was disallowed; the case has been discussed throughout the District, and there are no grounds for assailing the impartiality of this juror even if the facts are as alleged. He comes from the moffusil. A third objection was allowed on the ground that the juror was concerned in a dispute over a hat in which the accused was also concerned. Against the other four jurors selected, no objection was raised, and no objection was raised against the constitution of the jury as a whole. These remarks are considered a necessary part of the order-sheet in view of the petition submitted after the jury had been sworn and the case opened for the Crown. I am satisfied that the accused have been in no way prejudiced."

In my opinion, there is no substance in the argument which was sought to be advanced before us that there was no lottery. The record shows that there was a lottery; the only thing that happened was that the Judge proceeded to choose the jury from amongst those able to read English. In doing what he did, the learned Judge did not in my opinion exceed the inherent powers that he had in ensuring a fair trial or infringe in any way the provisions of S. 278, Criminal P. C. It is really not necessary to go to the last clause of S. 278, Criminal P. C., for authority for the procedure adopted by the learned Judge. As far as I can make out, what was done could not possibly raise any question of jurisdiction and it was done with the entire concurrence of learned counsel for the accused. I deprecate most strongly the attempt to give a communal complexion to the affair in the grounds of appeal in this Court. The learned Sessions Judge Mr. Stork cannot be accused of any bias and the attempt in this Court by means of the said affidavit is incompatible with one's notion of what we are used to in this Court. Each case must depend upon its own facts and I am unable to say that on the facts of this case the learned Judge's action was in any way irregular or contrary to law. I am therefore of opinion that this point about the constitution of the jury which has been urged by both the accused must fail.

On behalf of the accused Mohiuddin grounds 3, 6, 9, 10 and ground 4 relating to the question of Sovana's age have been urged before us. Ground 3 relates to Sovana's letters. This ground is inseparably connected with the question of Sovana's age on 30th April when she was taken away by Mohiuddin and during the month of May and until she was recovered. Now the question of Sovana's age is of course all important having regard to the charge under S. 366 and it is dealt with in paras. 7-14 of the learned Judge's charge to the jury. All the material evidence on record was placed by the learned Judge before the jury; the question was viewed in the light of the medical evidence and from various angles and it is difficult to suggest that this portion of the learned Judge's charge suffers either from under-statement or over-statement. A great deal of Mr. Bagram's forensic wrath was centred on Ex. 26 for no earthly reason whatsoever. The jury were left a free hand; the jury were told that it was for them to consider whether the document in question which the prosecution claimed was a horoscope had been manufactured for the purposes of this case and whether Charu Babu's word that it was a horoscope written by him and containing the dates of the births of his several children could be accepted. What more the learned Judge was to do or could have done has not been made clear to us. Nothing more need be said about this point.

On the charge under S. 366 and 376, as indicated above the question of Sovana's age was very material. If in fact Sovana was less than 14 years of age although she had been love-smitten and could write the letters referred to above, her consent to the acts referred to in Ss. 366 and 376, I. P. C., was in law immaterial; and this question has been brought out prominently in the learned Judge's charge to the jury. The whole of Sovana's present story is referred to in paras. 17-22 in the learned Judge's charge to the jury at very great length and the jury were definitely asked to come to a conclusion having regard to Sovana's letters whether Sovana actually consented to go away with Mohiuddin. Here again the learned Judge has been scrupulously fair to the accused. The question of age and her consent, if any, have an important bearing on the question of the charge under S. 376, I. P. C., and this was dwelt upon by the learned Judge. He points out all the circumstances that could be urged on behalf of the accused, such as Sovana's previous relationship with Mohiuddin, the visits to the theatre, the presentation of the ring and the exchange of letters. The learned Judge goes on to discuss the conduct of Sovana's father up to 31st May 1929 and he has said enough from which the jury could, if they had liked, have drawn an inference that Sovana's father was supremely indifferent and that he gave implied consent to what happened. Lastly there was the question as to whether a marriage has been celebrated between Mohiuddin and Sovana. On this point too, the learned Judge's summing up was adequate, clear and exhaustive.

There remains the question of the withholding of certain witnesses by the prosecution. Now it may be said at once that para. 4 of the learned Judge's charge dealing with this point may at first sight be open to certain verbal criticism; but when the facts are gone into and the evidence perused, one must come to the conclusion that there is nothing in that paragraph to which any objection can be sustained in law. In my opinion the jury were given proper directions and no prejudice to the accused has been shown to our satisfaction.

Now, as regards the accused Hemayetuddin in addition to the grounds referred to above, grounds 7, 8, 9, 10, 11, 12, 13, 14 and 15 in his grounds of appeal were urged. The accused Hemayetuddin was charged with having abetted Mohiuddin in the commission of the offence of kidnapping by taking part in the removal of the girl immediately after she was taken out of her father's house and by procuring steamer tickets for them. The learned Judge in paras. 60-62 has referred to the matter at very considerable length, leaving to the jury to determine for themselves whether or not compulsion was being continuously brought to bear on Sovana in order to prevent her from returning while she had an opportunity. The threat to publish to the world Sovana's letters and thereby bring disgrace on her, was that not compulsion? However, the matter was for the jury and I can see nothing in the charge of the learned Judge to which any exception can be taken by anyone acquainted with the facts. Indeed this portion of the charge was distinctly in favour of the accused Hemayetuddin. Then as regards the charge of conspiracy there was an abundance of material on the record to which the jury's attention has to be directed and the learned Judge did it in an extremely careful and satisfactory manner. The grounds taken on behalf of the accused Hemayetuddin have no substance and must be negatived.

On the question of sentence I am unable to reduce the sentence in Mohiuddin's case. I am fully aware that the crime in respect of which Mohiuddin has been convicted would have been impossible, were it not for the negligence, to put it very mildly, of Sovana's parents but I cannot take that fact into consideration for a further reduction of the sentence, because the learned Judge in passing the sentence he did has already taken this and various other circumstances into his consideration.

As regards Hemayetuddin, the record shows that he has been throughout the most resourceful ally of Mohiuddin and I fail to find anything on the record which can induce me to order a further reduction in the sentence passed on him. In his case too, the learned Judge has passed a moderate sentence.

The result is that both these appeals will stand dismissed. The accused who are on bail must surrender to their bail

bonds and serve out the remainder of the sentences imposed on them.

Guha, J.—I agree.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1930 Calcutta 442

PEARSON AND PATTERSON, JJ.

Kuti and *others*—Appellants.

v.

Emperor

Criminal Appeal No. 486 of 1929, Decided on 15th January 1930, against order of Offg. Addl. Sess. Judge, Faridpur, D/- 14th June 1929.

(a) Criminal Trial—Defence — Nature of defence to be ascertained from statements of accused persons and trend of cross-examination of prosecution witnesses.

The nature of the defence is to be ascertained not only from the statements of the accused persons themselves, but also from the trend of the cross-examination of the prosecution witnesses and from the arguments of the accused's pleader at the close of the trial.

[P 442 C 2; P 443 C 1]

(b) Criminal P. C., Ss. 297 and 299—Plea of private right of defence could have been put forward as disclosed from cross-examination of prosecution witnesses but not put forward—Charge to jury expressly calling upon jury not to consider plea of private right of defence amounts to misdirection—Duty of Court explained.

It was clear from the cross-examination of the prosecution witnesses that occurrence in connexion with which the accused were tried on the charge of rioting attended by murder of one of the opposite party, took place in consequence of the complainant and his party coming to the land with a large body of armed men and having attempted to forcibly cut the paddy grown by the accused. In his charge to the jury as the plea of right of private defence was not expressly raised by the defence counsel, the Judge after discussing evidence regarding possession and actual occurrence at considerable length expressed himself in following terms with regard to the plea of right of private defence : "The accused have not set up right of private defence, in answer to the charge against them, and there are not also circumstances appearing upon the evidence in the case justifying the exercise of right. The learned prosecutor had argued the matter by way of anticipation but as it is not necessary for you to consider in this case, I do not think it necessary to place the law on the subject before you."

Held : that the charge to the jury amounted to misdirection which occasioned failure of justice in the sense that it has the effect of depriving the accused of their undoubted right to have the question of the existence of the right of private defence and other questions of fact arising therefrom decided by the jury;

Held further: that it ought to have been left to the jury to decide on a consideration of evidence as a whole, whether the existence of the right of private defence had or had not been established and if so what would be the effect of the existence of that right on the question of the liability of the various accused persons in respect of the charges on which they had been tried. [P 442 C 2; P 443 C 1, 2]

S. C. Taluqdar and *Jyotish Chandra Guha*—for Accused.

Khundkar and *Anil Chandra Ray Chowdhury*—for the Crown.

Judgment.—This case arises out of a riot that is said to have taken place over the cutting of paddy, in the course of which one of the members of the complainant's party was killed.

At the trial both sides claimed to have been in possession of the land and to have grown the disputed crop, and each party alleged that the members of the other party had been the aggressors.

In his charge to the jury the learned Additional Sessions Judge discussed the evidence regarding possession, and the evidence regarding the details of the actual occurrence at considerable length, and he expressly left these matters to the decision of the jury.

As regards the question of the right of private defence, however, the Judge expressed himself in the following terms:

"The accused have not set up the right of private defence in answer to the charge against them, and there are not also circumstances appearing upon the evidence in the case justifying the exercise of that right. The learned Public Prosecutor had argued the matter by way of anticipation, but as it is not necessary for you to consider in this case, I do not think it necessary to place the law on the subject before you."

This, in our opinion, amounted to a misdirection such as makes it necessary that the case should be sent back for retrial.

It is true that none of the accused in their statements in Court, expressly claimed to have grown the disputed crop or gave their own version of the occurrence or put forward the plea that they had asked in the exercise of the right of private defence; most of them merely stated that they were innocent and that false evidence had been given against them out of enmity, while some of them said that they had been elsewhere at the time of occurrence. The nature of the defence is, however, to be ascertained not only from the statements of the accused persons themselves, but also from the trend of the cross-examination

of the prosecution witnesses and from the arguments of the accuseds' pleader at the close of the trial. To hold otherwise would be to run the risk of grave injustice being done in certain classes of cases, for it is a matter of common experience that ignorant people who have been directly or indirectly concerned in causing a man's death will seldom admit that they have been so concerned, even though death may have been caused in the lawful exercise of the right of private defence. Now it is clear from the trend of the cross-examination of the prosecution witnesses in the present case, that the defence sought to be set up by the accused's pleader was that the alleged delivery of possession to Bani Kanta Chakravarti and his brothers in execution of a decree of the civil Court, had never actually taken place, that the disputed crop had been grown by the accused Mazaffar and others of his party, and that the occurrence had taken place not in the manner alleged by the prosecution, but in consequence of the complainant and his party having come to the land with a large body of armed men and having attempted to cut the paddy by force. The case for the defence as put forward by the accuseds' pleader in the course of his argument has nowhere been clearly stated in the charge to the jury, but it would appear from various passages in the charge that it was of the nature indicated above, and it is hardly conceivable that the accuseds' pleader would not have pursued his argument to its logical conclusion, and would not have expressly raised the plea of private defence.

The mere fact of this plea having been so raised, would not, however, have made it incumbent on the Judge to place this aspect of the matter before the jury, unless there was some evidence in support of the plea.

There is, however, some such evidence on the record, not only as regards the question of possession but also as regards the nature of the actual occurrence, (there is, for example, the deposition of prosecution witness Kamini Kumar Das before the committing Magistrate), and it ought in our opinion, to have been left to the jury to decide on a consideration of the evidence as a whole, whether the existence of the right of private defence had or had not been established, and if so, what would be the effect of the existence of that right on the question of the liability of the various accused persons in respect of the charges on which they had been tried.

The only question that remains to be considered is whether the misdirection referred to above, has in fact occasioned a failure of justice. In our opinion it has, in the sense that it has had the effect of depriving the accused of their undoubted right to have the question of the existence of the right of private defence, and the other questions of fact arising therefrom, decided by the jury.

In this view of the matter, the convictions and sentences must be set aside, and the case must go back for retrial.

V.B./R.K. *Case remanded.*

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* A. I. R. 1930 Calcutta 443

SUHRAWARDY AND PAGE, JJ.

Emperor

v.

Derajtulla Sheikh and *others* — Accused.

Death Ref. 4 and Criminal Appeal No. 230 of 1929, Decided on 18th December 1929, made by Sess. Judge, Faridpur, D/- 24th September 1929.

*** Criminal P. C., S. 303—Judge can question jury only to ascertain verdict and for no other purpose.**

The object of S. 303 is merely to enable the Court to ascertain whether the jury intended to bring in a verdict of guilty or not guilty. For no other purpose is a Judge entitled to interrogate the jury under S. 303 after they have given their verdict. A Judge is not entitled to examine the jurors as to the grounds upon which they have based their verdict.

[P 444 C 1]

B. C. Chatterjee and *Nurul Haq*—for Accused.

D. N. Bhattacharjee—for the Crown.

Page, J.—In this case the three appellants were charged with the offence of murder under S 302, I. P. C. The accused Derajtulla was unanimously found guilty, and the accused Erfan and Surat were found guilty by a majority of 7 to 2. The learned Sessions Judge, agreeing with the verdict of the jury in the case of each of the accused, sentenced Derajtulla to death and Erfan and Surat to transportation for life. The three accused have now appealed against their conviction and respective sentences to this Court. It is expedient, I think, that we should say something

about the action of the learned Sessions Judge in taking the verdict of the jury. The jury having brought in a clean and clear verdict of guilty as against the accused, the learned Judge proceeded to examine the jurors, apparently with the object of ascertaining the ground upon which their verdict was based, in the following manner :

Q. Have you believed the evidence of Anath and Ajmal?

A. We are unanimous in believing the evidence of Anath. We have believed the evidence of Ajmal by a majority of 7 to 2.

In our opinion such a question the learned Judge was not permitted by law to ask. S. 303, Criminal P. C., provides suitable procedure, where the answer of the jury to the question put to them as to whether an accused person is guilty or not guilty is so vague and uncertain that in order to ascertain whether the jury intended to bring in a verdict of guilty or not guilty it is necessary to ask supplementary questions. The object of S. 303 is merely to enable the Court to ascertain whether the jury intended to bring in a verdict of guilty or not guilty, and for no other purpose, in our opinion, is a learned Judge entitled to interrogate the jury under S. 303 after they have given their verdict. In this case the verdict of the jury was clear and precise, but for some reason or other the learned Judge took upon himself to examine the jurors with a view to ascertain whether their verdict was based upon the evidence of one or other or both of two important witnesses who had been called for the Crown. Such an interrogatory, in our opinion, the learned Judge was not permitted by law to administer, and the course taken by him has repeatedly been condemned by this Court, which has laid down that a Judge is not entitled to examine the jurors as to the grounds upon which they have based their verdict.

Now, the fact that a murder was committed on the night of 5th March 1929 is not and cannot be challenged. By a deodar tree at the entrance to a path leading through a bamboo jungle the trunk of the body of Sushil Bhaduri was discovered about 10-30 on the night of 5th March 1929; but the head had been severed from the trunk by some sharp and heavy weapon and has never been found. Where it is, and what happened to it, nobody knows, and it is idle to speculate. The question to be determined in this case is whether the accused or any of them took part in the murder of Sushil Bhaduri. (After discussing the evidence in the case, his Lordship concluded.) In these circumstances, in our opinion, the case on behalf of the Crown was so strong that the only verdict which a jury of reasonable men would be justified in returning was one of guilty of wilful murder under S. 302 against each of the accused.

With regard to the sentences that ought to be imposed upon the accused it is enough to say that the perpetrators of a crime so callous and brutal as the murder of Sushil Kumar Bhaduri rendered each of them amenable to the extreme penalty of the law. The sentence of death passed upon Derajtulla Sheik is confirmed, and if a like sentence had been passed upon Erfan and Surat we should not have been disposed to disturb it. The learned Sessions Judge, however, for three reasons (none of which we think should have weighed with him in considering the sentence), has sentenced Erfan Sardar and Surat Sardar to transportation for life, and in all the circumstances we do not feel it necessary to alter that sentence which will stand.

The appeal, therefore, of all the appellants is dismissed, the sentence of death passed upon Derajtulla Sheikh is confirmed, and that of transportation for life upon Erfan Sardar and Surat Sardar will also stand.

Suhrawardy, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 444

C. C. GHOSE AND GUHA, JJ.

Emperor

v.

Chauthmall and *another*—Accused.

Goverment Appeal No. 8 of 1929, Decided on 2nd April 1930.

(a) Police Act (5 of 1861), S. 34 (7)—Making water is easing oneself.

The expression "easing oneself" comprises within its ambit "making water" so as to constitute it an offence within Cl. 7, S. 34. [P 446 C 1]

(b) Police Act (5 of 1861,) S. 34 (7)—Making water by side of road—High Court taking into consideration evidence of anno-

yance and hour of occurrence refused to set aside order of acquittal.

Although making water by the side of road was an offence under S. 34 (7) where the Sessions Judge had acquitted the accused on wrong construction of the section, High Court taking into consideration the evidence of annoyance on record and the hour of occurrence refused to set aside order of acquittal.

[P 446 C 1]

D. N. Bhattacharjee—for the Crown.

Ramendra Chandra Roy, Amicus curiae.

C. C. Ghose, J.—This is an appeal by the Government of Assam and it arises out of the following circumstances:

On 9th March 1929, at about 10 p. m. two constables of Jorhat Town Police in the District of Sibsagar, named Phanidhar Aham and Bibhu Ram Chutia, while on duty were passing along the Trunk Road. They saw accused 1, Chauthmall making water by the side of the road. The constable thereupon went up to the said accused and told him that he had committed an offence punishable under the Police Act and asked for his name. The accused refused to give his name and thereupon the constable, Phanidhar, gave him a piece of paper and pencil and asked him to write his name thereon. The accused having refused to do that either, the constables arrested the accused by seizing his two hands. The constables thereafter asked the accused to go with them to the thana and he having refused to go to the thana, the constables tried to tak him by force. It is said that thereupon Chauthmall called out to his friends who with the accused 2 came up, assaulted the constables and rescued accused 1 from their custody. The accused were thereafter placed on their trial before the Magistrate, First Class, Jorhat under Ss. 147 (rioting), 225-B (escaping from lawful custody) and 353 (assaulting a public servant), I. P. C. The trying Magistrate by his order dated 4th July 1929, negatived the case against the accused under S. 147. He, however, was of opinion that the accused had committed the offences punishable under sections 225-B and 353, I. P. C., and he thereupon convicted them under those sections and sentenced them to pay certain fines. The accused then preferred an appeal to the learned Sessions Judge of the Assam Valley Districts and that officer by his judgment and order dated 23rd Septem- ber acquitted both the accused, holding that 'making water' was not included within the expression 'commits nuisance by easing himself' as used in Cl. 7, S. 34, Act 5 of 1861. Now, having regard to the view which we have taken it is only right and proper that we should set out herein a short extract from the judgment of the learned Sessions Judge, Mr. Patterson, dealing with this question. The Sessions Judge observes as follows:

"The act in respect of which Chauthmall was arrested by the constable was that of making water by the side of the public road, and the only point that has been discussed before me on appeal is whether this was, or was not an offence under S. 34, Act 5 of 1861. Under that section, a person who 'commits nuisance by easing himself' is under certain circumstances, liable to punishment, and may be arrested without a warrant by any police officer in whose view the offence is committed. The section is, however, silent as to whether, 'making water,' in similar circumstances is an offence or not. The question is, therefore, whether the act of making water is, or is not covered by the term 'easing himself.' I am definitely of opinion that it is not covered thereby. 'Easing oneself' means, 'evacuating the bowels,' whereas 'making water' means 'evacuating the bladder.' The two things are quite distinct, and there are obvious reasons why the former has in certain circumstances, been made a cognizable offence under the Police Act, while the latter has not been declared to be punishable and cognizable under that Act though it might be, and often is, declared so to be under bye-laws framed by the local authorities."

It is argued on behalf of the Local Government in this appeal that the learned Judge's construction of the expression referred to above is much too narrow and is indeed wrong in law and that such construction has occasioned a failure of justice. The accused did not appear by an advocate before us but we invited Mr. Ramendra Chandra Roy to assist us in this matter as an *amicus curiae*. Mr. Roy has contended that the learned Sessions Judge's construction is by no means to be summarily rejected and has further argued that on the evidence on record there is no case for action under S. 34, Police Act, inasmuch as there is no evidence of any obstruction, inconvenience, annoyance, risk, danger of damage, or resistance of passengers. He has, therefore, submitted that it was not lawful in the circumstances for the constables to take accused 1 into custody without a warrant. Now the expression 'easing one-

self' means 'relieving nature' and the expression 'relieving nature' means' "evacuating the bladder or bowels': (see Fowler's Concise Oxford Dictionary); the underlying idea being that of relief or comfort to one's person or freedom from strain. If that is so, then it is difficult to hold that 'making water' is not within the ambit of the expression "easing oneself." I am not unaware that in Murray's Oxford Dictionary the expression 'to ease nature' is put down as being absolute but equivalent to the expression 'to ease oneself' which again is put down as equivalent to relieve the bowels.' The word 'ease' is of French origin and the word nature' is of Latin origin; and going by the etymological meaning of the word 'nature' it would include the bowels aswell as the bladder. In an ancient book called Potter's Antiquities of Greece (1715) the expression occurs "Whosoever easeth nature in Appollo's Temple shall be indicted." Having regard to the context in which it appears, the expression would include 'evacuating the bladder as well as the bowels.' It is, however, not necessary for us to go into the lexicographical meaning of the expression in older days. It is sufficient to observe that the expression in modern times means what has been given in Fowler's Oxford Dictionary. We are, therefore, of opinion that the learned Sessions Judge in the view he has taken has placed an unduly narrow construction on the expression and to that extent he is wrong in law.

The question, however, arises whether on the evidence on record this is a fit and proper case for interference by this Court with an order of acquittal. We, have, therefore, made ourselves acquainted with the entire record and we are satisfied that in this case there is no evidence on record of any annoyance or inconvenience caused to anybody, having regard to the hour of the occurrence alleged. Therefore, on the facts, we are of opinion that this is not a fit and proper case for interference with an order of acquittal. The result therefore is that the present appeal stands dismissed on the facts, it being held that the learned Judge's constructions of the expression in Cl. 7, S. 34, Act 5 of 1861 is wrong.

The accused who are on bail will be discharged from their bail bonds forthwith.

Guha, J.—I agree.

V.B./R.K. *Appeal dismissed*

* A. I. R. 1930 Calcutta 446

C. C. GHOSE AND GUHA, JJ.

Kaseruddin Mahaldar—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 858 of 1929, Decided on 2nd April 1930.

*** Criminal P. C. S. 300—Jury retiring to consider verdict—All jurors must be in retiring room together during whole time**

When the jurymen are not able to come to a decision or agree upon a verdict before the trial then the law requires that they should retire to consider their verdict and they should all be in their retiring room together during the whole of the time between the moment of their retirement and the moment when their verdict is taken by the presiding Judge: *R.* v. *O'Connel* 1, *Cox. C. C.* 410, *Rel. on.*

The jury who were nine in number retired to consider their verdict. At 4 p. m. five of the jurors came out and sat in Court. The remaining four stayed in the retiring room till 4-30 p. m. and then came out and sat in Court, when the presiding Judge proceeded to take the verdict of the jury.

Held: that the accused had not the benefit of the joint consideration and consultation of all the jurymen before the verdict was returned and hence the verdict should be set aside.

Mrityunjoy Chatterjee—for Appellants.

Prafulla Chakravarthy—for Crown.

C. C. Ghose, J.—In this case, the only point that has been argued on behalf of the appellants is that the jury did not after the delivery of the Judge's charge to the jury, sit together in their retiring room during the whole of the time taken for their deliberations and that, therefore, the accused have been deprived of the benefit of the joint deliberation of the jury before their verdict was taken. Now, the undisputed facts are as follows: The learned Judge concluded his charge to the jury at about 3-30 p. m. on 16th September 1929. The jury who were nine in number then retired to consider their verdict. At about 4 p. m., five of the jurors came out and sat in Court. The rest of the jury i. e., the remaining four jurors stayed in the retiring room till 4-30 p. m. and then came out and sat in Court. The learned Judge then proceeded to take the verdict of the jury. The case was under Ss. 302, 302/149 and 120-B, I. P. C. What happened after the jury had re-assembled together appears from the following:

"*Verdict of the jury*"

"Q.—Are you unanimous ?"

"A.—No."

"Q.—What is the majority verdict ?

"A.—Eightof us find all the accused guilty under S. 304, I. P. C., part 2 read with S. 149, I. P. C."

"We are all unanimous that the accused are not guilty under S. 120-B, I. P. C., and that they are not guilty under Ss. 302 and 302/149, I.P.C. (Sd.) K. K. Dutta,

16-9-29 Sessions Judge.

The learned Judge convicted all the accused, who were 15 in number under Ss. 304, I. P. C., part. 2, read with S. 149, I.P.C., and sentenced the accused other than three to undergo rigorous imprisonment for three years and as regards three of the accused to undergo rigorous imprisonment for one year. Mr. Chatterjee argues that the appellants were entitled to have the benefit of the joint consideration and consultation of all the jurymen before the verdict was returned and that in the events that happened his clients have not had that benefit. He argues further that if what happened in Court is allowed the raison d'tre of a trial by jury will have disappeared.

The learned advocate, who appears for the Crown, does not challenge any of the facts set out above. Indeed, they cannot be challenged because it appears that the accused put in a petition before the learned Sessions Judge then and there drawing attention to what had happened. In these circumstances, we have had to consider whether the verdict of the jury can be allowed to stand. It is elementary that after the conclusion of a trial the jury are not allowed to separate until they have considered and returned their verdict. The trial was by a jury composed of nine pers ons and unless and until it is shown that all the jurors have taken part throughout in deliberating upon what their verdict should be, the assent of all the jurors to a verdict pronounced by the foreman cannot be conclusively presumed. In this case, it may be said that the verdict was delivered by the foreman in the presence and hearing of all the jurors but that is not enough. If the jurymen were not able to come to a decision or agree upon a verdict before retiring then the law requires that they should retire to consider their verdict and it follows that they should all be in their retiring room together during the whole of the time between the moment of their retirement and the moment when their verdict is taken by the learned presiding Judge. In England it has been held from very ancient times that the jury, when once enclosed for deliberation cannot separate without the special permission of the Court : see in this connexion Archbold's Criminal Pleadings Edn. 26, p. 210 and the case of *R.* v. *O'Connel* (1). It is quite true that in England it used to be the rule that the jury were not even allowed to go to their homes until the verdict was delivered if the deliberation should have extended over two days. The law has been amended in this particular in England. But it has never been held that during the process of their deliberation they can go about in any manner they like. It is obvious that the rule against separation of the jury has a great deal of common sense in it and in our opinion it should be strictly adhered to. In this view of the matter, much as we regret the result the verdict of the jury and with it the conviction and sentence must be set aside and the matter must go back for retrial according to law.

Guha, J.—I agree.

R.K. *Conviction set aside.*

(1) 1 Cox. C. C. 410.

A. I. R. 1930 Calcutta 447

SUHRAWARDY AND GRAHAM, JJ.

Prahlad Barman and *others*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1267 of 1928, Decided on 25th March 1929.

Penal Code, S. 498—Legal proof of marriage is necessary to support conviction—It must be shown that marriage other than that under general law could be effected in particular way.

Among Hindus there are forms of marriage called customary marriages which are in the nature of exceptions to the recognized forms of marriages. There must be satisfactory and sufficient evidence on record that a marriage other than that under the general law may be effected in a particular way. [P 448 C 1]

A complaint under S. 498 was made by a low caste Hindu. He alleged that he had married the woman enticed away in nika form. The only evidence of marriagethat was adduced was that the complainant put vermilion on the forehead of the woman and that there was a feast of the caste people.

Held, that the evidence of marriage was legally insufficient for a conviction under S. 498. [P 448 C 1,2]

Girija Prosanna Sanyal, and *Bijuli Bhushan Sanyal*—for Petitioners.

Suhrawardy, J.—This rule has been issued on the ground that the evidence is legally insufficient for a conviction under S. 498, I. P. C. The complainant belongs to a low caste Hindu sect known as Rajbangshi. His case is that he had married the woman said to have been enticed away in the form which is known among them as nika marriage, that is, marriage with a widow. The point that has been urged before us is that there is not sufficient evidence on the record of legal marriage. It is not necessary to consider the circumstances under which the witnesses for the prosecution were not cross-examined by the defence because on the evidence as it stands, the marriage between the complainant and the woman has not been proved. The only evidence of marriage that has been adduced in this case is that the complainant put vermilion on the forehead of the woman and that there was a feast of the caste people. There is no evidence that any mantra was recited or whether there was any priest who officiated and solemnized the marriage. According to the Hindu Law certain ceremonies have been laid down as necessary for a valid marriage. There is no evidence that any such ceremony was observed on the occasion of this marriage of the complainant with the woman. But among the Hindus there are forms of marriages called customary marriages which are in the nature of exceptions to the recognized forms of marriage. They deviate a great deal from the orthodox style; but as it is observed in Sir Gooroo Das Banerjee's Tagore Law Lectures (The Hindu Law of Marriage and Stridhan, Edn. 3, p. 238) the customary rites must be strictly proved; in other words, there must be satisfactory and sufficient evidence on the record that a marriage other than that solemnized under the general law may be effected in a particular way. There is no evidence in this case that among the caste to which the complainant belongs it is enough for a valid marriage to put vermilion on the forehead of the wife and give a feast to the caste people. The fact that the woman lived with the complainant for a long time and bore children is not evidence of a valid marriage. In this view I hold that the evidence of marriage in this case is insufficient for the purpose of S. 498, I. P. C. We accordingly set aside the conviction of and the sentence passed on the petitioners and direct that they be discharged from their bail bond.

Graham, J.—The Rule was issued to show cause why the conviction and sentence passed on the petitioners under S. 498. I. P. C. should not be set aside on the ground that the evidence is legally insufficient for a conviction under that section.

The main contention is that there is no proof of a valid and legal marriage, and that therefore the conviction cannot be supported. It is well settled that in cases, where marriage is an ingredient of an offence, the fact of marriage must be strictly proved. Is there any such proof here? The evidence on the point is given by the complainant and two witnesses and is to the effect that the marriage, a nika marriage was solemnized by applying 'vermilion' to the forehead of the bride followed by a feast. It is also said a barber was present.

The two witnesses referred to above were not cross-examined, so that their evidence is unrebutted. But is it sufficient? It seems probable that the fact of the marriage was not seriously disputed at the trial, but the prosecution was nevertheless bound to prove that a valid marriage had taken place. No doubt among the poor and ignorant classes the same importance is not attached to forms and ceremonies as among the upper classes. But it is also to be borne in mind that loose unions without any sort of marriage at all are not uncommon among the lower orders. It is essential in such cases that the fact of marriage be proved, and I am not prepared to hold that the meagre and unsatisfactory evidence which has been adduced in this case was sufficient to discharge the onus of proof. The barber referred to as having been present at the marriage was not called as a witness, and no explanation of this omission has been given. Some evidence too might have been given to establish that the marriages of this particular class of people are validly performed in the manner described by the complainant and his two witnesses. No such evidence is forthcoming. I agree therefore that the Rule should be made absolute.

R.M./R.K. *Rule made absolute.*

*A. I. R. 1930 Calcutta 449
Special Bench

RANKIN. C. J., AND C. C. GHOSE AND BUCKLAND, JJ.

In the matter of Bissesswar Lal Brijlal.

Civil Ref. No. 4 of 1929, Decided on 27th January 1930, on reference by Commissioner of Income-tax, Bengal.

*** (a) Income-tax Act, S. 2 (14)—Income-tax Officer has power to call for evidence in support of application for registration as firm.**

A set of persons purporting to constitute a firm as described by S. 2 (14) cannot get themselves registered as such as of right by merely making an application in the prescribed form with the instrument of partnership enclosed. The Income-tax Officer has power to investigate the reality of their constituting a firm and call for evidence as to reality of the instrument produced and reject the application if he is not satisfied with the evidence. He is not required to show that his investigation is permitted by express terms of a section.

[P 450 C 1]

*** (b) Income-tax Act, S. 2 (14) — Application by members of joint Hindu family applying to be registered as firm with deed of partnership attached—Income-tax Officer has power to call for evidence of dissolution of joint family over and above partnership deed.**

Where a set of persons formerly assessed as members of an undivided Hindu family apply to be registered as a firm the Income-tax Officer has power to call for evidence of dissolution of the joint family for the purposes of registration under S. 2 (14) over and above the deed of partnership presented with the application.

[P 450 C 2]

S. N. Banerjee and *Bejoy Prasad Sinha Roy*—for Assessees.

Advocate-General and *Radha Binode Pal*—for the Crown.

Rankin, C. J.—In this case the Commissioner of Income-tax, Bengal, has referred to this Court under S. 66 (2), Income-tax Act 1922, two questions: (1) Whether the Income-tax Officer has any power under the law to refuse an application for registration made in the prescribed manner with partnership deed prior to assessment and, if so, under what section of the Act; and (2) whether the law gives the Income-tax Officer any power to call for evidence of dissolution of the joint family for the purpose of registration under S. 2 (14) over and above the documentary evidence adduced by the partnership deed in support of the application in Form 1 under R. 2.

Now it is abundantly clear that the assessees in this case carry on a certain business. The Income-tax Officer says that this business has been assessed on the footing that the persons who carry it on are members of a Hindu undivided family in business as such. It seems there is the grandfather who is the senior member and there are grandsons who are minors; and the business has been treated in that way until the time with which we are now concerned.

It appears that, after notices, requiring a return of income for the year 1927-28 had been issued, the assessees, on 12th October 1927, applied, purporting to make the application under the rules laid down in the Income-tax Manual, for registration of the firm as a registered firm within the meaning of Cl. (14), S. 2 of the Act. They produced a document according to which these various members who had formerly been assessed as a Hindu family said that the parties had been carrying on the business for a long time and that for various reasons it has become necessary that their respective shares should be defined.

Then the document purported to describe an ordinary contractual partnership each one of the five members of the firm including the minors being stated to have a one-fifth share. On this document being presented to the Income tax Officer, he was immediately suspicious of it because it appeared to him that while no doubt the members of an undivided Hindu family owning a family business might dissolve the family business and enter into a contractual partnership business on their own account, the probabilities of that having been done in the circumstances of this case were extremely remote. It seems tolerably clear, in the absence of some evidence to the contrary, that this piece of paper which the parties have signed was expected to be a magical talisman which would protect them from the imposition of super-tax and had no other reality at all. In these circumstances, the Income-tax Officer required the assessees to produce evidence of the bona fides of this document; some evidence to show that the family had been dissolved; some evidence to show that the business which had formerly been treated as a joint family business had really and, in fact, ceased to be so; and no such evidence was forthcoming.

The question which the Income-tax Officer was asked to refer to us was whether any set of people purporting to be a firm as described by Cl. (14), S. 2, were not entitled to get themselves registered as a registered firm under the rules, however much the document upon which they relied was either forged on the one hand or intended not to be acted upon or otherwise a pure unreality. It is said that the rules contain no provision for an investigation into the reality of such a document. Neither they do. On the other hand, under the Act and under the rules, the right to present such a document at all is only given to a firm constituted under an instrument of partnership specifying the individual shares of the partners; and, if a firm is not a firm in fact constituted under such an instrument of partnership, the Income-tax Officer, in my judgment, is not obliged to receive the application at all or to register the document which the parties were putting forward. It may or may not be in view of the meticulous character of some of the other provisions of the Act that it would be as well to prescribe expressly that the Income-tax Officer may investigate such a question as the present. But there is nothing in the Act to show that he may not investigate such a question and I dissent from the doctrine that before investigating into anything the Income-tax Officer has to show that his investigation is required or permitted by the express terms of the section. In the present case, a duty is cast upon him by Cl. (14), S. 2 and by the rules made thereunder, and in order to work the Act properly, it appears to me that he has power to call for evidence as to the reality of the instrument produced.

In these circumstances, it would be sufficient to answer the first question by saying that the Income-tax Officer has the power referred to. As regards the third question, the answer should be in the affirmative.

The assessees must pay the costs of this reference.

C. C. Ghose, J.—I agree.

Buckland, J.—I agree and desire to add only a few observations. The first question, stated broadly, appears to be whether the Income-tax Officer has power to enquire whether a person or a body of persons is or are what he or they represent themselves to be for the purpose of taking advantage of a provision of the Act. If the question is so stated, it becomes clear that the Income-tax Officer must have power to make the enquiries necessary to satisfy himself as to the person or persons with whom he is asked to deal. If the reply to the first question propounded is in the affirmative, it would, in my opinion, be a sufficient reply to the third question to say that the Income-tax Officer is entitled, for the purposes of such enquiries as the reply to the first question contemplates may be necessary, to call for any evidence which may properly be required.

Speaking for myself, it may be that in this particular matter the Income-tax Officer was right in calling for evidence of dissolution of the joint family, and it certainly cannot be said that he was not. But I prefer to base myself on more general grounds and to say that when persons claim to constitute a partnership firm for the registration of which they make an application the Income-tax Officer may call upon them to prove by evidence that they are what they claim to be before he proceeds further with the application.

R.M./R.K. *Order accordingly.*

A.I.R. 1930 Calcutta 450

B. B. GHOSE AND S. K. GHOSE, JJ.

Jogendranath Sen and *others*—Defendants—Appellants.

v.

Behari Lal Das and *others*—Plaintiffs—Respondents.

Appeals Nos. 1753 to 1755 of 1926, Decided on 26th August 1929, from appellate decrees of Addl. Dist. Judge, Jessore, D/- 29th March 1926.

(a) Possession — Evidence — Order under Criminal P. C., S. 145 is admissible against all persons to prove fact of possession on date of order—As regards parties to proceedings order is admissible as evidence of possession before two months of date of order.

An order under S. 145 of the Magistrate is admissible as evidence of the fact as to who was declared entitled to retain possession and these orders are admissible against all persons when the fact of possession on the date of the order has to be ascertained. But as between parties to the proceedings such an order is also admissible as evidence as regards possession before two months of the date of the order 29: *Cal.* 187 (*P. C.*), *Rel. on.* [P 452 C 2]

(b) Bengal Tenancy Act, Sch. 3, Art. 3—In case of suit for recovery of possession by a raiyat or under-raiyat dispossessed by landlord special rule of limitation of two years applies—It is not necessary that dispossession must be by landlords as such or that they should plead special limitation.

When a raiyat or an under-raiyat sues for recovery of possession and when the dispossession is by the landlord a special rule of limitation laid down in Sch. 3, Art. 3, applies and he must come within two years. It is not necessary that the dispossession must be by the landlords as such or by the entire body of the landlords or that all the cosharers landlords or any of them should plead special limitation: *A. I. R.* 1927 *Cal.* 488; 7 *C. W. N.* 542 and 31 *C. L. J.* 199, *Ref.* [P 454 C 1]

Brojo Lal Chakravarti and *Radhika Ranjan Guha*—for Appellants.

Gunada Charan Sen and *Pashupati Ghose*—for Respondents.

B. B. Ghose, J.—These appeals are by the defendants 1 to 3 in the suits which have been decreed by the Additional District Judge affirming the decisions of the Munsiff. In all these suits the plaintiffs claimed as under-raiyats of a certain holding in a village called Chorekhali. The lands in all the suits comprise the C. S. plots 3, 4 and 5. The plaintiffs alleged that they were in possession of the lands through their bargadars and that in the month of Sravan 1327 B. S., one of the plaintiffs, Ramesh Chandra Das Gupta, in one of the suits raised a hut on plots 3 and 4, which led to the institution of proceedings under S. 145, Criminal P. C. between the plaintiffs and defendants 1 to 4 in which an order was made in favour of the defendants. The plaintiffs thereupon were prevented from going upon the lands and the suits were, therefore, brought for recovery of khas possession against the defendants. Defendant 4 did not put in appearance. Defendants 1 to 3 pleaded that the lands in question belonged to one Judisthir Nashkar and not to the person from whom the plaintiffs claimed to have purchased, that those defendants purchased the interest of Judisthir and had been in possession of the lands in question for a considerable number of years much beyond 12 years. Several issues were raised in the Court below and one of the issues was whether the suits were barred by special law of limitation under Art. 3, Sch. 3, Ben. Ten. Act. Defendants 1 to 3 claimed to be cosharer landlords of mouza Chorekhali. In para. 15 of the written statement they stated that fact. In other paragraphs following (16 and 17) of the written statement, these defendants said that they were also the cosharer landlords of the neighbouring mouza Bardiahat within which there was a mirash tenure and that their vendor Judisthir used to hold these lands under that mouzah. Both the Courts below have found that the lands are not within mouzah Bardiahat but within Chorekhali and that the persons from whom the plaintiffs professed to have derived their title were raiyats on the lands. Both the Courts have also found that the plaintiffs had proved that they were in possession within 12 years before the suits. It was mainly on all these findings that suits were decreed. Proceedings under S. 145, Criminal P. C. were started on 12th August 1920 and the final order of the Magistrate retaining the defendants in possession of the lands in suits was made on 14th April 1921. The suits out of which these appeals have arisen were instituted between 9th and 11th April 1923. The question that has been pressed before us on behalf of the appellants is that the plaintiffs' suits were barred by the special law of limitation under the Bengal Tenancy Act. The learned Additional District Judge rejected this contention of the defendants by the following observation:

"The defendant-appellant claimed title to the land not as cosharer malik but as purchaser of a lease of Judisthir's holding and he is therefore not in a position to raise any question of transferability"

and lower down he observes:

"As regards special limitation I have already expressed the view that the possession of the defendants was not in the capacity of a cosharer landlord and there can consequently be no question of special limitation."

Babu Brojolal on behalf of the appellants contended that the view of the Additional District Judge, in affirming the Munsiff's judgment that in order to bring into play the special limitation as provided in the Bengal Tenancy Act, it is necessary to establish that the defendants dispossessed the plaintiffs in the capacity of cosharer landlords is erroneous. Now this theory of the landlord dispossessing a raiyat or an under-raiyat as such, in order to bring the special law of limitation under the Bengal Tenancy Act into operation, is an exploded one. It is not necessary

to refer to the long line of cases dealing with this point, as it is sufficient to draw the attention of the learned District Judge to the case of *Satish Chandra Banerji* v. *Hasemali Kazi* (1), and many years previous to this Sir Lawrence Jenkins, took exception to the expression made in some of the cases about the dispossession by a landlord "as such." The view of the learned Additional District Judge being obviously erroneous, the question then arises whether the plaintiffs' suits were barred under the special law of limitation. In the view taken by the learned Additional District Judge that the rule of special limitation did not apply, he did not come to any finding on the question. The Munsiff also came to no finding on the special law of limitation, as he held this was not a case of dispossession by a landlord. He expressed his view in the following words:

"Defendant 4 is a cosharer malik of Chorekhali. He has not entered appearance in this suit though duly summoned. He does not come forward and plead special limitation. Only defendants 1 to 3 have entered appearance. They are the de facto maliks of the Bardiahat. Defendant 4 is very likely their benamdiar. So I hold that the suits are not barred by special limitation."

It is contended by the learned advocate for the appellants that this finding means that defendant 4 was the benamidar of defendants 1 to 3 with regard to both the properties. On the other hand it is contended by the learned advocate for the respondents that the Munsiff meant that defendant 4 was a malik of Chorekhali, but he was the benamidar of defendants 1 to 3 with regard to the Bardiahat. With regard to this question I will make my observation later on.

The important question that we have to decide having regard to the fact that no finding has been arrived at by either of the Courts below as to the possession of the plaintiffs of the lands in dispute within two years of the suits, is whether such possession has been established or not. The learned advocate for the respondents asks for a remand; but as these cases have been pending here from 1926, we think it advisable and in the interest of the parties to deal with the matter under S. 103, Civil P. C., upon the evidence, as the fact has not been determined by the lower appellate Court as to whether the plaintiffs were in possession within two years of the suits or not. On that account after the first day of hearing we allowed time to the learned advocate for the respondents to go through the evidence and place the evidence as regards this point. As I have already pointed out the final order in the case under S. 145, Criminal P. C., was made on 14th April 1921. There is no question that the plaintiffs were not in possession from that date; and the suits having been brought within five days before the expiry of two years from that date, the question of possession becomes very important. There is no direct evidence of possession on these five days. But it is contended on behalf of the plaintiffs-respondents that as the plaintiffs had paid rent to their landlords up to Pous 1327 B. S., that is, a few months before Chait 1327, possession of the plaintiffs should be presumed to continue till the end of Chait 1327 B. S., that is, within 13th or 14th April 1921.

Now the difficulty in the plaintiffs' way is the order of the Magistrate retaining the defendants in possession of the lands in dispute. As was observed by their Lordships of the Privy Council in the case of *Dinomani Choudhurani* v. *Brojo Mohini Chaudhurani* (2), the order of the Magistrate is in the nature of a police order admissible as evidence of the fact as to who was declared entitled to retain possession; and these orders are admissible against all persons when the fact of possession on the date of the order has to be ascertained. But as between the parties to the proceedings one may go further and say that such an order is admissible as evidence as regards possession before two months of the date of the order, because if there had been a dispossession within two months of the date of the order when the proceedings were started, the Magistrate would have been bound to make over possession to the person who had been so dispossessed. In this case the proceedings were started on 12th August 1920 and it would require very strong evidence to show that although the order of the Magistrate was made retaining the defendants in possession

(1) A. I. R. 1927 Cal. 488=54 Cal. 450.

(2) [1902] 29 Cal. 187=29 I. A. 24=8 Sar. 224 (P.C.).

on 14th April 1921, the meaning of which was that they were in possession on the date of the order first made, that is, 12th August 1920, still the plaintiffs were in possession up to April 1921. There is no evidence to that effect. On the other hand, one of the plaintiffs, Mahima Chandra Das, gives evidence that "Go-hat is being held on our lands (disputed lands) since the last four years." The go-hat was being held by the defendants and this plaintiff gave evidence on 15th May 1924. Therefore the dispossession by the defendants will be carried back to some time in 1920 and that would be quite in keeping with the order of the Magistrate passed in April 1921 on the preliminary order made in August 1920.

It is not necessary to deal with the evidence of the rest of the witnesses for the plaintiffs as regards the question of possession, because all of them say that the dispossession of the plaintiffs was on account of the order of the Magistrate. That can hardly be right. The rest of the witnesses who gave evidence of possession stated the dates of possession in a very vague way. The only tangible evidence is that one of their under-raiyats grew crops in 1326 B. S., and in Sravan 1327 on account of the building of a hut by the plaintiffs, the criminal proceedings were instituted. In this state of evidence it must be held that the plaintiffs have not succeeded in showing that their dispossession was within two years before the suits. This finding ought to put an end to the plaintiffs' case. But the learned advocate for the respondents, Mr. Sen, contends that as a matter of fact the defendants are not cosharer maliks. It is not contended that the special rule of limitation could not apply, if the defendants are the cosharer landlords. This matter has been settled by a long series of cases. It is only necessary to refer to *Annoda Sundari* v. *Kebulram* (3) and *Nabin Chandra* v. *Wajid* (4). The first objection that the appellants' advocate raises is that this question was not open to the respondents to argue, because the Additional District Judge has taken it for granted that the defendant-appellants before him were cosharer landlords but they had not dispossessed the plaintiffs in their capacity as cosharers. This finding, he seemed to contend, concluded the plaintiff's case. On the other hand, the argument on behalf of the respondents amounted to this, that although the learned Additional District Judge took the fact for granted that the defendants were cosharer landlords, he did not come to any definite finding on the question, and that having regard to the finding of the Munsiff, it is still open to him to argue that defendants 1 to 3 were not cosharer landlords of mouzah Chorekhali. We have allowed the plaintiffs to argue the matter having regard to the ambiguous findings of both the Courts below. The first question that must arise in this connexion is that the defendants pleaded in para. 15 of their written statement that they were cosharer landlords of Chorekhali, and upon that apparently, the issue as regards special limitation was raised. There is no evidence on behalf of the plaintiffs directly denying the fact that defendants 1 to 3 are the landlords of Chorekhali. As a matter of fact in the Record-of-Rights of mouzah Chorekhali, the names of defendants 1 to 3 appear as cosharer landlords. But the plaintiffs argue that in the Record-of-Rights the plaintiffs were recorded as being liable to pay rent only to the sarkars and nothing has been stated with regard to their being liable to pay rent to defendants 1 to 3. It may be that by some arrangement between the cosharer landlords, the rent due from the plaintiffs used to be paid only to the sarkars. It is found by the Munsiff that defendant 4 is a cosharer malik of Chorekhali; and he also finds that defendants 1 to 3 are also recorded as cosharer landlords of Chorekhali; and when the Munsiff says that defendant 4 is very likely the benamidar of defendants 1 to 3, it might be that defendant 4 was the benamidar of the other defendants both with regard to Chorekhali as well as Bardiabat. Therefore defendants 1 to 3 must be considered as the cosharer landlords with regard to the mouzah within which the plaintiffs claim to hold as raiyats or under-raiyats. Further, even if defendant 4 was a cosharer landlord of Chorekhali and he was declared to have been in possession of the lands by

(3) [1908] 7 C. W. N. 542.
(4) [1920] 31 C. L. J. 199=58 I. C. 598=24 C. W. N. 382.

the Magistrate's order in April 1921 and the plaintiffs sought to recover possession as against him also, no matter whether he put in appearance or not, or whether he pleaded special limitation or not, the special limitation under the Bengal Tenancy Act would apply to the suits. It has been held repeatedly that where a raiyat or an under-raiyat sues for recovery of possession and when the dispossession is by the landlord he must come within two years. Here there is no question that the plaintiffs plead that there was dispossession by all the four defendants and seek relief against all of them; it does not matter whether all the defendants or any one of them plead limitation or not, special limitation must apply to these cases.

Under the circumstances tho appeals must be allowed. The judgments and decrees of the Courts below are set aside and the plaintiffs' suits dismissed. The appellants are entitled to their costs in all the Courts.

S. K. Ghose, J.—I agree.

R.M./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 454

RANKIN, C. J.

Jahar Lal Saha—Petitioner.

v.

Sm. Lalita Sundari Dasi and *another*—Opposite Party.

Civil Revn. No. 964 of 1929, Decided on 10th December 1929, from order of Munsiff, 1st Court, Hooghly, D/- 17th May 1929.

(a) Civil P. C., S. 73—Requirement of S. 73 is that decree must have been passed against same judgment-debtor.

The undoubted requirement of S. 73, a requirement which must be satisfied before a person is entitled to a rateable distribution, is that the two decrees must have been passed against the same judgment-debtor.

A obtained a money-decree against *N* in respect of money which he had lent to *N's* husband in his lifetime. *N* having died *L* was substituted as her legal representative. *R* got a rent decree against *L* in respect of certain lands and *R's* decree was enforced first by sale. Thereupon *A* applied for rateable distribution.

Held: *A's* application for rateable distribution could not be granted as the requirement of S. 73 was that the two decrees must have been passed against the same judgment-debtor: 25 *Bom.* 494; 33 *Mad.* 465; 42 *Cal.* 1; *Rel. on*; 11 *Cal.* 718, *Dist.* [P 455 C 1]

(b) Civil P. C., S. 73—Decree passed against same person in different capacities—*Quaere*.

Quaere: Whether decree passed against the same person in different capacities one personally and the other as legal representative are decrees passed against the same judgment-debtor. [P 455 C 1, 2]

Bijan Kumar Mukherji—for Petitioner.

Apurbadhan Mukherji—for Opposite Party.

Judgment.—In my judgment, this Rule must be discharged. The order complained of is an order refusing rateable distribution under S. 73 of the Code to the applicant decree-holder in the following circumstances: It appears that the applicant obtained a money decree against one Narrottam Dasi in respect of money which he had lent to Krishna Lal Mallik, her husband in his lifetime. Against the widow Narottam Dasi, he obtained his decree and, Narottam Dasi having died, the opposite party 1, Srimati Lalita Sundari Dasi was substituted as her legal representative in her place for purposes of execution in terms of S. 50, Civil P. C. It appears that the opposite party 2, Rajendra Nath Adhikari Mohanta got a rent decree in respect of certain homestead lands against Srimati Lalita Sundari Dasi. The lands in question appear not to be agricultural lands but lands on which there is a house and a tank within the municipal limits of Chinsura. A sale was held under each decree and the decree of the opposite party Rajendra Nath Adhikari was enforced first by sale. Thereupon, the present petitioner Jahar Lal Saha applied for rateable distribution and having been refused he applies to this Court under S. 115, Civil P. C.

The learned advocate for the opposite party has not attempted to support the reasoning of the Munsiff but he has pointed out that the undoubted requirement of S. 73 a requirement which must be satisfied before a person is entitled to rateable distribution is that the two decrees must have been passed against the same judgment-debtor. In this case, the petitioner's decree was passed against Narottam Dasi (as a matter of fact, it was passed against her in respect of the debt of her husband Krishna Lal Mallik) whereas Rajendra Nath Adhikari's rent decree was passed against Srimati Lalita Sundari Dasi herself. It may or may not be that Srimati Lalita Sundari Dasi was wrongly made the legal representative of Srimati Narottam Dasi. I am not concerned

with any question of that sort. It appears to me that the test is whether the two decrees were passed against the same person. An authority for that has been shown to me in the following cases. The first is a decision of Sir Lawrence Jenkins in the case of *Govind Abaji* v. *Mohoniraj Vinayak* (1), where the plaintiff in one case obtained a money decree against Bhau Babaji. After the decree, his son Kashinath was placed on the record for purposes of execution. Another person Govind Abaji obtained a decree in a form which was improper but which was really held to be a decree against Kashinath, though it was a decree against him in respect of a claim which originally arose against Bhau Babaji in his lifetime. Treating the one as a decree passed against Bhau Babaji and the other as a decree passed against Kashinath, the Court held that it was not possible to say that these two money-decrees were against the same judgment-debtor.

In the same way, the Madras High Court in the case of *Srinivasa Aiyangar* v. *Kanthimathi Ammal* (2), followed the ruling of the Bombay High Court above referred to. *A* obtained a decree against one person and then *B* obtained a decree against that person's legal representatives. It was held that the case was not within the requirements of what is now S. 73, Civil P. C. It has been pointed out that, in the case of *Hart* v. *Tara Prosanna Mukherji* (3), there were certain observations made by this Court in 1885 in respect of the Code of 1882 which may be thought to go against the rulings which I have just cited. In that case, it appears that there were two brothers and one of them died. The plaintiff obtained a decree against one and the widow of the other for the amount of interest and costs due on a mortgage and it was provided in the decree that he was to get the money from the mortgaged properties and from the defendants personally. The defendant also obtained a decree against the same two people, the brother and the widow of the other brother for a certain sum of money and costs. In these circumstances, a contention was raised that decrees against a defendant personally and against the same defendant in a representative capacity were not decrees "against the same judgment-debtor." The Court did not think it necessary to decide the point but intimated that it was inclined to decide that the decrees against the defendant personally and against the same defendant in a representative capacity were decrees "against the same judgment-debtor"; in other words, the decrees were against the same judgment-debtor, although they were against him in different capacities. That does not seem to me to be an authority which runs counter to the decisions which I have already quoted from the Madras and the Bombay High Courts. I express no opinion upon the point which was merely touched upon. The observation was not intended as a considered decision. It is sufficient for me to say that it in no way throws any doubt upon the doctrine of the cases to which I have referred. It has been pointed out to me that the language of S. 73 of the Code of 1908 has been slightly varied from the language of the Code of 1882. Whereas the language of the Code of 1882 was "decree for money against the same judgment-debtor" the Code of 1908 says "passed against the same judgment-debtor." It has been pointed out in *Balmer Lawrie & Co.* v. *Jadu Nath Banerjee* (4), at p. 9:

> "It is essential for the application of the section that the decrees should have been passed against the same judgment-debtor. This has been made clear beyond possibility of dispute by the introduction of the word "passed" which did not find a place in S. 295 of the Code of 1882."

It appears to me, therefore, that the argument of the learned advocate for the opposite party must be given effect to and that the Rule must be discharged with costs, hearing fee 3 gold mohurs.

R.M./R.K. *Rule discharged.*

(1) [1901] 25 Bom. 494=3 Bom. L. R. 407.
(2) [1910] 33 Mad. 435=5 I.C. 917=7 M.L.T. 157.
(3) [1885] 11 Cal. 718.
(4) [1915] 42 Cal. 1=27 I.C. 644=19 C.W.N. 1202.

A I. R. 1930 Calcutta 455

PAGE AND PATTERSON, JJ.

Satyendra Nath Khan and *others*—Appellants.

v.

Panchanon Chatterjee and *others*—Respondents.

Appeal No. 2142 of 1927, Decided on 24th July 1929.

Civil P. C., O. 32, R. 3, (1)—Certificated guardian representing minors—No formal appointment of guardian ad litem—Decree passed—Decree held binding on minor.

In a suit brought against four brothers two of whom were majors and two minors, the minors were represented by their brother and certificated guardian without his formal appointment as guardian ad litem by the Court on formal application by the plaintiff and a decree was passed against the four brothers the minors being represented as above by certificated guardian.

Held: that in substance the minors were duly represented in the suit and the decree passed against them was binding upon them, the absence of the formal application being a mere irregularity not affecting the merits of the case: 30 *Cal.* 1021 *(P.C.)*, *Rel. on.*

[P 456 C 2]

D. N. Bagchi, *Tarakeswar Pal Choudhury* and *Anil Chandra Dutt*—for Appellants.

Urukram Das Chakrabarty—for Respondents.

Page, J.—In our opinion this is a clear case. The plaintiff's case is that one Shib Chandra died leaving four sons, one of whom was Kedar and another Ram Nrisingha. Kedar had a daughter Rakhal Dasi who had a son, the plaintiff. Rakhal Dasi is dead, and the plaintiff sues to recover his share of the inheritance. He is resisted by defendants 1 to 3 who assert that on the death of Ram his four sons mortgaged the property in suit to the mother of defendants 1 to 3. The finding of both Courts is adverse to the defendants.

On appeal before us the learned advocate on behalf of the defendants-appellants has taken two points, firstly that the plaintiff has no title inasmuch as he based his title upon a decree of 1909, in a suit brought by Rakhal Dasi against the four sons of Ram, and in that suit two of the sons of Ram were minors and were not represented by a guardian-ad-litem appointed by the Court and therefore the decree was not binding upon them. The second point taken was that that being so the suit was against the minor defendants and being a nullity, symbolical possession given through the Court to Rakhal Dasi on 25th January 1909 was not to be treated as possession against the minor defendants and, therefore the suit was barred by limitation. It was also claimed in the lower appellate Court that the defendants had acquired a title by adverse possession, but there was a clear finding of fact adverse to them in the lower appellate Court, and before us that claim has not and could not have been pressed.

As regards the first contention on behalf of the appellants in our opinion the appeal is concluded against them by the decision of the Privy Council in *Mt. Bibi Walian* v. *Banke Behari Pershad Singh* (1). It appears that at the date when the proceedings in 1896 were commenced the two elder sons of Ram, Jogendra and Girindra, were major, the other two sons minors, and in the plaint the two minor sons are set out by name and it is added that on their behalf Girindra appears as their certificated guardian. That plaint was admitted by the Court. A petition on behalf of Jogendra, the eldest brother, and others was presented for leave to file a written statement, but no written statement was filed, and eventually a preliminary decree was passed on 9th February 1897, and the final decree on 10th March 1897 declaring Rakhal Dasi to be entitled to one-third share in the immovable properties in suit. In that decree as in the plaint the four brothers are named, the decree against the two minors being against them as represented by Girindra their certificated guardian.

In my opinion the facts which I have stated bring the present case within the decision in *Mt. Bibi Walian* v. *Banke Behari Pershad Singh* (1), and, in my opinion, the learned Judge rightly held that in substance the two minor defendants were duly represented in the suit. Upon that footing issue 2 does not arise, because as against the parties to the suit symbolical possession was treated as actual possession. The result is that the appeal fails and must be dismissed with costs.

Patterson, J.—I agree.

V.B./R.K. *Appeal dismissed.*

(1) [1903] 30 Cal. 1021=30 I. A. 182=7 C.W. N. 774=3 Sar. 512 (P.C.).

A. I. R. 1930 Calcutta 457

JACK AND MITTER, JJ.

Nripendra Chandra Sarkar and *others* —Defendants—Appellants.

v.

Ekherali Joardar and *others*—Respondents.

Appeal No. 1421 of 1924, Decided on 20th March 1929, from decree of Sub-Judge, Nadia, D/- 7th March 1924.

Hindu law— Alienation— Manager —Rule that manager of joint family cannot bind minor by contract for purpose of immovable property is not limited to immovable property —It also applies to contracts for family necessities—Contract if divisible can however be enforced except to extent of minor's share—Specific Relief Act, S. 26.

A contract entered into by the manager on behalf of the joint family at a time when one of the members is a minor cannot be enforced as against the minor. The rule is not limited to contract on behalf of the minor for the purchase of immovable property but also applies to contracts made by managing members of a joint Hindu family for necessities or for the benefit of the family. [P 458 C 1]

Such a contract, if it is not indivisible can, however, be enforced with variation except with reference to the share of the minor : 39 *Cal.* 232 (*P.C.*), *Rel. on*; *A. I. R.* 1926 *Cal.* 445, *Ref.* 2 *P. L. J.* 513, *Diss. from.* [P 458 C 1]

Radhabinode Pal, *Bhupendra Kishore Bose* and *Jitendra Mohan Banerjee*—for Appellants.

Kshetra Mohan Ghose, *Prem Ranjan Roy Choudhary*, *Saraj Kumar Maity* and *Mohendra Kumar Ghose*—for Respondents.

Mitter, J.—This is an appeal by the defendants and arises in a suit for specific performance of a contract. The plaintiff, now respondent, alleges that the defendants got an ex parte mortgage degree against the plaintiff for a sum of Rs. 2,500 and the plaintiff intended to apply to have the ex parte decree set aside. At this stage the parties came to an arrangement and the arrangement was arrived at between plaintiff on the one hand and defendant 1 on the other purporting to act on behalf of the joint family of which defendants 2, 3 and 4 were also members. It was agreed that two plots covered by the mortgage, viz., plots which were mentioned in schedule *Ka* and *Kha* to the plaint would be sold by defendant 3 as representing the family to the plaintiff and the defendants would refrain from executing their mortgage decree on payment by the plaintiff of the sum of Rs. 1,654 in certain instalments. Of the numerous defences which had been taken in this case it is necessary to notice only one which is to the effect that as defendant 3 was a minor at the time of the plaintiff's alleged contract no specific performance of the contract could be enforced in this case as the contract was entered into by the manager of the family of which defendant 3 was a member. Both the Courts below have not given effect to this defence and the Court of first instance decreed the suit for specific performance after holding that the agreement with the plaintiff for retransfer of the two properties in dispute on payment of Rs. 654 and the payment of the said money and the breach of that agreement by the defendants must be taken to be established and the Court of first instance directed that the defendants do execute a kabala for the said properties in favour of the plaintiff within 15 days from the date of the judgment failing which the kabala would be executed by the Court.

Against this decree an appeal was taken to the Court of the Subordinate Judge of Nadia which affirmed the decision of the Munsif. It is to be mentioned in this case that defendant 5 is a subsequent purchaser of the two properties now in suit and the finding was that she was not a bona fide purchaser for value although the lower appellate Court came to the conclusion upon the circumstance that there was no bona fides in the vendor. It is unnecessary, however, to consider this part of the case as I shall show presently.

A second appeal has been taken to this Court against the decision of the Subordinate Judge affirming that of the Munsif and two points have been taken before us by the learned advocate for the appellants. It is argued in the first place that no specific performance of the contract could be ordered as defendant 3 was a minor at the time of the contract and on the principle of want of mutuality which is available in this case as a good defence, this suit must fail. It is argued in the second place that even if the defendants do not succeed on this point as there is no finding that defendant 5 is not a bona fide purchaser for value and as the plaintiff did neither allege in his

plaint that she was not a bona fide purchaser for value nor adduce any evidence on that point, the decree of the Court of first instance which was affirmed by the lower appellate Court cannot possibly be sustained.

With regard to the first point taken, we think that the contention of the appellant is well founded and must prevail although not to the extent contended for by the learned advocate for the appellants. In view of the decision of their Lordships of the Judicial Committee of the Privy Council in the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1), it cannot now be seriously contended that the contract which was entered into by defendant 1 on behalf of the joint family at a time when defendant 3 was a minor could be enforcible as against defendant 3. It is argued on behalf of the respondent that the decision of the Judicial Committee of the Privy Council must be limited to a case where the contract on behalf of the minor is a contract for the purchase of immovable property. We can find no such limitation in the decision of their Lordships. It is also said that this principle has no application to a case when there is a contract to sell for the purpose of necessity by a manager of a joint Hindu family and reliance is placed in support of that contention on a decision of the Full Bench of the Patna High Court in the case of *Hari Charan Kuar* v. *Kaula Rai* (2). As we read the decision of their Lordships of the Judicial Committee it seems to us that it is impossible to draw the distinction which has been drawn by the learned Judges of the Patna High Court. In the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed Choudhuri* (1) which has already been cited their Lordships say this :

"They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property and they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality and that the minor who has now reached his majority cannot obtain specific performance of the contract."

(1) [1912] 39 Cal. 932=13 I. C. 331=39 I. A. 1 (P.C.).

(2) [1917] 2 Pat. L. J. 523=40 I. C. 142=1 Pat. L. W. 587=(1917) P. H. C. C. 20.

Chamier, C. J., who delivered judgment of the Full Bench of the Patna High Court said this :

"I apprehend that the decision of their Lordships in the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1) does not apply to contracts made by the managing member of a joint Hindu family for family necessities or for the benefit of the family i. e., contracts made by the managing members which bind the minor members of the family. Such contracts can be enforced on behalf of the family by the persons who make them and I find nothing in the decision of their Lordships which requires us to hold that such contracts cannot be enforced against the family."

In the observations of their Lordships of the Judicial Committee of the Privy Council in the case of *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* (1) we can find no such limitation as is suggested in the Patna Full Bench decision. This Court in a recent decision has held that the principle can be applied to cases where a contract is entered into by a member of a Hindu joint family under that Bengal School. It is sufficient to refer to the decision of Greaves, J. and Mukerji, J., in the case of *Srinath Bhattacharya* v. *Jatindra Mohan Chatterji* (3). It has been argued, however, on behalf of the respondent that even if it be assumed that the contract in so far as it affects the infant's share could not be enforced the contract could be enforced with variation except with reference to the share of the infant in the property contracted to be sold. I think this contention of the respondent must be given effect to. On an examination of the evidence it appears that the share of defendant 3 in the property contracted to be sold is one-sixth and we do not think that the contract is of such an indivisible character that no specific performance could be ordered with variation.

In these circumstances the proper decree to make in this case is to vary the decrees of the Courts below by allowing a decree to the plaintiff not in respect of the entire disputed properties but in respect of five-sixths of the said properties. Decrees of the Courts below will be varied accordingly.

With regard to the second point taken, viz., that there being no evidence and no allegation that defendant 5 was not a bona fide purchaser

(3) A. I. R. 1926 Cal. 445.

for value without notice the suit for specific performance must fail. It is sufficient to state that defendant 5 died a year before the date when an application was heard by this Court at the instance of the appellants as to whether the heirs of defendant 5 should or should not be brought on the record of this case as respondent. The application by the heirs themselves which was put before this Court was never served on the respondent and he had no opportunity of meeting the allegations made in that application that the heirs of defendant 5 did not know that their mother defendant 5 had filed this appeal to this Court. There is no order of this Court by which the heirs of defendant 5 had been substituted as appellants in the present appeal. It must, therefore, be taken that so far as defendant 5 is concerned the appeal has abated. It is not, therefore, necessary to consider the second point taken by the learned advocate for the appellants.

The result is that the decrees of the Courts below are varied in the way which we have indicated being limited to five-sixths of the disputed property. Parties will have costs of this appeal in proportion to their success.

Jack, J.—I agree.

R.M./R.K. *Decrees varied.*

A. I. R. 1930 Calcutta 459

MUKERJI AND GUHA, JJ.

Official Trustee of Bengal (Estate Manik Lal Sil)—Appellant.

v.

Kissen Gopal Behami and *others*—Respondents.

Appeal No. 294 of 1928, Decided on 17th December 1929, from Original Order of Addl. Dist. Judge, Howrah, D/- 23rd May 1928.

(a) Provincial Insolvency Act, S. 34—Debts provable under the Act.

The debt to be provable under S. 34 must accrue before adjudication, but if it accrues after adjudication and before discharge it is provable only if the obligation giving rise to the debt was incurred before adjudication.

[P 461 C 1]

(b) Provincial Insolvency Act, Ss. 28 (2), 34 and 61 (3)—Adjudication order—Liability to pay rent of premises occupied by firm adjudicated insolvent as expenses of administration or otherwise and debt provable in insolvency.

On 26th August 1925 *T* alleging that he was the sole proprietor of a firm applied that the the said firm might be adjudged insolvent. In the schedule to the petition one of the creditors was said to be the Official Trustee of Bengal for the estate of *M* and Rs. 900 was said to be due to him for rent of the shop and godowns occupied by the firm for three months up to July 1925 at the rate of Rs. 300 a month. An interim receiver was appointed on 23th August 1925. On 9th December 1925 the Official Trustee put in a petition in which he amongst other things brought to the Court's notice that Rs. 900 was due to him for May to July 1925 and that since the appointment of the interim receiver rents at the rate of Rs. 300 per month were accumulating and that for August to December 1925 Rs. 1,200 had fallen due, which he asked might be paid to him; and he further asked that the premises might be vacated unless the Court thought it necessary to retain possession of them. On 16th April 1926 another petition was put in by the Official Trustee in which it was pointed out that up to March 1926 Rs. 2,400 had become due to him and more or less similar prayers were made as in the previous petition. On 9th July 1926 the Court ordered him to wait till the order of adjudication was passed for an order in regard to the rent of the shop. On 17th August 1926 the adjudication order was passed and the interim receiver was appointed receiver after adjudication. On 12th March 1927 the Official Trustee again applied that his dues might be paid off and also prayed that if the receiver failed to do so, permission might be granted to him to sue the receiver. On 16th June 1927 there was a change in the personnel of the receiver. On 3rd September 1927 the Court ordered notice to be given to the Official Trustee that the premises would be vacated by the end of the month and the receiver should no longer be held responsible for the rent. In the meanwhile insolvent's properties were sold and the Official Trustee applied for payment of his entire dues.

Held: that there was no such antecedent obligation which accrued for the liability to pay rent for the period after the adjudication, and debt in respect of such rent is not a provable debt. [P 461 C 1]

Held also: that the amount of rent due to the Official Trustee for the period from 17th August 1926 to 30th September 1927 will be treated as "expenses of administration or otherwise" and will be given priority, while the rent due to him from 1st May 1925 to 16th August 1926 will rank as a debt provable under the law and in respect of which the appellant will rank pari passu with the other creditors who may have proved their debts.

[P 461 C 2]

Gunada Charan Sen, *Radhika Ranjan Guha* and *Hari Das Majumdar*—for Appellant.

Haradhan Chatterji, *Sitangshu Bhusan Basu*, *Jatindra Nath Sanyal*, *Narendra Nath Sett* and *Khushi Prasun Chatterjee*—for Respondents.

Mohendra Kumar Ghosh for *Suresh Chundra Talukdar*—for Deputy Registrar.

Judgment.—On 26th August 1925 Tulshi Charan Pal, alleging that he was the sole proprietor of the firm of Akhil Chandra Pal and Co., carrying on business in Chandney Chauk, Calcutta, applied that the said firm might be adjudged insolvent. In the schedule to the petition one of the creditors being creditor No. 17, was said to be the Official Trustee of Bengal for the Estate of Manik Lal Sil, and Rs. 900 was said to be due to him for rent of the shop and godowns occupied by the firm for three months up to July 1925 at the rate of Rs. 300 a month. An interim receiver was appointed on 28th August 1925. On 9th December 1925 the Official Trustee put in a petition in which he amongst other things brought to the Court's notice that Rs. 900 was due to him for May to July 1925 and that since the appointment of the interim receiver rent at the rate of Rs. 300 per month was accumulating and that for August to December 1925 Rs. 1,200 had fallen due, which he asked might be paid to him and he further asked that the premises might be vacated unless the Court thought it necessary to retain possession of them. On 16th April 1926 another petition was put in by the Official Trustee in which it was pointed out that up to March 1926 Rs. 2,400 had become due to him and more or less similar prayers were made as in the previous petition. On 9th July 1926 the Court made an order in these terms :

"Creditor No. 17 must wait till the order of adjudication is passed for an order in regard to the rent of the shop in Dhurummtolla Street and godowns in Chandney Chauk."

On 17th August 1926 the adjudication order was passed and the interim receiver was appointed receiver after adjudication. On 12th March 1927 the Official Trustee again applied that his dues might be paid off and also prayed that if the receiver failed to do so, permission might be granted to him to sue the receiver. On 16th June 1927, there was a change in the personnel of the receiver. On 3rd September 1927 the Court ordered notice to be given to the Official Trustee that the premises would be vacated by the end of the month and the receiver should no longer be held responsible for the rent. A sum of Rs. 17,000 appears to have been realised from the sale of the insolvents' properties, and upon that the Official Trustee applied that his dues amounting to Rs. 7,800 might be paid to him first. The Court refused the prayer with the following order :

"The rent claimed is mainly for continuation of the tenancy by the receiver and I cannot see how it can be described as expenditure for administration of the estate. In my opinion this claim ranks along with all other creditors' claim for dividend and will be dealt with accordingly by the receiver."

This is the order from which the Official Trustee has appealed.

Arguments advanced on the strength of cases decided under the special provisions of the English bankruptcy laws or preferential payments in the Bankruptcy Act or arguments derived from the fact of the presence of S. 50, Presidency Towns Insolvency Act, or of the absence of an analogous provision in the Provincial Insolvency Act are of no assistance. The provisions of the last-mentioned Act itself, if examined, throw a good deal of light on the matter.

In this case the interim receiver appointed by the Court was not directed to take possession as he might have been under S. 20. The proceedings show that his appointment was more or less for the purpose of doing certain preliminary investigations. On 17th August 1926 when the order of adjudication was made and the interim receiver was ordered to continue as receiver, the insolvents' property vested in him under S. 28 (2) and from that date the receiver was in possession in the eye of law, whether he actually exercised any act of possession or not.

Now the scheme of the Provincial Insolvency Act is to vest the insolvents' property in the Court or the receiver upon the order of adjudication being made, and to make it divisible amongst the creditors : S. 28 (1). The creditors are to tender proof of their respective debts provable under the Act on which a schedule is to be framed which, however, may be amended subsequently : S. 33. S. 34 is an important section. It states what debts are provable under the Act. Excluding those,

which come under sub-S. (1) of that section, sub-S. (2) says that :

"all debts and liabilities, present future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable under the Act."

The debt to be provable therefore must accrue before adjudication, but if it accrues after adjudication and before discharge it is provable only if the obligation giving rise to the debt was incurred before adjudication. In the present case there was no such antecedent obligation which accrued for the liability to pay rent for the period after the adjudication. Debt in respect of such rent is not a provable debt.

On the other hand, the receiver when the order of adjudication was made was vested with all rights in the insolvents' property. The several petitions of the Official Trustee asked the Court to order the receiver to vacate the premises as otherwise Rs. 300 was accruing due every month and such a prayer was made even before the order of adjudication was passed. Notwithstanding all this and with full knowledge that a liability to pay Rs. 300 a month was being incurred for the use and occupation of the premises the possession of the premises was retained by the receiver. Had this not been so, the landlord would have been entitled to only such rent from the receiver as was fair and equitable. The premises were occupied to keep the property for the purpose of administration and distribution. It is difficult to see when the rent that accrued should not be regarded as "expenses of administration or otherwise" within the meaning of S. 61, sub-S. (3). It is said that for a part of the period the goods in the shop were under attachment in execution of a decree in favour of third party. We do not see how that makes a difference on the question of the receiver's liability.

The result is that, in our opinion, the view taken by the Court below is wrong. If the Court had only carefully considered the legal position and passed prompt and proper orders on the Official Trustee's petition of 9th August 1925 or 16th April 1926 or even on 17th August 1926 when the order for adjudication was made a large sum of money would probably have been available for distribution amongst the other creditors.

The appeal must be allowed. The order of the Court below is set aside and it is ordered that the amount of rent due to the appellant for the period from 17th August 1926 to 30th September 1927 will be treated as "expenses of administration or otherwise" and will be given priority, while the rent due to him from 1st May 1925 to 16th August 1926 will rank as a debt provable under the law and in respect of which the appellant will rank pari passu with the other creditors who may have proved their debts.

The appellant will be entitled to his costs in this appeal. Hearing-fee, 5 gold mohurs from the insolvents' estate.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 461

RANKIN, C. J., AND B. B. GHOSE, J.

Kanti Chandra Tarafdar and *others* —Defendants—Appellants.

v.

Radha Raman Sarkar and *another* —Plaintiff—Respondents.

Appeal No. 243 of 1927, Decided on 17th May 1929, from decree of Sub-Judge, Burdwan, D/- 25th July 1927.

(a) Accounts—Suit for — Executors of will appointed for limited period must account for money received after period is over—Executor.

If executors appointed for a limited period receive any money belonging to the estate after that period is over, they must account for such money also in a suit for accounts. They cannot say that they are not liable because they had ceased to be executors. [P 462 C 1, 2]

(b) Accounts—Suit for—Against executors plaintiff has option to implead representatives of executors who have died—Executor.

In a suit for accounts against executors of a will it is optional on the part of the plaintiff to implead the representatives of the executors who have died. [P 462 C 2]

(c) Accounts—Suit for—Against executors —No relief sought against one executor—Other executors not taking objection in written statement or in argument cannot be allowed to raise objection at later stage—Executor.

In a suit for accounts against executors the plaintiff did not seek any relief against one of them on the ground that the executor had taken no part in the management, though he made him a party. The other executors too did not raise the objection in the written state-

ment or at the time of the framing of the issues or during argument that he was a necessary party to any order to account that might be passed. An order for rendering accounts was made against the others.

Held: that although prima facie all the surviving executors should be made parties to a suit for accounts and the order for accounts ought prima facie to be made against them all yet in the circumstance of the case the other executor could not be allowed at a late stage to insist on the executor omitted being joined in the order.

[P 462 C 2, P 463 C 1]

Sarat Chunder Bose, *Narendra Nath Mitter*, *Nirod Bandhu Roy*, *Nilmoni Goswami*, *Apurba Charan Mukherji* and *Satindra Nath Roy Choudhary*—for Appellants.

H. D. Bose and *Sourindra Narayan Ghose*—for Respondents.

Rankin, C. J.— This is an appeal by defendants 1 and 2 from a preliminary decree for accounts passed by the learned Subordinate Judge of Burdwan in a suit brought by the plaintiff Radha Raman Sarkar against the persons who were appointed executors of the will of one Rajabala Dasi. These persons were appointed executors by her will dated 6th December 1909 which appears to have been about the time when she died and the grant to them was limited to the minority of the plaintiff. The date of the grant to them of the probate was 8th May 1911. The learned Judge has found and it appears to be clear that the plaintiff came of age in September 1918 and he has decreed accounts for 1911 to 1919 against defendants 1 and 2 only. He has also given certain directions with regard to the taking of these accounts.

The first question that was raised in this appeal when it was opened was the question whether or not the learned Judge was correct in making an order for accounts for the period of 1911 onwards and that matter having been argued, it was not further persisted in. It appears that, from 1911 onwards, these persons were at all events nominally executors and it is quite clear to me that they must account.

A question was raised as to whether the learned Judge was right in endeavouring to determine the time up to which these executors acted as such. In my judgment for the purpose of the account there is no point in dealing with that matter now. These executors, when they give the accounts, have got to state their receipts and payments and if in any particular year they have not received any money, it is quite obvious that they would not have to account for any. On the other hand, if in any particular year, say 1919, they did receive money belonging to the estate, they must clearly include that in their account, and it is idle to say that, though they received money and did not account for it, they are not liable because they have ceased to be executors. It does not appear to me that it is necessary for this Court to trouble itself with that matter.

It is to be observed that the executors were originally five in number. Two of these persons have died and Mr. H. D. Bose has been able to satisfy me upon authorities including a citation in Seaton on Decrees, Seventh Edition, p. 1459, and Williams on Executors, Eleventh Edition, p. 1629, that it is not necessary for the plaintiff to implead the representatives of these deceased executors unless he wants to do so.

There remains, however, a question as to one Jatindra Nath Bose who is a party to these proceedings as defendant 5. The plaintiff's case is that this man Jatindra, although he did allow his name to be put forward for the grant of probate and did not renounce, nevertheless has taken no part at all even from the beginning in the management of the estate as executor. There can be no doubt that prima facie all the surviving executors ought to be made parties to a suit for account and the order for account ought prima facie to be made against them all. We have, however, to see whether this point which prima facie is a good point though a technical point is one which it is open to the appellants before us to take. I find that, in para. 15 of the plaint, the prayer for relief as regards accounts is expressly limited against defendants 1 and 2 and the mass of materials which is disclosed by the written statement in no way objects that, if a decree for account is to be made, it is necessary that defendant 5 should join in rendering the account with defendants 1 and 2. The issues which were settled for the trial of this case raised no such objection on the part of these defendants. Issue 6 was whether the plaintiff was entitled to a decree

for accounts against defendants 1 and 2 and, if so, for what period and against whom. When the learned Judge comes to deal with this matter in his judgment, he deals with it in a way which shows that no objection was raised before him that defendant 5 was a necessary party to the order directing the account. Defendant 5 would have, it seems to me, in these circumstances, some grievance, if we were not at this stage of the proceedings to direct that an order for account be made against him also; and, in view of the course taken in the Court below, I am of opinion that it is not necessary for us to add defendant 5 as a party against whom a decree for account is to be made. I see no objection to the directions which the learned Judge has given and I am loath to make any amendment in the decree passed by the Court below. It appears to me that the proper order to pass in the case is that this appeal should be dismissed with costs. Hearing fee five gold mohurs.

B. B. Ghose, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 463

MUKERJI AND GUHA, JJ.

Mahammad Mahmud Choudhry and *others*—Plaintiffs—Appellants.

v.

Behary Lal Saha and *others*—Defendants—Respondents.

Appeal No. 5 of 1929, Decided on 19th November 1929, from appellate order of 1st Addl. Dist. Judge, Sylhet, D/- 21st September 1928.

(a) Civil P.C., O. 32, R. 7—Minor is bound by consent of guardian to abide by deposition given by opposite party on oath although given without leave of Court provided there is no fraud or negligence on his guardian's part—Oaths Act, S. 8.

The offer of the guardian of a minor defendant on behalf of the minor to abide by the deposition to be given by a plaintiff on a special oath stands on a very different ground from an agreement or compromise contemplated by O. 32, R. 7, and in such a case the minor is bound by the consent of his guardian although given without the leave of the Court provided there is no fraud or gross negligence on the part of the guardian : 27 *Cal.* 229, *Foll.* [P 464 C 2]

(b) Civil P. C., O. 3, R. 1—Pleader cannot bring suit to close by offering to be bound by oath of opposite party—But Court can draw inference from circumstances of case that there was authority on his part.

A pleader as an agent on behalf of his client cannot bring the suit to a close by offering to be bound by the oath of the opposite party, but it is quite open to the Court to make an inference from the peculiar circumstances of a case as regards the fact that there was authority on the part of the pleader : 14 *Bom.* 455, *A. I. R.* 1922 *All.* 160, *Ref.* [P 465 C 1]

Priya Nath Dutt—for Appellants.

Hemendra Kumar Das—for Respondents.

Judgment.—This appeal has been preferred from an order of remand passed by the First Additional District Judge of Sylhet. The facts necessary to be set out for the purposes of the present appeal are these :

The appellants were the plaintiffs in a suit for money in which there were originally three defendants. The defendants filed a joint defence taking various objections to the claim, one of them being that the amount claimed by the plaintiffs had been already paid back to them. When the suit was pending in the trial Court one of these defendants died leaving two minor sons as his heirs and thereupon the said two minors were substituted as defendants in the place of their deceased father and a pleader of the Court was appointed as their guardian ad litem. The guardian ad litem appointed as aforesaid entered appearance in this suit and filed a petition on 22nd June 1928 adopting the original defence of the defendants as the defence of the minors who had been substituted. On the same day after a witness was examined on behalf of the plaintiff a petition was filed by the pleader, who had entered appearance on behalf of all the defendants originally, now signing on behalf of the two adult defendants, namely, Bepin Chandra Saha and Behari Lal Saha. The petition was also signed on behalf of the substituted minor defendants, namely, Bonomali Saha and Barindra Chandra Saha by the guardian ad litem Mohendra Nath Das, pleader. In this petition it was stated that the defendants would be bound by the special oath of plaintiff 2 in respect of the principal amount of Rs. 1,414. This statement in the petition obviously meant that as regards the question as to whether the principal amount advanced by the plaintiffs to the defen-

dants had been repaid by them or not, the defendants would be bound by the said special oath. It was further stated in the petition that the question of compensation, costs and other things would have to be decided by the Court itself. On this petition being filed, the Subordinate Judge allowed plaintiff 2 to go into the witness box and to take the special oath and on that being done he decreed the suit for the sum of Rs. 1,414 with compensation and costs.

Thereafter Bepin Chandra Saha and Behari Lal Saha and the two minor defendants through the said Behari Lal Saha preferred an appeal from the trial Court's decision. Before the learned Judge it appears to have been contended that when the petition to be bound by the special oath of plaintiff 2 was filed on 22nd June 1928 only one of the two adult defendants was present in Court and the pleader who purported to file the said petition had not been properly authorized to do so. It appears also to have been contended before him that the guardian ad litem of the minor defendants had not received instructions to join in the application and had not obtained the Court's permission for that purpose. The learned Judge came to no finding on the first contention, but preferred to decide the case on the second one. He took the view that O. 32, R. 7, Civil P. C., applied to the case and that the proceedings were in the nature of an agreement or compromise to enter into which it was necessary for the guardian ad litem to have the leave of the Court and such leave should have been expressly recorded in the proceedings. Being of opinion that the absence of the leave aforesaid rendered the proceeding void and because the minors would not be bound by the agreement aforesaid he held that the decree would not possibly stand either as against the minors or even as against the adult defendants. The learned Judge, therefore, remanded the suit to the trial Court in order that it might be retried in the ordinary way after giving opportunity to the parties to adduce evidence. From this order the plaintiffs have preferred the present appeal.

In order to appreciate the exact position it is necessary to set out a few facts. It would appear from the order sheet that when on 22nd June 1928, the application was filed on behalf of the defendants the guardian ad litem was present in Court and on the same day made the application praying that the defence originally filed by all the defendants might be accepted as the defence of the minors who had been subsequently substituted. In the petition, as has been already stated, the guardian ad litem had put down his signature as representing the minors Bonomali Saha and Barindra Chandra Saha. The question as to whether the proceedings were void or not by reason of the fact that leave of the Court was not taken seems to us to be concluded by the decision of this Court in the case of *Sheo Nath Saran* v. *Sukh Lal Singh* (1). In that case it was held that :

"the offer of the guardian of a minor defendant on behalf of the minor to abide by the deposition to be given by a plaintiff on oath taken in a particular form under the Oaths Act, stands on a very different ground from an agreement or compromise contemplated by S. 462, Civil P. C., of 1882, and that in such a case, the minor is bound by the consent of his guardian although given without the leave of the Court, provided that there is no fraud or gross negligence on the part of the guardian."

It may be stated here that in so far as the present case is concerned it has not been alleged that there was any fraud or negligence on the part of the guardian ad litem. The learned Judge's reason therefore, for holding that the proceedings were not binding upon the minor by reason of the fact that leave of the Court was not taken nor recorded seems to us to be entirely erroneous.

As regards the want of authority on the part of the pleader who put in the petition it may be stated here that it is an admitted fact that one of the defendants, namely, Bepin Chandra Saha was present in Court at the time when the petition was put in. The whole question, therefore, so far as this matter is concerned, is whether because of the fact that Behari was not present it should be held that the pleader who put down his name in the petition could not file the petition on his behalf as well, or that he acted without authority. Having regard to the circumstances of the case, specially to the fact that there was one joint defence originally filed by all the defendants and also to the fact

(1) [1900] 27 Cal. 229=4 C. W. N. 327.

that Bepin was present in Court to do all that was necessary for the purpose of doing all that was necessary to be done on that day, in our opinion, it is not an unreasonable inference at all to make to hold that Bepin had been authorized by Behari to instruct the pleader to make the petition that he eventually did. We are of opinion that the circumstances of the case do not point to the pleader having acted on his own initiative or without instructions nor do they suffice to establish that merely because one of the defendants was absent from Court on that particular day he is not to be held bound by the statement contained in the petition. There is no indication at all of any intention on the part of Bepin or of the pleader to defraud Behari.

Our attention has been drawn to a number of cases on behalf of the respondents in support of the proposition that the pleader as agent on behalf of his client had no authority to bind the latter by making a petition of this character. One of the cases referred to in this connexion is the case of *Sadashiv Rayaji* v. *Maruti Vithal* (2). In that case it was held that

"an agent, holding a power of attorney authorising him to act and appear for a party to a suit cannot bring the suit to a close by offering to be bound by the oath of the opposite party in a particular form. Nor can a pleader so bind his client".

The proposition laid down in that case cannot be disputed but it is quite open to a Court to make an inference from the peculiar circumstances of the case as we feel inclined to do in this case as regards the fact that there was authority on the part of the pleader because of the presence of one of the adult defendants who evidently had been put forward by the other to take all necessary steps in connexion with the suit.

Another case referred to is the case of *Parbhu Dayal* v. *Jamil Ahmad* (3). The special circumstance in that case was that in addition to the stipulation to be bound by the special oath there was a prayer to the effect that the suit would be decreed in terms of the oath taking the whole case out of the decision of the Court. Whether this decision is correct or not we need not discuss. It is sufficient for us to say that it has expressly followed *Sheo Nath Saran* v. *Sukh Lal Singh* (1).

We are of opinion, therefore, that the view which the learned Additional District Judge has taken is not correct. We accordingly allow the appeal, set aside the order from which it has been preferred and direct that the decree of the trial Court be restored. The appellants will be entitled to the costs of this appeal as well as of the appeal before the lower appellate Court, hearing fee in this Court being assessed at two gold mohurs. The connected application is dismissed.

R.M /R.K. *Appeal allowed.*

(2) [1890] 14 Bom. 455.
(3) A. I. R. 1922 All. 160=44 All. 117.

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* A. I. R. 1930 Calcutta 465

LORT-WILLIAMS, J.

Kedarnath Bhutra—Defendant—Applicant.

v.

Jchormull Bhutra—Plaintiff.

Application in Original Civil Suit No. 1180 of 1925, Decided on 28th April 1929.

*** (a) Decree—Construction—Compromise decree — Consent decree providing each party to bear its costs but not stating that previous interlocutory orders for costs should be superseded—It cannot supersede them.**

A decree by consent, one of the terms of which is that each party should bear its own costs, cannot supersede previous interlocutory orders for costs passed during the course of the suit, if the decree does not specifically state that they should be so superseded : *Beymon & Co.* v. *Godden & Son*, (1878) 4 *Ex. Div.* 246 and *British Natural. Premium Provident Association* v. *Bywater*, (1897) 2 *Ch.* 531, *Rel. on.* [P 466 C 1]

(b) Practice—Costs.

Interlocutory orders for costs made by the Court of appeal during the progress of the suit may be taxed forthwith and execution levied therefor. [P 466 C 1]

W. Gregory and *N. N. Bose* — for Applicant.

S. C. Roy and *J. C. Sett*—for Plaintiff.

Judgment.—In this case a decree was made by consent, one of its terms being that each party should pay its own costs to be taxed by the Taxing Officer of this Court if necessary as between attorney and client on scale No. 2. Mr. Gregory argues that the effect of the decree is to supersede all interlocutory orders for costs which have previously been made in the suit. These interlocutory orders include orders which have been made by the

Court of appeal. He bases that argument on two decisions of Wilson, J., in 1891 and 1892 and says that the practice of this Court has been in accordance with these decisions. I doubt whether the decisions are sufficient in their terms to support the rule which Mr. Belchambers based upon them in those days, which rule, I am informed, has been followed hitherto in this Court. Such a rule would not be in accordance with English practice on this point and in my opinion the rule as minuted by Mr. Belchambers is not a correct rule or one which should be followed. If it is intended to supersede previous interlocutory orders for costs that fact should be stated specifically in the final decree. In the case of a consent decree it should be stated specifically as one of the terms of the agreement to which the parties have come, i.e., it should be stated that they had agreed to abandon the rights which had already accrued to them under the previous orders of the Court. It is worthy of note, that according to the English practice, and I believe also the practice which does or ought to obtain in this Court in the case of orders for costs made by the Court of appeal during the progress of the suit, such orders for costs may be taxed forthwith and execution levied therefor. They are distinguished in this way from interlocutory orders made in the original Court, which according to the practice both here and in England must await taxation at the final termination of the suit. There is very little authority to assist one in coming to a conclusion on this matter, but my decision is based to some extent upon the case of *Beynon & Co.* v. *Godden & Son* (1) and *British Natural Premium Provident Association* v. *Bywater* (2). The result is that this application is dismissed with costs.

S.N./R.K. *Application dismissed.*

(1) [1878] 4 Ex. Div. 246=48 L. J. Ex. 80.
(2) [1897] 2 Ch. 531=66 L. J. Ch. 787=77 L. T. 22=46 W. R. 23.

A. I. R. 1930 Calcutta. 466

MUKERJI AND JACK, JJ.

Abdul Wahed—Plaintiff—Appellant.

v.

Mohan Bashi Saha and *others*—Defendants—Respondents.

Appeal No. 1909 of 1927, Decided on 23rd August 1929.

Adverse Possession—Cosharers—Adverse possession must be to knowledge of cosharer directly or indirectly however notorious it may be.

Adverse possession that would extinguish a cosharer's title must be adverse to the proved knowledge of the cosharer ousted, however notorious such possession may be. Exclusion or ouster involves not merely the act of the person ousting but the state of the mind of the person ousted. Knowledge on the part of the latter, therefore, is essential. Such knowledge may be proved directly or inferentially. On the principle of constructive notice, it may also be proved that the cosharer against whom possession was exercised had sufficient notice of facts or sufficient information which would put a reasonable person on enquiry and on receipt of which a reasonably attentive person could not but realize that he was ousted. It is not the law that a non-diligent cosharer is bound to suffer. It is essential to find knowledge of ouster of his part: (*case law considered*). [P 468·C 1]

D. L. Khastgir, *Akhal Ch. Dutt* and *Sailendra Mohan Das*—for Appellant.

Gunada Charan Sen and *Jatindra Mohan Ghose*—for Respondents.

Mukerji, J.—The principal question that arises for consideration in this appeal is whether the findings recorded by the Court of appeal below are sufficient in law to constitute such adverse possession on the part of the defendants and their predecessors as would extinguish the plaintiff's title.

The parties are cosharers. The District Judge has found that the adverse possession that was exercised on the part of the defendants and their predecessors was hostile and notorious, that all through the period, which was well over twelve years, their rights were asserted, and that the sales made by them in assertion of such rights were attended with considerable publicity. He has found that these sales were overt acts of an unequivocal character to the exclusion of the rights of the plaintiff. On the question whether the plaintiff had knowledge of these overt acts the District Judge has only observed that :

"if the plaintiff did not know it was simply due to his lack of diligence for which he cannot claim any benefit."

Now the findings recorded as above by the learned District Judge would seem to suggest that if the possession has been notorious in character and if the overt acts indicative of such possession are unequivocally referable to an as-

sertion of a hostile title to the exclusion of the plaintiff, such possession is sufficient, even though the plaintiff may not have had knowledge of the ouster, provided that if the plaintiff was diligent he would have known of it. The question in this appeal is whether this is a correct or adequate statement of the law as to the sufficiency of adverse possession for the purpose of extinguishing a cosharer's title. I am of opinion that it is not.

As regards diligence the learned District Judge appears to have reproduced with a little, though very important variation, a dictum of Mookerji, J. to be found in the case of *Jagannath Marwari* v. *S. Chandni Bibi* (1), which runs in these words :

"It may be conceded that a cosharer cannot close his eyes and ears, nor by wilful inattention obtain an advantage from his lack of diligence."

It will be seen that the words of this dictum are very carefully weighed. What they mean is fairly clear from some passages that precede and follow. The judgment states :

"Any act or conduct signifying his intention to hold, occupy and enjoy the premises exclusively and of which the tenant out of possession has knowledge or of which he has sufficient information to put him upon enquiry .... For this reason it has been held sufficient that the acts of adverse possession are such in their character and attendant circumstances that a man reasonably attentive cannot but realise that an adverse right is asserted against him. But if no notice is given to the cosharer of the denial of his right the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify an inference of knowledge on the part of the co-owner sought to be ousted and of laches if he fails to discover and assert his rights."

There is, however, another passage in the aforesaid judgment on which much stress has been laid in support of the District Judge's view and which runs thus ;

"But what is essential is that the overt acts which constitute a definite and continuous assertion of an adverse right must be of an unequivocal character clearly indicating an assertion of ownership of the premises to the exclusion of the right of the other co-tenants."

This passage merely repeats in different words the principle enunciated by Wood, V. C. in *Thomas* v. *Thomas* (2), (at p. 83), namely "possession is never considered adverse if it can be referred to a lawful title." It specifies the essentials of such possession, but does not purport to say that possession having those ingredients and without anything more would suffice to extinguish the title of a cosharer.

In the case of *Ayenenussa Bibi* v. *Shaikh Isuf* (3) it was pointed out that in order to establish adverse possession by one tenant-in-common against his co-tenants there must be an exclusion or ouster and the possession subsequent to that must be for the statutory period. In that case Jenkins, C. J., referring to the cases of *Doe* v. *Posser* (4) and *Culley* v. *Doe dem Taylerson* (5) (statements of the law in which cases are to be found reproduced in the decision of the Judicial Committee in *N. Varada Pillai* v. *Jeevarathnammal* (6), *Gangadhar* v. *Parashram* (7) and *Bandacharya* v. *Srinivasacharya* (8), laid down that mere non-participation of rents and profits would not necessarily of itself amount to exclusion but such non-participation or non-possession may in the circumstances of a particular case amount to adverse possession. He observed that what is sufficient evidence of exclusion must depend upon the circumstances of each and that amongst the circumstances to be taken into consideration are the relationship of the parties their position, the mode of life in the particular community to which the parties belong, the character of the property and other circumstances of a similar character. Besides proof by direct evidence exclusion or ouster may be presumed from circumstances. So in *Culley* v. *Doe Dem Taylerson* (5) Lord Denman said :

"But where the claimant tenant-in-common has not been in the participation of the rents and profits for a considerable length of time and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there had been an ouster."

Also Ashhurst, J., in *Doe* v. *Posser* (4) pointed out that long and continued

(1) A. I. R. 1921 Cal. 647.
(2) [1855] 2 K. & J. 79.
(3) [1912] 16 C. W. N. 819=14 I. C. 722.
(4) [1774] 1 Cowper 217.
(5) [1840] 11 Ad. & El. 1003=3 P. & D 589=9 L. J. Q. B. 288.
(6) A. I. R. 1919 P. C. 44=43 Mad. 244=46 I. A. 235 (P.C.).
(7) [1905] 29 Bom. 303=7 Bom. L. R. 252.
(8) [1903] 5 Bom. L. R. 742.

acquiescence in the enjoyment of rents and profits may justify a jury in presuming either an actual ouster or a conveyance. In the same way the House of Lords in the case of *Corea* v. *Appuhamy* (9) speaking of extinguishment of title of a person by reason of adverse possession on the part of his co-owners observed that :

"nothing short of ouster or something equivalent to ouster could bring about the same result."

Exclusion or ouster involves not merely the act of the person ousting but the state of mind of the person ousted. Knowledge on the part of the latter therefore is essential. Such knowledge may be proved directly or inferentially. On the principle of constructive notice it may also be proved by showing that the cosharer against whom the possession was exercised had sufficient notice of facts or sufficient information which would put a reasonable person onenquiry and on receipt of which a reasonably attentive person could not but realise that he was ousted. That knowledge has to be found is also clear from a series of decisions amongst which may be referred those of *Lokenath Singh* v. *Dhakeswar Prosad Narayan Singh* (10), *Jer Narain* v. *Srikantha Roy* (11) and *Jogendra Nath* v. *Rajendra Nath* (12). The District Judge has nowhere found that the plaintiff had the required knowledge. He has rather refrained from arriving at a finding one way or the other on the question of knowledge, being apparently of the view that if the plaintiff had been sufficiently diligent he would have known of the matter. Now in cases of this sort there is seldom if ever any actual notice of exclusion or ouster. But, at the same time it is not the law that a non-diligent cosharer is bound to suffer: he will suffer only when the circumstances unequivocally tell him that he has been excluded or ousted or when he has sufficient information that will put a reasonable man on enquiry which if pursued will unmistakably show that he has been excluded or ousted.

The result is that while the other findings namely those as to the character of the possession of the defendants and their predecessors, are well made there is want of a proper finding on the question of knowledge and for such a finding one way or the other the case will have to be reheard by the lower appellate Court.

It has been brought to our notice on behalf of the respondents that the decision of the District Judge on the question of maintainability of the suit is erroneous inasmuch as the exclusion of the plaintiff's father's share from the claim is not practicable because that share cannot possibly be ascertained without knowing whether the plaintiff's mother had left other heirs besides those that are parties to the suit a point on which the trial Court's decision was against the plaintiff. The lower appellate Court will have to go iuto this matter again and record a proper decision thereon. With these remarks the appeal is allowed the judgment appealed from is set aside and the case is remanded to the lower appellate Court for disposing of it after determining the two matters referred to above. Costs to abide the result.

Jack, J.—I agree.

R.M./R.K. *Case remanded.*

(9) [1912] A. C. 230=81 L. J. P. C. 151=105 L. T. 836.
(10) [1916] 20 C. W. N. 51=27 I. C. 465= 21 C. L. J. 253.
(11) A. I. R. 1922 Cal. 8.
(12) A. I. R. 1922 Cal. 54.

A. I. R. 1930 Calcutta 468

B. B. GHOSE AND S. K. GHOSE, JJ.

Ganendra Mohan Bhaduri and *another* —Appellants.

v.

Bhavani Charan Chakravarti—Respondent.

Appeal No. 305 of 1929, Decided on 28th August 1929, against appellate order of Dist. Judge, Hooghly, D/- 29th April 1929.

(a) Arbitration Act, S. 2—Although suit in respect of portion outside ordinary jurisdiction of High Court is barred reference to arbitration with regard to such property can be made under S. 2.

A reference was made to arbitration in a dispute relating to property only a portion of which was within the ordinary jurisdiction of the Court. The arbitrator filed an award which was amended by the consent of the parties and a decree was passed accordingly. Subsequently execution was sought with regard to portion of the award which was not amended.

Held: that although a suit could not have been instituted with regard to property without leave under Letters Patent, a reference to arbitrator could be made under S. 2 of the Act. [P 470 C 1]

(b) Arbitration Act, Ss. 13, 14 and 15—Portion of the award not remitted for reconsideration nor set aside is enforceable as decree under S. 15.

According to the provisions of the Arbitration Act the arbitrator only files the award in the Court and after that the Court may remit the award for reconsideration or set it aside under Ss. 13 and 14 of the Act. When this is not done the award is enforceable as if it were a decree under S. 15 of the Act. [P 469 C 2]

A dispute relating to property only a portion of which was within original jurisdiction of the High Court was referred to arbitration. The award was amended by the consent of the parties and a decree passed accordingly. Subsequently a widow sought execution of the portion of the original award relating to her maintenance.

Held: that although the decree made was itself of no force the portion of the award as originally made and not amended or remitted by the Court of which execution was sought could be enforced as regards the widow as a decree of the Court under S. 15: *Pisini* v. *Attorney-General of Gibraltar*, (1880) 5 *P. C.* 516 and 2 *I. A.* 219, *Ref.* [P 470 C 2; P 471 C 1]

H. D. Bose and *Bijan Kumar Mukerji*—for Appellants.

Rupendra Coomar Mitter and *Manilal Bhattacharya*—for Respondent.

B. B. Ghose, J.—This is an appeal by the executor of the Will of Babu Rajendra Lal Goswami against an order of the District Judge affirming the order of the Subordinate Judge of Hooghly holding that the respondents were entitled to execute the decree of this Court. The decree was made by Chaudhuri, J., dated February 1919. It was transmitted to the Hooghly Court for execution. An objection was taken by the appellants that the decree was void and without jurisdiction and, therefore, it was not capable of execution. The point in controversy arises out of proceedings in arbitration under the Arbitration Act which, it is admitted by the respondent, were very irregular. The dispute between the parties was referred to the arbitration of the late Mr. Byomkesh Chuckerbutty. He made an award which was filed under S. 11, sub-S. 2, Arbitration Act (9 of 1899). It does not appear what happened after the award was filed. But it appears that all the parties agreed to certain modifications in the award and the learned Judge gave effect to the modifications which were made by consent and they were entered in the two schedules of the decree which are marked B and C. There was an infant concerned and the learned Judge made the order that the agreement was for his benefit. But at the present moment we are not concerned with the question of the infant's being bound by the agreement. As I have said, a decree was made the effect of which was to embody the award along with the two other documents which contained the stipulations on which the parties agreed before the learned Judge. Previous to this there were proceedings between the present parties which came up on appeal from the Original Side: see the case of *Jnanendra Mohan* v. *Annapurna Debi* (1). The question now in dispute was not considered at the time, but with regard to certain other matters an opinion was expressed by the learned Chief Justice about which there is no dispute now. The question which arose then between the parties was whether a decree could have been made by Chaudhuri, J., as was done. According to the provisions of the Arbitration Act the arbitrator only files the decree in Court and after that the Court may remit the award for reconsideration or set it aside under Ss. 13 and 14 of the Act. When this has not been done, the award is enforceable as if it were a decree of the Court under S. 15 of the Act. As was pointed out by the learned Chief Justice in the case cited above, the procedure that was had before Chaudhuri, J., was a mixed procedure under the Arbitration Act and also under the provisions of Sch. 2, Civil P. C. As I have already said, the learned advocate for the respondent admits that the proceedings were irregular. It is contended on behalf of the appellant that the learned Judge had no jurisdiction to make a decree and that being so the executing Court ought not to have made an order for its execution. The present execution was sought for with regard to a portion of the award and that was contained in the second paragraph of it as regards the maintenance of the widow of the testator Rajendra Lal Goswami. It was provided there, amongst other things, that the widow was to get a certain sum for maintenance per mensem and that was to be paid by the executors. It is contended that there was no suit pending in the High Court and, therefore, there

(1) A. I. R. 1927 Cal. 562=102 I. C. 108.

could have been no decree whether by consent or otherwise ; and the definition of a "decree" in the Civil Procedure Code was referred to in support of the contention that unless there is a suit there cannot be a decree. Of course, this argument does not take cognizance of a decree being made on an award under para 20, Sch. 2, of the Code. It is next contended that as the Court had no jurisdiction to make a decree, the executing Court was entitled to refuse to execute it on the ground that the decree was a nullity according to the Full Bench case of *Gora Chand Haldar* v. *Prafulla Kumar Roy* (2). It should be stated in passing that the learned District Judge was not quite accurate in saying that no objection was taken before him as to the jurisdiction of the High Court, because apparently that was the only objection on which they fought the case in the trial Court and that must have been the only ground upon which they attacked the decision of that Court on appeal. The question, therefore, which we have to consider is first: whether the decree is a nullity or incapable of execution ; and secondly, if the decree is irregular and has been made on consent, it was one which could be enforced by way of execution.

The first point that arises for consideration is whether the learned Judge sitting on the original side had any jurisdiction to entertain the suit with regard to the properties involved in the matter of arbitration. It may be conceded that he had not, because only a small portion of the property was situated within the limits of the original jurisdiction of this Court and without leave under the Letters Patent the suit could not have been instituted on the original side with regard to the properties left by the testator. But under S. 2, Arbitration Act, the matter in dispute could be referred to an arbitrator, because the provision under that section is that the Act shall apply only in cases where if the subject-matter submitted to arbitration were the subject of a suit, the suit could, whether with leave or otherwise, be instituted in a Presidency town. It cannot be disputed that the suit could have been instituted with leave, but it could not be done without leave as I have already stated. Therefore, although the suit would have been without jurisdiction, the reference to arbitration was competent and this has been conceded by the learned counsel for the appellant. The question, then, is whether the learned Judge had jurisdiction to make a decree on consent of the parties. It is contended that the only jurisdiction that the learned Judge had under the Arbitration Act was either to remit the award or to set it aside. He could not amend it himself in any manner and moreover he had no right to pass a decree upon the agreement on consent. On the other hand, it is contended on behalf of the respondent relying upon the cases of *Pisini* v. *Attorney-General, Gibraltar* (3) and *Sadasiva Pillai* v. *Ramalinga Pillai* (4), at p. 233, that there being no want of general jurisdiction in the Court if the parties consented that the award made by the arbitrator should be amended in a certain way, the learned Judge acted with the consent of the parties and therefore, although the proceeding was irregular, it was an act not absolutely without jurisdiction. It is said that if the learned Judge instead of accepting the petition of compromise himself remitted the award to the arbitrator and the arbitrator had made an award annexing these petitions to his original award, everything would have been quite regular ; and if the learned Judge, instead of going through that process with the consent of parties amended the award, it cannot be said that it is void and cannot be enforced. The whole question, therefore, turns upon the fact whether the act of the learned Judge was absolutely without jurisdiction or the learned Judge had jurisdiction but it was exercised with consent in an irregular manner. I do not think that this broad question arises out of the present proceedings as the execution that is sought for by the present application only refers to the question of maintenance which was contained in the original award of the arbitrator. That portion of the award was not amended by the learned Judge and the award not being remitted, it seems to

(2) A. I. R. 1925 Cal. 907=89 I. C. 685=53 Cal. 166 (F.B.).

(3) [1880] 5 P. C. 516=30 L. T. 729=29 W. R. 900.

(4) [1877] 2 I. A. 219=15 B. L. R. 283=24 W. R. 193=3 Sar. 519 (P.C.).

me that under S. 15 of the Act the widow could enforce the award as regards herself as if there was a decree in her favour by the Court. Mr. Bose on behalf of the appellant argues that the award does not exist, because it is merged in the decree. But it is contended by Mr. Mitter for the respondent that although the learned Judge passed a decree, he ought not to have made it because the Arbitration Act does not refer to a decree being made by the Court in accordance with the award. The short point, therefore, upon which I would decide this case is that here the applicant for execution asks for enforcement of the portion of the award which was in her favour and she can do so. The decree is itself of no force whatsoever and if that is wiped out, there remains the award and which, as I have already said, is enforceable as a decree of the Court under S. 15, Arbitration Act. The form of the application, inasmuch as it seeks to execute the decree, is bad, but the substance is there. On this ground this appeal stands dismissed with costs. Hearing fee three gold mohurs.

S. K. Ghose, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 471

B. B. GHOSE AND S. K. GHOSE, JJ.

Tara Prasad Chaliha—Appellant.

v.

Secy. of State and *another* — Respondents.

Appeal No. 325 of 1927, Decided on 29th July 1929, against original decree of Addl. Dist. Judge, Assam, D/- 5th July 1927.

Land Acquisition Act, Ss. 9 and 25 — S. 9 not strictly followed as regards service of notice—Claimant can put forth his claim for proper compensation before Court.

If the provisions of S. 9 have not been strictly followed as regards the service of notice, then it would be absolutely wrong to prevent the claimant from asking for proper compensation on a reference made by the Collector to the Court under the Land Acquisition Act. In such a case it is not possible to apply the penal provisions of S. 25 in order to prevent the claimant from putting forward his claim before the Court: 34 *Cal.* 470; 30 *Cal.* 576 and 1 *C. W. N.* 562, *Ref.* [P 473 C 1]

Probodh Chandra Chatterji and *Jnananath Basak*—for Appellant.

Nasim Ali—for Respondents.

B. B. Ghose, J.—This is an appeal by a claimant against an order of the Additional Judge, Assam Valley Districts. A piece of land measuring 4 bighas odd within the municipal area of Sibsagar was acquired by the Collector under the Land Acquisition Act. A large area was acquired along with the piece of land in question in this appeal. The Collector awarded Rs. 141 as compensation for the lands to the claimant. The appellant made an application for reference to the Court on 2nd September 1926, in which he claimed Rs. 2,500 as the market value of the land at the rate of Rs. 500 per bigha. Thereupon the Collector made a reference under S. 18, Land Acquisition Act, dated 27th October 1926, in which he stated that the appellant had not accepted the award made by him. In that letter of reference the Collector further stated that special notice was served upon the objector on 24th February 1926 and he further mentions the fact that the objector asked for Rs. 500 per bigha being awarded to him. When the matter came up before the learned Judge, the claimant alone was examined. The learned Judge made an order to this effect on 5th July 1927:

"One witness examined. The applicant was duly served with a notice under S. 9. He did not make a claim for compensation. His explanation is that he trusted to the good sense of the Collector. This excuse can be put forward in all cases in which claim for compensation is not made. I cannot accept it as a sufficient reason under S. 25 (2). The petition is, therefore, dismissed. No order about costs."

This was apparently made on an application to allow the claimant to make a claim under S. 25, sub-S. 2, Land Acquisition Act. There was an application for review, and judgment was pronounced by the learned Judge on 30th July 1927, in which the learned Judge found that the notice under S. 9 of the Act dated 3rd February 1926 was served on the claimant's brother and it was a sufficient service under S. 45 (3) of the Act. It was further found that the notice which was served on the brother of the claimant G. P. Chaliha on 24th February 1926 was a clear 15 days' notice. The learned Judge rejected a further objection made by the claimant that the notice was bad as it was not signed by the Collector himself but by an Extra Assistant Commissioner on his behalf. Another notice was served which was marked as Ex. A on the claimant himself; but the learned Judge

found that it was not 15 days' notice. The learned Judge, however, remarked that this notice was superfluous. On these facts the learned Judge observed that there was absolutely no justification on the part of the claimant not to make a claim before the Collector pursuant to the above notices. Before this Court the learned advocate for the appellant takes exception to the validity of the notice under S. 9, Land Acquisition Act. He points out that the learned Judge was in error in holding that there was 15 days' clear notice as is required by S. 9, Land Acquisition Act. If any notice had actually been served according to law, Ex. A was undoubtedly superfluous. The question is whether a proper notice was served under S. 9, Land Acquisition Act, and, if not, whether the appellant has any remedy. The notice was dated 23rd February 1926 as signed by the Collector. There is the report of the peon who stuck up the notice to the effect that on 24th and 25th February 1926 signature was taken of the Mouzadar on a copy of the notice, one copy was hung up in front of the outer door of the office of the Sub-Deputy Officer on getting the signature of the clerk of the Sub-Deputy. Another copy was hung up over the signboard of Gaonbura and so forth. Assuming, as the learned Judge says, that the notice was served under S. 9 on 24th February 1926, the notice required the persons interested in the land to appear before the Collector on 11th March 1926 in the office of the Sub-Deputy Officer, Sibsagar, to state the nature of their claims. Between the 24th February and the 11th March there was no clear 15 days' notice because the 15th day would be 11th March 1926 and the notice, therefore, was not valid in law. The question is, if that is the position whether the appellant is precluded from preferring his claim under S. 25, Land Acquisition Act. Now, it is well settled that where special provisions are made by the legislature for compulsory acquisition of property belonging to a person, the provisions of the law must be strictly complied with. I may refer to what is stated in the well-known book of Cripps on Compensation, 6th Edn., at p. 26, where the learned author says:

"Any person whose property is interfered with under Parliamentary authority has a right to require that the promoters shall comply with the letter of the enactment so far as it makes provisions in his behalf and no Court can remodel arrangements sanctioned or relax conditions imposed by the Act of Parliament."

The case of *Herron* v. *Rathmines and Rathgar Improvement Commissioners* (1) is cited in support of the proposition. Again, at p. 90, the learned author says:

"The consent to permit the promoters to enter on any lands cannot be revoked when once given, so as to place the promoters in the position of trespassers. The effect of such consent is to bring the promoters under the protection of their statutory powers, and the only remedy of the owner is to take the necessary steps to compel the assessment and payment of compensation. If no consent has been given, and the promoters have not complied with the statutory conditions as to entry on lands, they can be proceeded against as trespassers by any owner who has an interest in the lands. The principle is that all statutory conditions, which have been imposed as conditions precedent to an entry on lands, must be fulfilled: see the cases of *Parkdale Corporation* v. *West* (2) and *North Shore Rail Co.* v. *Pion* (3)."

These cases have been referred to in our Court in the case of *Rameswar Singh* v. *Secy. of State* (4). That was a case in which the owner sued in the civil Court for damages for acquisition of land without strictly following the provisions of the Land Acquisition Act. There the learned Judges no doubt observed that irregularities in connexion with the service of notice might be waived; but the waiver is, as I understand from the passage I have cited from Cripps on Compensation, waiver of the right to treat the public authority as a trespasser. It does not prevent the owner from asking for payment of proper compensation. In this case the learned Government Pleader also drew our attention to the case of *Ganga Ram Marwari* v. *Secy. of State* (5), where Banerjee and Henderson, JJ., observed that the principles laid down in some of the English cases could not apply in this country in its entirety. But these observations were made in reference to a case in which the plaintiff asked for recovery of possession of the property which had been acquired under the Land Acquisition Act, although not strictly in accordance with

(1) [1892] A. C. 498=67 L. T. 658.
(2) [1887] 12 A. C. 602=56 L. J. P. C. 66=57 L. T. 602.
(3) [1889] 14 A. C. 612=59 L. J. P. C. 25=61 L. T. 525.
(4) [1907] 34 Cal. 470=5 C. L. J. 669=11 C. W. N. 356.
(5) [1903] 30 Cal. 576.

its provisions after service of special notice under S. 9 of the Act. In the present case there is no question that the property has vested in the Secretary of State. The only question is whether the claimant has the right to ask the Court to take his evidence as regards the proper compensation to be paid according to the market value. In my judgment, as the provisions of the law have not been strictly complied with, it is not possible to apply the penal provisions of S. 25, Land Acquisition Act, in order to prevent him from putting forward his claim before the learned Judge. That the provisions of S. 25 should not be so strictly applied was also held by Banerjee and Rampini, JJ., in the case of *Nabin Chunder Sarma* v. *Deputy Commissioner of Sylhet* (6), where the learned Judges said :

"that the Collector in his grounds of reference to the civil Court stated that the persons interested, amongst whom the appellant is expressly named, did not agree to accept the amount of compensation offered was sufficient to prevent his case from being affected by the provisions of S. 25."

It is not necessary to go so far in the present case but, in my opinion if the provisions of S. 9, Land Acquisition Act, have not been strictly followed as regards the service of notice, then it would be absolutely wrong to prevent the claimant from asking for proper compensation on a reference made by the Collector before the learned Judge under the Land Acquisition Act.

In my opinion, therefore, the judgment of the learned Judge must be set aside and the case sent back to him to decide the question of proper compensation to be paid to the claimant on the reference made by the Collector under S. 18, Land Acquisition Act. It appears that the claimant was too trustful a person and that is the reason why he has got into difficulties. The appellant is entitled to his costs in this appeal, hearing fee being assessed at three gold mohurs.

S. K. Ghose, J.—I concur.

V.S./R.K. *Appeal allowed.*

(6) [1897] 1 C. W. N. 562.

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MUKERJI AND GUHA, JJ.

Pannalal Lala—Plaintiff—Appellant.

v.

Abdul Gani and *others*—Defendants—Respondents,

Appeal No. 433 of 1928, Decided on 3rd January 1930 against original order of Sub-Judge., Hughly, D/- 25th July 1928.

Court-fees Act, S. 7 (iv) (c) and (d)—Plaintiff is entitled to put his own valuation.

Even if a plaintiff ought not to be permitted to have his relief without paying adequate court-fees, yet, he in a suit coming under Sub-Cl. (c) or sub-Cl. (d), S. 7 (iv) may justly say that his valuation of the relief is what he has to pay for. There is hardly any good reason why the words of S. 7 should not be applied as they are. (*Case Law referred*). [P 474 C 2]

Rupendra Kumar Mitter and *Bijan Behary Mitter*—for Appellant.

Bijan Kumar Mookerji and *A. Quasem*—for Respondents.

Judgment.—The plaintiff appellant sued the defendants for an injunction restraining them from erecting a building on a piece of land on declaration of his title therein in maurashi jamai right, it being alleged by him that the defendants were mere tenants-at-will He valued the suit at Rs. 15. The suit was decreed by the Munsiff. On appeal by the defendants the Subordinate Judge set aside the decree of the trial Court and ordered that the plaint be returned to the plaintiff for presentation to the proper Court. His reason was a two-fold one: 1st, that the plaintiff had asked for declaration of title to and injunction in respect of 13 cottas of land which was worth Rs. 1,300 and so the suit should have been valued at Rs. 1,300 and was beyond the pecuniary jurisdiction of the Munsif ; and 2nd, that the plaintiff had really asked for two declarations one relating to his own title as a maurashi tenant and the other relating to the defendants' title as tenants-at-will and also for an injunction and consequently should have paid court-fee ad valorem the property. Both these grounds are challenged in this appeal as erroneous.

As regards the first of these two grounds much need not be said because S. 11, Suits Valuation Act, affords answer which is conclusive in plaintiff's favour : there is not the faintest

suggestion anywhere in this case that the under-valuation prejudicially affected the disposal of the suit on its merits.

The suit as framed looking at its substance is to obtain an injunction with certain ancillary declarations and so comes under S. 7, Cl. (iv) sub-Cl. (d), Court-fees Act. It may perhaps be also regarded against the plaintiff as a suit to obtain a declaratory decree with a consequential relief in the shape of an injunction and therefore coming within S. 7, Cl. (iv), sub-Cl. (c) of the Act. In either view the amount of fee payable should be computed as the section states according to the amount at which the relief sought is valued in the plaint and in such a suit the section also states the plaintiff shall state the amount at which he values the relief. The plaintiff in this case valued the relief at Rs. 15.

So far as authorities are concerned it appears that there is strong divergence of judicial opinion on the question whether in cases coming under sub-Cls. (c) and (d), Cl. 4, S. 7 of the Act, the plaintiff is absolutely at liberty to put his own valuation on the relief he claims. The High Courts of Allahabad and Bombay have preferred to give a strict meaning to the words of the Act while this Court and the Madras High Court have been inclined sometimes to take a different view. So far as this Court is concerned there is some authority for the view that the plaintiff is at liberty to put his own valuation: e. g. *Hari Sankar Dutt* v. *Kali Kumar Patra* (1) at p. 739 ; *J. N. Sen* v. *Toria-utunnessa* (2) while there is also authority perhaps preponderant in favour of the view that although the plaintiff can always put his own valuation on the relief he claims the Court is also competent to exercise its powers conferred on it by O. 7, R. 11, Civil P. C., (e. g. *Umatul Batul* v. *Nauji Kuar* (3) *Krishna Das Laha* v. *Hari Charan Banerji* (4) and *Raj Krishna Dey* v. *Bepin Bihari Dey* (5). The Judicial Committee, however, in a case from Bombay made some remarks which may not unreasonably be regarded as approving of the words of the statute being strictly applied: *Sundara Bai* v. *The Collector of Belgaun* (6), and which have been so understood in the case of the *Official Trustee of Bengal* v. *Gobardhan Guchait* (7) and *Bal Krishna Narayan* v. *Jankibai Sitaram* (8).

It seems to us that there is hardly any good reason why the words of S. 7 should not be applied as they are. If the plaintiffs' valuation of the relief may at times appear arbitrary or too low the assessment of the real value is often no less arbitrary and almost an impossibility. A plaintiff no doubt ought not to be permitted to have his relief without paying adequate court-fee but the remedy lies not in nullifying the words of the Act, but in the rule-making power of the High Court conferred on it by S. 9, Suits Valuation Act. Till such rules are framed a plaintiff in a suit coming under sub-Cl. (c) or sub-Cl. (d), Cl. (4), S. 7, Court-fees Act. may justly say that his valuation of the relief is what he has to pay for. The result is that in our judgment the view taken by the Subordinate Judge is erroneous. The appeal is allowed and the case is remanded to his Court so that the appeal may be heard and disposed of on its merits. Costs, hearing-fee being assessed at 2 gold mohurs, will abide the result.

V.S./R.K. *Case remanded.*

(1) [1905] 32 Cal. 734=9 C. W. N. 690.
(2) A. I. R. 1922 Cal. 242.
(3) [1907] 6 C. L. J. 427=11 C. W. N. 705.
(4) [1911] 10 I. C. 865.
(5) [1913] 40 Cal. 245=17 I. C. 162.
(6) A. I. R. 1918 P. C. 135=52 I. C. 897=46 I. A. 15=43 Bom. 376 (P.C.).
(7) [1929] 118 I. C. 357.
(8) [1920] 44 Bom. 331=56 I. C. 340.

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MUKERJI AND MITTER, JJ.

(*Sreepati*) *Bhusan Mondal* and *another* —Plaintiffs—Appellants.

v.

Sarbeswar Mondal and *another*—Defendants—Respondents.

Appeal No. 1669 of 1927, Decided on 24th July 1929, against appellate decree of Sub-Judge, Birbhum, D/- 14th March 1927.

(a) Adverse Possession — Adverse possession starting against original owner—Interposition of subsequent life estate — Reversioner cannot compute time from death of limited owner.

Where adverse possession once starts against the original owner and continues after his death, the interposition of a subsequent life-estate does not avail against the running of time and the reversioner cannot compute limi-

tation from the death of the limited owner : 27 *I. C.* 954, *Rel. on.* [P 476 C 1]

(b) Hindu Law—Widow — Gift to widow of predeceased son — No deed to evidence nature of donee's interest — Absolute interest held to have been gifted.

When a property is given to a person whether that person is man or woman the grant must be taken to be an absolute grant. If a person say:"I give this property to a particular woman" there is no rule of Hindu law which limits that grant to the life time of that particular woman.

A Hindu having no son or adopted son made a gift of a plot of land to the wife of his predeceased son because she wanted to be maintained. There was no document evidencing the gift from which the precise nature of the gift could be construed.

Held : that the gift was of an absolute interest. The gift could not be in lieu of maintenance as the donee was not a person who would be entitled to claim maintenance and the gift to her stood on the same footing as a gift to a stranger : 24 *W.R* 395 and 30 *All.* 84 *(P.C.), Rel. on.* [P 476 C 2 P 477 C 1]

Bankim Chander Mukerji and *Purna Chander Chatterji*—for Appellants.

Jadunath Kanjilal and *Subodh Chander*—for Respondents.

Mitter, J.—This is an appeal by the plaintiffs and it arises out of a suit brought by them for recovery of possession of several plots of land, 19, in number mentioned in the plaint after declaration of their title thereto. The plaintiffs claimed the disputed plots as the reversionary heirs of one Syam Chandra Mondal. There is a genealogical tree attached to the plaint which shows the relationship between Syam Chandra and the present plaintiffs and it has not been questioned before us that the plaintiffs are the reversionary heirs of Syam Chandra. The defendants' case was that plots 1 to 3 and 17 and 19 belonged to Syam Chandra but that their father purchased the same from Syam Chandra on 18th Falgun 1272 B. S. and that since then they had been in possession thereof in their own right. They further said that plots 14, 15 and 16 were their own ancestral property and that Syam Chandra had no interest therein. As regards plot 18, their case was that it was the stridhan property of their sister Nistarini and that they had got it from her. The Court of first instance found in favour of the defendants as regards plots 14, 15, 16 and 18; and as regards the remaining plots, it held that the defendants had made out a case of adverse possession although it disbelieved the story of the purchase of those plots by the defendants' father from Syam Chandra in 1272 B. S. The plaintiffs' suit in respect of all these plots was accordingly dismissed by the trial Court. On appeal that decision has been affirmed by the learned Subordinate Judge. The plaintiffs have thereupon preferred this second appeal.

The points taken before us are with reference to plots 1 to 13 and 17 and 19 and plot 18. We shall first deal with plots 1 to 13 and 17 and 19 ; and plot 18 will be dealt with afterwards separately.

It has been contended before us by the learned advocate appearing for the plaintiffs-appellants that the decision of the lower appellate Court on the question of adverse possession by the defendants is wrong as it has not been shown that, at the time of Syam Chandra's death, the defendants' predecessor-in-interest had acquired a right by adverse possession to plots 1 to 13 and 17 and 19. It appears from the genealogical tree appended to the plaint that Ramlal, the son of Syam Chandra, predeceased his father leaving behind him his widow Nistarini who died in Pous 1327 B. S. and it is argued that, as the present suit was instituted within 12 years of the date of the death of Nistarini the limited owner, it should have been held that the suit was in time and that it should also have been held that the right of Syam Chandra to the plots in question was not extinguished by adverse possession. It appears, however, on the finding of the lower appellate Court that Syam Chandra was not in possession of these lands shortly before his death and that Court also finds on a consideration of the documentary evidence in the case that Ram Narain Mondal, the defendants' father, was in possession of these plots as would appear from the thoka of the year 1277 B. S. in which it is stated that these plots appertain to the jote of Syam Chandra, but are in the possession of the defendants' father Ram Narain. The lower appellate Court has rightly approached the question from the point of view, namely as to whether Syam Chandra was in possession of these disputed plots at the time of his death. If Syam Chandra was not in possession of these plots at the time of his death, limitation would begin to

run against him from that time and, as he died more than 50 years before the institution of the suit, the defendants have been in possession for a period of upwards of 12 years so as to acquire a title by adverse possession. If time had once begun to run from Syam Chandra's lifetime, no subsequent interposition of a life estate would be of any avail. If any authority is needed for this proposition, reference may be made to the case cited by the learned Subordinate Judge in his judgment, namely, the case of *Mohendra Nath Biswas* v. *Shamsunnessa Khatun* (1). This was the only point urged on behalf of the appellants as regards plots 1 to 13 and 17 and 19 and we think that the lower appellate Court was right in coming to the conclusion that the reversioners' title to these plots was barred by the statute of limitation by adverse possession for more than the statutory period by the defendants' father Ram Narain and the defendants. The result is that the appeal in so far as it relates to these plots must fail and be dismissed.

As regards plot 18, the defendants in para. 14 of their written statement aver that Nistarini had got an absolute title to this property. Evidence was led on behalf of the defendants to prove that Nistarini got this property from Syam Chandra who was her father-in-law. The plaintiffs' witness Jatil who was examined on commission did, as a matter of fact, admit in his examination-in-chief that this property, plot 18, was given to Nistarini by Syam Chandra. It is said also that this was given to her for her maintenance. The lower Courts have held that Nistarini had got an absolute title to this property, and have dismissed the plaintiffs' suit in respect of this plot. In second appeal before us, it has been strenuously argued on behalf of the appellants that this decision of the Courts below is wrong inasmuch as the grant in favour of Nistarini having been made only for her maintenance, the said grant spent its force when she died and that, after her death, the property would revert to the heirs of Syam Chandra which the plaintiffs claim to be and which claim has been established on the findings of the Court. It appears clear that Nistarini was the widow of the predeceased son of Syam Chandra and that Syam Chandra was not under any legal obiigation to maintain Nistarini. This grant, therefore, which was made in favour of Nistarini could not be regarded as a maintenance grant in the technical sense of the term; that is, a grant which is given to a person for maintenance who is entitled to claim maintenance under the Hindu law. It is not a case where the grant is evidenced by a document wherein it is expressed that the grant is in lieu of maintenance or for maintenance. The effect of the evidence of defendant 2 Bishnu Chandra and of the plaintiff's witness Jatil is that this property was given to Nistarini and those witnesses proceeded to state that it was given to her for her maintenance. The evidence also shows that, after the grant was made, Nistarini left her father-in-law's place and went to reside at her father's place and lived there with her brothers up to the time of her death which took place in 1327 B. S. The evidence is that the property was given to her and it must be taken that it was given to her absolutely. Where a property is given to a person whether that person is a man or a woman, the grant must be taken to be an absolute grant. If a parson says: "I give this property to a particular woman," there is no rule of Hindu law which limits that grant to the lifetime of that particular woman. The matter was considered in the case of *Kollany Kooer* v. *Luchmee Pershad* (2), which was decided in 1875 by Ramesh Chunder Mitter, J., and the learned Judge pointed out that:

> "Adopting the rule of construction above quoted, we must hold that the gift in question was an absolute gift unless it can be shown that by the Hindu law gift to a female means a limited gift or carries with it the effect of erecting an estate exactly similar to the "widow's estate" under the law of inheritance. I am not aware of any such provisions in the Hindu law nor have we been referred to any authority in support of it."

This passage is quoted and approved by their Lordships of the Judicial Committee in the case of *Surajmani* v. *Rabinath Ojha* (3). We are not called upon here, it is to be observed, to construe any grant on paper or to construe

(1) [1915] 27 I. C. 954.

(2) [1875] 24 W. R. 395.

(3) [1908] 30 All. 84=35 I. A. 17=5 A. L. J. 67 (P.C.).

a particular grant the terms of which are known to us. The effect of the evidence, as we have already stated, is that this gift was made to Nistarini. This was a gift of a small portion of the property which belonged to Syam Chandra and was a gift to the widow of his predeceased son of the same kind as, the evidence shows, as the gift to his daughter Sarbeswari. The evidence discloses that Sarbeswari parted with the property which she got by way of gift in favour of her son-in-law and that there was subsequently a sale thereof by this son-in-law to another man. It is argued on behalf of the respondents that the effect of the evidence of the witnesses is that both these gifts namely, the gift to Nistarini and the gift to Sarbeswari stood on the same footing. There is considerable force in this argument. The learned advocate for the respondents has attempted to draw a distinction with regard to maintenance grants, that is, grants which are made in favour of persons who are entitled under the Hindu law to claim maintenance. But it has already been stated that Nistarini was not such a person. The gift to her must be taken to stand on the same footing as a gift to a stranger whether male or female.

Our attention has been drawn to several cases by the learned advocate for the appellants to the effect that, in construing the wills of Hindus, the ordinary notions of Hindus are to be taken into consideration and it is said that there is a general disposition amongst Hindus not to make a bequest of an absolute interest in favour of a female, the tendency being to retain the property in the family of the person bequeathing the property. This consideration, however, does not apply to the present case, for we find that Syam Chandra had no son at the time of his death. There was his daughter Sarbeswari and there was this Nistarini his predeceased son's widow. In these circumstances, the consideration which will apply to a case where there is either a son or an adopted son in the family will not apply to the present case. After giving our best consideration to the evidence of the two witnesses, namely the plaintiffs' witnesses Jatil and defendant 2 Bishnu Chandra, we think that the effect of that evidence is that this property plot 18 was given to Nistarini absolutely. These witnesses state that because she wanted to be maintained, therefore, Syam Chandra gave this property to her. It is a very different thing from saying that this was a gift to her in lieu of maintenance. We think, therefore, that the decisions of the Courts below are right with regard to this property plot 18. The result is that the appeal fails and must be dismissed with costs.

Mukerji, J.—I agree.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 477

PANCKRIDGE, J.

Ghasiram Goenka—Appellant.

v.

Haribux Goberdhonedas and *another*—Opposite Party.

Original Civil Jurisdiction Suit No. 159 of 1929, Decided on 5th December 1929.

Civil P. C., O. 3, R. 1—It is duty of counsel to consult client before consenting to decree—Decree should not be enforced in case of omission to do so—Legal practitioner—Compromise.

There is a duty upon counsel to consult his client and take his instructions and when the performance of the duty is omitted for whatever reason, it would be contrary to principle to enforce a decree passed in such circumstances. [P 479 C 2]

When a client is present in the Court he has a right to be consulted before the counsel gives his consent to a decree and consent given by the counsel without such consultation is without authority express or implied : *Neale* v. *Gordon Lennox*, (1902) *A. C.* 465 ; *A. I. R.* 1927 *Cal.* 714 and *Hickman* v. *Berens* 1892 2 *Ch.* 638, *Foll*: *Mathews* v. *Munster*, (1887) 20 *Q. B. D.* 141 and *A. I. R.* 1924 *Cal.* (651) *Dist.* [P 479 C 2]

S. N. Banerji, *C. C. Lewis* and *P. C. Bose*—for Appellant.

N. N. Sircar and *A. K. Roy* — for Respondent.

Judgment.—This is an application by Haribux Goberdhonedas that a consent decree made by my learned brother Buckland J., on, 14th August last be set aside.

The suit was one for Rs. 3052-9-2, being the price of goods sold and delivered, the applicants being impleaded as guarantors. The applicants entered appearance and filed a written statement by which they put the factum of the guarantee in issue. The suit came on for hearing on 14th August last. Mr. B. C. Ghose was briefed as counsel

for the defendants to ask for an adjournment. He applied for the adjournment which was refused and he was thereupon instructed to continue to represent the defendants in the case itself, the brief having previously been delivered to him. The applicant's account of the only important incident with which I am concerned is to be found in para. 10 of their petition which runs as follows:

"A short time after the case was opened by Mr. A. K. Roy who appeared for the plaintiff Mr. Roy read to his Lordship the Honble Mr. Justice Buckland the translation of a portion of the said letter and on Mr. Ghose asking Mr. Roy to show it to him the same was handed to Mr. Ghose. Mr. Ghose perused same, suddenly turned round and asked your petitioner's attorney to tell your pertitioners to consent to a decree and just as your pertitioner's attorney Mr. J. K. Mukherji was going to ask Goberdhonedas Deora who was present in Court if your petitioners were agreeable to consent to a decree, Mr. Ghose suddenly stood up and told the Court that your petitioners consented to a decree for the amount claimed in the plaint without the consent or authority of your petitioners."

Thereafter a decree was passed to which the applicants now take exception saying that counsel had no authority to consent and in fact consented against their wishes.

The petition is verified by Goberdhonedas Deora who describes himself as a partner in the defendant firm. In opposition an affidavit has been used in which the plaintiff swears that he was present in Court and that he overheard Goberdhonedas distinctly give authority to his counsel Mr. B. C. Ghose to use his discretion in the matter. Upon that affidavit I should not in any case have acted. I was at first disposed to take the view urged upon me by Mr. A. K. Roy that even if all the statements in the petition were correct, yet they disclosed no ground for setting aside the decree. That opinion, however, has not survived a closer examination of the authorities, and it has therefore become necessary for me to come to a conclusion as to the facts, and with the concurrence of counsel on both sides I have adopted the course taken by the Court in *Hickman* v. *Berns* (1) and have requested Mr. Ghose to make a statement from the Bar as to what occurred. The material parts of Mr. Ghose's statement are as follows:

"Mr. Roy relied strongly on a certain letter in Nagri and was opening that letter when I got up and objected and said that it was not disclosed in the affidavit of documents and therefore I was entitled to time upon that ground. Mr. Roy then pointed out to me much to my disappointment that inspection of this letter had been given, and although in fact it had not been disclosed by affidavit it was disclosed by a letter. Not being able to read Nagri myself I handed the original letter over to my solicitor or client and, in the meantime perused the pleadings. From the pleadings I came to the conclusion that if the letter had in fact been written by my client then the story of having nothing to do with the transaction or with the possession of the goods under the contract could not but be false, and thereupon I turned round and asked my lay client in the presence of my solicitor as to whether he admitted that this letter bore the signature of my client. I further enquired whether my client was present in Court and was going to give evidence. I then discovered that the gentleman present was not my client but his son. He further admitted that the letter bore his father's signature. Thereupon I turned round and said that there was no case and I will consent to a decree, and I got up and consented to a decree because I thought I would not take the risk of having my client put into trouble."

I accept that as a correct picture of what took place subject only to this. It is now agreed that Goberdhonedas, to whom Mr. Ghose spoke on this occasion, is in fact a member of the defendant firm and therefore a defendant himself, and Mr. Ghose was under a misapprehension when he treated the matter upon the basis that Goberdhonedas was merely a relative of one of the defendants and not one of his clients.

These being the facts it is urged upon me that the case is covered by the cases of *Mathews* v. *Munster* (2) and *B. N. Sen Bros.* v. *Chuni Lal Dutt & Co.* (3). Now, *Mathews* v. *Munster* (2) was an action for damages for malicious prosecution. When the case was part-heard defendants' counsel, before the defendants' arrival in Court and without the defendant's instructions consented to a verdict for £350 and costs, and also agreed that all imputations should be withdrawn against the plaintiffs. I assume, though it is not expressly stated, that the plaintiff's claim was for a larger amount than that mentioned in the consent decree. In the other case, *B. N. Sen* v. *Chuni Lal Dutt & Co.* (3), after negotiations outside Court, counsel on both

(1) [1895] 2 Ch. 633=64 L. J. Ch. 785=73 L. T. 223.

(2) [1887] 20 Q. B. D. 141.

(3) A. I. R. 1924 Cal. 651=33 I. C. 611=51 Cal. 385.

sides appeared in Court and consented to a decree for some Rs. 3,000 less than the amount claimed. The defendant was not present in Court owing, it was alleged, to a misapprehension as to the date fixed for the trial, and has given counsel no authority to consent to a decree. In each case the Court refused to set aside the decree.

It appears to me that the present case differs from those I have referred to in two particulars. Those were cases of genuine compromise in the sence that the plaintiff abandoned some of his claim and was willing to accept less than he possibly might have got had the case been carried to a conclusion. In the case before me counsel submitted to judgment for the full. amount claimed and costs. I am not prepared to say whether this alone takes the present case out of those to which I have referred. I prefer to distinguish it by what appears to me a far more important feature, namely, that in neither of the former cases was the defendant present in Court when the decree was consented to. That this is a matter which affects the situation seems to me clear from the language used by Lord Esher, M.R. in *Mathews* v. *Munster* (2). At p. 144, he says:

"If the client is in Court and desires that the case should go on and counsel refuses, if after that he does not withdraw his authority to counsel to act for him and acquaint the other side with this, he must be taken to have agreed to the course proposed. This case is a still stronger one for the client was not present and it is not pretended that he ever withdrew his authority to counsel."

Lord Esher's words seem to me to presuppose that if the client is present, then he should be consulted and given the opportunity of withdrawing his authority if he sees fit. The language used by Bowen, L. J., at p. 145, is still more striking:

"What is to be done if the client is in Court? Is it the duty of counsel to consult him? I should say "yes", with regard to important matters in which the client has an interest. It does not follow that counsel will submit to carry out the view of the client if it appears that it would be injurious to the client's interest. He has the alternative of returning his brief. I should be sorry to say that counsel ought not to consult his client on such a matter as a compromise of the action, but that is a point we have not got to consider, for in the present case the client was not present and cannot complain if his counsel, who was in command and had authority to do the best for his client, compromised the suit within the reasonable limits of his authority to compromise."

I have therefore come to the conclusion that in this case as the client was in fact present in Court, although his counsel did not appreciate the fact, the client had a right to be consulted before counsel gave his consent to a decree, that he was not in fact consulted, and that therefore counsel's consent was without authority express or implied. In my view it would not be in accord with the principles laid down by Lord Halsbury in *Neale* v. *Gordon Lennox* (4) or with the application of them by Sir George Rankin and Mitter, J., in *Joharmall Bhutra* v. *Kedar Nath Bhutra* (5) to let his decree stand. No doubt Mr. Ghose did what he did in what he conceived to be and in fact very possibly was his client's best interests. None the less where in Bowen, L. J's. opinion there is a duty upon counsel to consult his client and take his instructions, and the performance of that duty is omitted for whatever reason, I consider it would be contrary to principle for the Court to enforce a decree passed in such circumstances.

I therefore set aside the decree. The applicants must pay the costs of the trial before Buckland, J. As regards the costs of this application, inasmuch as it has been successful and the opposition to it has been supported by an affidavit made by the plaintiff which I hold to be wilfully false, I make no order.

R.M./R.K. *Decree set aside.*

(4) [1902] A. C. 465=71 L. J. K. B. 939=18 T. L. R. 791=87 L. T. 341=51 W. R. 140 =66 J. P. 757.

(5) A. I. R. 1927 Cal. 714=55 Cal. 113.

A. I. R. 1930 Calcutta 479

SUHRAWARDY AND COSTELLO, JJ.

Jobeda Khatun and *others*—Appellants.

v.

Sheik Monabali and *others* — Respondents

Appeal No. 72 of 1928, Decided on 5th March 1930.

(a) Evidence Act, S. 65 (c) — Original filed in another Court and not produceable without delaying suit—Certified copy is admissible.

The certified copy of a document, which is already filed in another Court and cannot be produced without unnecessarily delaying the trial of the suit, is admissible under S. 65 (c).

[P 480-C 1]

(b) Bengal Tenancy Act, Sch. 3, Art. 3—Property sold in execution of rent decree

and formal possession given — Suit brought alleging that decree under which property was sold was money decree — Defendant pleading limitation—Plaintiff alleging that delivery was given without his knowledge—Special limitation would not apply.

Two years after property was sold in execution of a rent decree and formal delivery was given, a suit was brought alleging that the decree under which the property was sold was not rent decree but money decree, and so the property was not liable to be sold, the defendants pleaded limitation, but the plaintiffs alleged that the landlord obtained decree secretly and the formal delivery was given without his knowledge and that he was dispossessed long after formal delivery was given in consequence of case under S. 107, Criminal P. C.

Held: that the special law of limitation would not apply to this case: 3 *I. C.* 315, *Ref.*

[P 480 C 1, 2]

Atul Chandra Gupta and *Radhika Ranjan Guha*—for Appellants.

Rupendra Kumar Mitter for *Bijan Kumar Mukherji* and *Gopendra Krishna Banerjee*—for Respondents.

Judgment. — Two points have been raised in this case on behalf of the defendants-appellants. The first is that Ex. 3, the kabala by which the plaintiff purchased the land in suit, was not rightly admitted in evidence by the trial Court. The document was not filed in proper time. A certified copy of it was filed before the suit was decided. An objection was taken to the reception of the certified copy and the plaintiff filed an affidavit saying that the original was filed in another Court and the learned Munsif accepted the copy on the ground that it would be an unnecessary waste of time to call for the original. The learned District Judge on appeal observed that this was only a "talking point" and had no substance whatever. The certified copy of the document was received by the Munsif in order to avoid delay. In our opinion it well came within S. 65 (c), Evidence Act, as it was not possible then to have the original brought within reasonable time. This objection must be overruled.

The second ground is that in this case the Courts below ought to have held that Art. 3, Sch. 3, Ben. Ten. Act, applies. A suit for rent was brought by the landlord and the holding was sold in execution of the decree and purchased by the appealing defendants. More than two years after the defendants obtained symbolical possession through civil Court, the present suit was brought to recover possession from them on the ground that the decree under which the property was sold was not a rent decree but a money decree and that the interest of the plaintiff did not pass thereunder. The defendants pleaded limitation and said that as the suit was brought more than two years after they had obtained possession through Court, it must be held to be barred by limitation. The plaintiff in his plaint alleges dispossession at a much later date. His case is that he was in quiet possession of this property. The landlord obtained a decree secretly, and had the property sold and the defendants obtained formal delivery of possession without his knowledge. He was, however, dispossessed in January 1914 much later than the date of delivery of possession through Court. The trial Court found that the plaintiff was dispossessed long after the formal delivery of possession to the defendants in consequence of a case under S. 107, Criminal P. C., in which the defendants were alleged to have forcibly cut the paddy grown by the plaintiff.

That being so, there was dispossession by the defendants not under their purchase under the rent decree, but by a subsequent act of force. This finding of the Munsif has not been set aside by the appellate Court though the learned Judge disposes of the plea of limitation by relying upon certain cases which have held that in the circumstances present in this case the special limitation does not apply. The finding of the Munsif does not appear to have been challenged before the learned Judge. That being so it cannot be said that because the dispossession by the defendants was under the rent decree obtained by the landlord, therefore on the authority of *Amiruddin Munshi* v. *Ulfatunnessa Bibi* (1) the special law of limitation will apply. That case has been discussed and dissented from in several cases, but it is not necessary in this case to discuss this point. We do not think that on the facts of this case the special law of limitation arises. Accordingly we dismiss this appeal with costs.

S.N./R.K. *Appeal dismissed.*

(1) [1909] 3 I.C. 351.

A. I. R. 1930 Calcutta 481

PEARSON AND PATTERSON, JJ.

Hachani Khan—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 546 of 1929, Decided on 21st January 1930.

(a) Criminal P. C., S. 297—Judge should group witnesses in such way as to direct attention of jury to evidence regarding each of particular facts sought to be proved on each side.

The Judge in his charge to the jury, should group the witnesses in such a way as to direct the attention of the jury to the evidence regarding each of the particular facts sought to be proved on each side. He should not merely place the depositions before the jury in the order in which they were examined as it may lead to confuse the minds of the jury in some respects. [P 482 C 1, 2]

(b) Criminal P. C., S. 297—Material witness not examined by prosecution—Judge should direct jury to presume that his evidence would not have supported prosecution.

Where a material witness for the prosecution is not called the Judge in his charge to the jury, should direct them that it should be presumed from the fact of his non-examination, that if he had been examined his evidence would not have supported the case for prosecution. [P 484 C 2]

(c) Criminal P. C., S. 297—Evidence of approver—Judge should tell jury that corroboration required is one tending to connect each accused with offence.

In dealing with the evidence of an approver the Judge should tell the jury that the sort of corroboration that is required is corroboration in material particulars tending to connect each of the accused with the offence.

Where the jury are well aware of the kind of corroboration required, the omission to state the law in more precise terms does not amount to misdirection.

But the omission of the Judge to draw the special attention of the jury to the fact that though there is some corroborative evidence as regards the movements of two of the accused in a case of dacoity immediately before and immediately after the occurence, there is no such corroboration in respect of the third accused, amounts to misdirection. [P 485 C 2]

Nurul Huq—for Appellants.

Khondkar and *Nirmal Chandra Das Gupta*—for the Crown.

Judgment.—This case arises out of a dacoity that was committed on the night of 2nd November 1928, in the boat of one Kali Kumar Banikya, an itinerant vendor of metal utensils. The other occupants of the boat were Kali Kumar's nephew, Lebu, and two Manjhis named Rajendra and Bir Charan. They were all strangers to the locality and so were unable to recognize any of the dacoits as men who had been known to them from before. Kali Kumar lodged a first information at the thana on 3rd November, in which he stated that none of the occupants of the boat had been able to recognize anyone, but that he thought that he might be able to recognize two or three of the dacoits, if he saw them again. He also gave descriptions of three of the dacoits, one of whom, he said, had threatened him with a knife, while the other two had caught him by the throat. On coming to the spot, the Sub-Inspector arrested one Samiruddin, and in consequence of information given by Samiruddin, a box of utensils that had been stolen by the dacoits was recovered from the bed of the river. Various other articles were also seized, and a number of persons were arrested and sent up for trial. When produced before the Magistrate, Samiruddin made a confession and was subsequently made an approver. Seven persons, including the three appellants, were committed for trial before the Third Additional Sessions Judge of Mymensingh, and of these, three were acquitted, while the three appellants and one other person, who has not joined in the present appeal, were convicted on a unanimous verdict of guilty.

The evidence consists mainly of that of the approver Samiruddin who gives a detailed account of the whole affair from start to finish, and the evidence of Kali Kumar, Lebu and Rajendra to the effect that the three appellants were among the dacoits, and also the evidence of some of the local men regarding the movements of the approver and of his associates immediately before and immediately after the occurrence, as well as evidence regarding the recovery of the box of utensils and the proceedings of the police in the course of the investigation.

The statements of the appellants at the trial were to the effect that they were innocent and knew nothing about the occurrence, while the defence sought to be set up on their behalf in cross-examination and in argument appears to have been that they had been falsely implicated by the approver, partly in order to exculpate his real associates in the crime and partly out of enmity. It

was not denied by the defence at the time of the trial that the dacoity had actually taken place as alleged and that the approver had been one of the dacoits, nor has any such contention been urged on appeal.

In his charge to the jury the learned Additional Sessions Judge has dealt with the matter in the following way. After explaining the charges he places the approver's evidence before the jury at great length, at the same time stating that though it is not illegal to convict an accused person on the uncorroborated testimony of an accomplice, it is considered as a rule of practice unsafe to do so, unless the testimony of the approver is corroborated by independent and reliable evidence in material particulars fixing the guilt on that person. He next places before the jury the evidence of Kali Kumar, Rajendra and Lebu with special reference to the question of identification, at the same time drawing the attention of the jury to the discrepancies in the evidence of these witnesses and of the approver as regards the specific acts attributed by them to the various accused persons. He also draws the attention of the jury to the fact that Rajendra and Lebu had not been able to identify any of the accused before the police, and asks them to consider whether in these circumstances the evidence of these witnesses is not altogether worthless, and whether it can at all the relied on as corroboration of the evidence of the approver Samiruddin. As regards Kali Kumar, the Judge points out that Kali Kumar has stated in his evidence that he hopes to get back his money in case of conviction, and he asks the jury to consider whether this hope may have induced Kali Kumar falsely to identify some of the accused as having been among the dacoits. After discussing the evidence of the approver and of the occupants of the boat in the above manner, the Judge proceeds to place the evidence of the remaining witnesses before the jury. This he does at great length, indeed at too great length, for the important facts elicited from these witnesses are to some extent buried under a mass of unnecessary and unimportant details. This is especially unfortunate in view of the fact that the Judge, instead of grouping the witnesses in such a way as to direct the attention of the jury to the evidence regarding each of the particular facts sought to be proved on either side, has merely placed their depositions before the jury in the order in which they were examined. This method of dealing with the evidence may have tended to confuse the minds of the jury in some respects, but this defect has in our opinion been remedied (except to some extent, as regards the existence or the absence of corroboration of the approver's evidence, a point which will be referred to again presently), by the summing up of the evidence against each individual accused in the concluding portion of the charge.

After placing the evidence before the jury in the manner indicated above, the Judge briefly discusses the evidence to show that the dacoity actually took place, and that the approver was one of the dacoits. He then goes on to say that the most important question is whether any of the accused persons standing in the dock and if so, which of them, were concerned in the dacoity, and again warns the jury that it would be extremely unsafe to rely solely upon the uncorroborated testimony of the approver. He also reminds them that they will have to consider whether the statements of the approver regarding the complicity of any of the accused have been corroborated by independent, untainted and reliable evidence, and points out that

> "it is one thing that a dacoity was committed, but it is quite another thing that any of the accused was concerned in the crime."

In this connexion he invites the attention of the jury to the evidence suggesting the existence of enmity between Samir and some of the accused and to the defence contention that Samir may have implicated them falsely out of enmity and in order to shield his real associates. He then again refers to the evidence of identification, pointing out that there was moonlight at the time of the occurrence, and that Kali Kumar had no grudge against any of the accused; and after referring again to the discrepancies regarding the part played in the dacoity by the persons whom Kali Kumar had identified, he asks the jury to consider whether, independently of the evidence of the approver, they can rely upon the identifications made by Kali Kumar at the trial.

In his summing up of the evidence against each individual accused, the Judge draws the attention of the jury, so far as the accused persons other than the present appellants are concerned, to the existence, or the absence, of independent evidence corroborating the approver. In dealing with the case of Hachani Khan one of the present appellants, the Judge refers to his identification by Kali Kumar, to the discrepancies regarding the part played by him as pointed out in the earlier part of the charge, and to the evidence suggesting the possible existence of enmity between him and the approver Samiruddin. He omits, however, to refer to the evidence of (P. W. 11), Safiruddin, who speaks of the assemblage of a number of people (including Meghu, one of the appellants), in Hachani's house on the night of the occurrence. This is a piece of evidence which if believed, tends to corroborate the evidence of the approver, both in respect of Hachani and in respect of Meghu. The Judge has dealt with Meghu's case in a manner similar to that in which he has dealt with Hachani's case referring again to the evidence of identification by Kali Kumar and to the discrepancies between the evidence of Kali Kumar and Samiruddin regarding the particular part played by the accused. He has also referred to Safiruddin's evidence regarding Meghu's presence in Hachani's house on the night of the occurrence and to the evidence of (P. W. 19), who says that he saw Samiruddin (the approver) and Meghu sleeping together in a hut in Meghu's bari shortly before sunrise on the morning after the occurrence. This is a piece of evidence which, if believed, tends to corroborate the approver's evidence as against Meghu. The Judge has not in so many words drawn attention of the jury to the fact that the evidence of Safiruddin and of Samiruddin Taluqdar (P. W. 19), tends, if believed, to corroborate the approver's evidence as regards Meghu's participation in dacoity, but he has, after referring to their evidence, again reminded the jury of the evidence of enmity betweeen Meghu and the approver.

As regards the appellant Shah Newaj alias Fuler Bap, the Judge asks the jury to consider whether they can rely on the identification by Kali Kumar and the approver. He has not, however, specifically drawn their attention to the fact that, apart from the identification of Shah Newaj by Kali Kumar, there is no other evidence of the approver so far as the participation of Shah Newaj in the dacoity is concerned. It may here be remarked that that there is some evidence on the record to the effect that some of the accused persons, including the three appellants, had been at the *hat* on the day immediately preceding the occurrence, but the Judge has quite rightly not treated this as corroboration of the approver's evidence to the same effect, and has in fact not referred to it in his charge, except quite casually while placing the evidence of the witnesses before the jury. It would perhaps have been better, if the Judge had told the jury in so many words that the evidence on this point ought not to be regarded as corroborating that of the approver inasmuch as it in no way tended to connect any of the accused with the actual occurrence.

It is true that the evidence on this point tends to corroborate Kali Kumar's evidence to the effect that he had seen these persons at the *hat* on the day in question. The first information, however, contains no mention of Kali Kumar having recognised any of the dacoits as men whom he had seen in the *hat* on the previous day, (as he now says), and it would have been better if the Judge had drawn the attention of the jury to this fact. It is very doubtful whether there is any truth in the allegation but the Judge, though he did mention it in stating the case for the prosecution, does not appear to have laid any stress on it and there is no reason to suppose that the jury attached any importance to it or that they might have taken a different view of Kali Kumar's evidence if their attention had been specifically drawn to the fact that the first information contains no mention thereof. As a matter of fact, the first information was read over to the jury in the course of the charge: so they were in a position to notice the omission for themselves and to draw such inference therefrom as they might think fit.

It has been urged on behalf of the appellants that there are certain defects in the charge which amount to misdirections and that the result has been a failure of justice. It is contended in the first place that there was an omission amounting to a misdirection in not drawing the special attention of the jury to the fact that the first information contains no mention of Kali Kumar having, as he stated in his evidence seen some of the dacoits including the present appellants, at the *hat* on the day immediately preceding the occurrence. This point has already been referred to above and for the reasons given we are of opinion that the accused have not been prejudiced by the omission in question, and that there is, therefore, no substance in this contention.

Another point that has been taken is that the Judge did not draw the attention of the jury to the fact that there was no evidence to show that Kali Kumar identified any of the present appellants before the investigating police officer. It is a fact that there is no such evidence on the record, and the reason is obvious, namely that, having regard to the provisions of S. 162, Criminal P. C., it was not open to the prosecution to question Kali Kumar on this point. It was, however, open to the defence to cross-examine him on the point (if he had, in fact, not identified the appellants before the Sub-Inspector) and this the defence did not do. The approver was arrested on 7th November and the appellants, Shah Newaj and Meghu were arrested on the following day. There is evidence that Shah Newaj and some others (but not Meghu) were taken to the complainant's boat after arrest and that Rajendra and Lebu failed to identify any of them as having been among the dacoits. There is, however, no evidence as to whether Kali Kumar did or did not identify any of these persons before the Sub-Inspector as having been among the dacoits. Now would such evidence have been admissible unless the defence had chosen to cross-examine Kali Kumar on the point. As regards Meghu, there is no evidence to show that he was at any time taken to the complainant's boat for the purpose of identification or that Kali Kumar and his companions were ever asked during the course of the police investigation whether they could identify him or not. As regards Hachani he was arrested later and was shown to Kali Kumar at the thana, but there was no cross-examination as to whether Kali Kumar did or did not identify him at that time.

In these circumstances the Judge was quite right in only drawing the attention of the jury to the fact that Rajendra and Lebu had not been able to identify Shah Newaj before the police, and in making no comments as regards the evidence or lack of evidence of identification before the police in respect of the other two appellants, Hachani and Meghu.

Then again, it is pointed out that Bir Charan, one of the occupants of the boat, was not examined as a witness and it is urged that the Judge was guilty of a misdirection in not telling to the jury that it might and indeed should be presumed from the fact of his non-examination that if he had been examined his evidence would not have supported the case for the prosecution. This contention is perfectly correct so far as it goes. The Judge should in our opinion have given the jury a direction on these lines. There is, however, evidence that Bir Charan is a very old man and there is nothing to show that he ever came out of the covered portion of the boat or that he saw anything of the dacoity. This being so we have no doubt that the jury, though not given any special direction on the point drew the correct inference for themselves, namely that Bir Charan if he had been examined as a witness would not have been able to throw any light on the question of the identity of the dacoits. In this view of the matter, the omission to give the jury the direction that is usually given in such circumstances, is a matter of little importance and cannot possibly have had any effect on the verdict.

Lastly, and this is a point of some importance, it is contended that the charge is defective inasmuch as the Judge did not properly direct the jury regarding the kind of corroboration that is required before placing reliance on the evidence of such an approver as the approver in the present case. It is conceded that the Judge repeatedly told

the jury that it would be unsafe to base a conviction on the evidence of the approver, unless, such evidence was corroborated by independent and reliable evidence in material particulars, but it is contended that the Judge should have gone further than that, and should have explained to the jury that by the expression "material particulars," as used in this connexion, is meant such particulars as tend to connect each of the accused with the offence charged. In this connexion reference has been made to the case *Rebati Mohan Chakravarti* v. *Emperor* (1) in which it was held that it is for the Judge to determine whether there is any evidence that does corroborate the story of the approver so far as the complicity of the accused is concerned, and that it is the duty of the Judge to direct the attention of the jury to those portions of the evidence confirming or corroboratiug the accomplice's story, which do or do not fulfil the requirements referred to above, namely the evidence corroborating the accomplice's story in material particulars implicating the accused. In that case the Judge had, in his charge to the jury, treated as corroborative evidence, evidence which in no way tended to connect tht accused with the offence, and in this he was held to have been wrong, but the conviction was nevertheless upheld,as it was found that there was in fact sufficient corroborative evidence in law against the two appellants, that is to say, evidence corroborating the accomplice in some material particulars implicating the accused. In the present case the Judge has not indeed told the jury, in so many words, which portions of the evidence should be regarded as corroborative in the above sense, and which portions should not be so regarded, but there are several passages in his charge which must in our opinion have had the same effect on the minds of the jury as a specific direction on the lines indicated above would have had, as for example, the passage that has already been quoted, namely :

"it is considered as a rule of practice unsafe to convict an accused upon the testimony of an approver, unless corroborated by independent and reliable evidence in material particulars fixing the guilt on that accused."

Then again, after placing the whole of the evidence before the jury, the Judge says :

"The most important question is whether any of the accused persons standing in the dock, and if so which of them, were concerned in the dacoity. On this point the jury, unless they are inclined to rely solely upon the uncorroborated testimony of the approver which would be extremely unsafe, will have to consider whether the statements of the approver regarding the complicity of any of the accused have been corroborated by independent, untainted and reliable evidence. It is one thing that a dacoity was committed, but it is quite another thing that any of the accused was concerned in the crime."

Lastly, in the concluding paragraph of the charge, the Judge again reminds the jury that

"though it is not illegal to convict any of the accused on the uncorroborated testimony of the approver, it would be extremely dangerous to do so without corroboration of Samir's statements regarding the complicity of the accused or any of them by independent reliable evidence."

In view of these remarks it may, we think, be assumed that the jury were well aware that the sort of corroboration that was required, was corroboration in material particulars tending to connect each of the accused with the offence, and this being so, it cannot, in our opinion, be held that the omission to state the law on the point in more precise language amounted to a misdirection.

Turning now to the cases of the individual appellants, it is in our opinion to be regretted that the learned Sessions Judge, in summing up the evidence against each, did not indicate more clearly in what respects the approver's evidence had been corroborated as against each, and in what respects it had not been so corroborated. This is not a matter of much importance so far as the appellants Hachani and Meghu are concerned, for there is, in our opinion, as in *Rebati Mohan* v. *Emperor* (1), sufficient corroborative evidence in law against those two appellants on the record, and that evidence has been very fairly and fully placed before the jury in other portions of the charge.

As regards Shah Newaj, however, the Judge ought, in our opinion, to have drawn the special attention of the jury to the fact that though there was some corroborative evidence as regards the movements of the appellants, Hachani and Meghu, immediately before and immediately after the occurrence, there

(1) A. I. R. 1929 Cal. 57=115 I. C. 258=30 Cr. L. J. 485=56 Cal 150.

was no such corroboration in respect of this appellant, Shah Newaj. The omission to do so amounts in our opinion, to a misdirection, and having regard to the weakness of the evidence of identification of Shah Newaj and the evidence regarding the existence of enmity between this appellant and the approver, it must, we think, be held that the evidence against him, is insufficient to justify a conviction, and that the misdirection referred to above has in fact occasioned a failure of justice, so far as this appellant, Shah Newaj, is concerned.

In these circumstances, the conviction and sentence in respect of the appellant Shah Newaj should, in cur opinion, be set aside, and he should be acquitted and released from custcdy. As regards the other two appellants, Hachani and Meghu, the convictions and sentences should be upheld, and their appeals dismissed.

R.M./R.K. *Order accordingly.*

A. I. R 1930 Calcutta 486

PEARSON AND MALLIK, JJ.

Matabbar Molla—Petitioner.

v.

Golam Panjaton—Opposite Party.

Criminal Revn. No. 372 of 1929, Decided on 12th April 1929.

(a) Criminal P. C., S. 137.— Accused alleged to have obstructed public pathway—On receipt of notice of proceedings under S. 133 he appearing in Court — Magistrate instead of enquiring whether he denied public right in pathway enquiring whether there was obstruction — Procedure held to be wrong.

Where the accused is alleged to have obstructed a public pathway, and on receipt of notice of the proceedings under S. 133, he appears in Court, the first duty of the Magistrate is to question him whether he denied the existence of public right in the pathway. If instead of doing so the Magistrate proceeds to enquire into the matter whether there was any obstruction, the procedure is wrong in law. [P 486 C 2]

(b) Criminal P. C., S. 139-A.— Accused alleged to have obstructed public pathway —Evidence on record indicating that path was private—Magistrate should stay trial until question is decided by civil Court.

Where accused is alleged to have obstructed a public pathway and there is some evidence on record indicating that the path was private, it is incumbent on a Magistrate under S. 139-A to stay his hands immediately, until the matter of the existence of the public right was decided by a competent civil Court. [P 486 C 2]

Panchanan Chaudhuri—for Petitioner.

Manindrakumar—for Opposite Party.

Judgment. — This rule is directed against an order whereby a conditional order under S. 133, Criminal P. C., was made absolute. The rule was issued on ground 2 alone of the petition and that ground was that the procedure as laid down under Ss. 139-A and 137, Criminal P. C., had not been followed. It appears that a notice was at first served on the petitioner to show cause why he should not be prosecuted under S. 283, I. P. C., and the petitioner, on the notice being served on him, appeared and showed cause. Thereupon, preceedings were drawn up against him under S. 133 of the Code and, when the petitioner appeared and showed cause by saying that his objection was the same as contained in his first petition, the learned Magistrate proceeded to enquire into the matter whether there had been any obstruction and, having come to the finding that there had been an obstruction, made the conditional order absolute. The procedure followed by the learned Magistrate was, in our opinion clearly wrong in law. When the petitioner, on receipt of the notice of the proceedings under S. 133, appeared in Court, the first duty of the Magistrate was to question him whether the petitioner denied the existence of public right in respect of the pathway alleged to have been obstructed. This the Magistrate did not do and he proceeded, as stated before, to enquire into the matter whether there had been any obstruction. The order of the learned Magistrate shows that there was some evidence before him, evidence which he nowhere said was unreliable, to indicate that the path was a private path. If the Magistrate had before him any evidence of this nature, it was, under the provisions of S. 139-A, Criminal P. C., incumbent on him to stay his hand immediately, until the matter of the existence of public right was decided by a competent civil Court. This again the learned Magistrate did not do in the present case.

We are, therefore, of opinion that the order of the learned Magistrate cannot be sustained. The rule is, accordingly, made absolute. The order passed by the Magistrate, making the conditional order under S. 133, Criminal P. C., absolute, is set aside and it is directed that he do proceed with the proceedings

which he started under S. 133 in accordance with law, after complying with the mandatory provisions of S. 139-A of the Code.

S.N./R.K. *Rule made absolute.*

A. I. R. 1930 Calcutta 487

C. C. GHOSE AND PANTON, JJ.

Corporation of Calcutta—Petitioner.

v.

T. H. E. Edwards—Opposite Party.

Criminal Revn. No. 236 of 1929, Decided on 2nd May 1929, against order of Presidency and Municipal Magistrate, Calcutta, D/- 21st December 1928.

Calcutta Municipal Act, S. 535—Order passed under S. 535 (2) (a)—Person in whose favour order was passed claiming costs by subsequent application— Magistrate can consider that question.

There is nothing in the terms of S. 535 or in any other section, which prevents the Magistrate from taking into his consideration on a date subsequent to the date of order under S. 535 (2) (a) the question of costs raised by an application by the person in whose favour that order was passed.

[P 487 C 2]

H. D. Bose with *Debendranath Bagchi* and *Gopendrakrishna Banerji* —for Corporation.

Mrityunjay Chattopadhyaya and *Jnanchandra Ray* — for Opposite Party.

Judgment.—The short facts necessary for the purposes of this judgment are as follows: Edwards is a ratepayer of the Corporation of Calcutta and he has his house in Burdwan Road at Alipur. Immediately to the south of his house, there is another house belonging to a gentleman, Amulyadhan Addy, and tenanted by D. M. Ray. In the compound of this last-mentioned house, were erected certain huts with cutcha floorings, in which were kept a number of cows, goats and horses. The result was that the whole place was turned insanitary and Edwards complained to the Corporation of Calcutta for the purpose of inducing the latter to take action to prevent or abate the nuisance. Nothing was apparently done and, in the last resort, Edwards complained before the Municipal Magistrate under S. 535, Calcutta Municipal Act.

The Magistrate came to the conclusion that there was no nuisance and refused to pass any order. The matter then came to this Court and, after an examination of the record, this Court passed an order under S. 535 (2) (a), by which it directed the Magistrate to pass a written order directing the Corporation to prevent or abate the nuisance. Thereafter, the Corporation, it would appear, took steps to abate and remove the nuisance in question. The date on which the Magistrate, in pursuance of this Court's order, made the written order referred to above is 10th August 1928. Thereafter, Edwards made an application for the award of costs to him against Messrs. Addy and Ray. That application was considered to be misconceived and it was allowed to be withdrawn. Subsequently, Mr. Edwards made an application against the Corporation of Calcutta under the provision of S. 535 (2) (c) of the award of costs and compensation against them. The Magistrate has gone into the matter and has awarded a sum of Rs. 501 against the Corporation of Calcutta and in favour of Edwards. It is against this last-mentioned order that a rule was obtained and Mr. Bose has appeared in support of the rule. His principal argument is that either the order is one which should have been made at the time when the Magistrate made the written order under S. 535 (2) (a) or the order should not have been made at all.

There is nothing, in our opinion, in the terms of S. 535, Calcutta Municipal Act, or in any other section, which prevented the Magistrate from taking into his consideration, on a date subsequent to the date of the order, under S. 535 (2) (a), the question of costs raised by Edwards. In that view of the matter, Mr. Bose's contention must be negatived. We have examined the terms of the judgment of the Magistrate assessing the amount of costs and it seems to us, on an examination of the circumstances present on the record and taking into account the submissions made by Mr. Bose, that the award of costs must be substantially varied, and we think that the ends of justice will be sufficiently met if we reduce the amount of costs and compensation from Rs. 501 to Rs. 100. With this variation, the rule is discharged. Nothing that we have said will prevent the Corporation of Calcutta, if so advised, from making

any application against anybody whom they might choose to proceed against in respect of costs incurred for abatement of the nuisance.

S.N./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 488

RANKIN, C. J., AND C. C. GHOSE, J.

K. B. Dutt—Plaintiff—Petitioner.

v.

Shamsuddin Shah Shaheb and *others*—Defendants—Opposite Parties.

Civil Revn. No. 608 of 1928, Decided on 8th January 1930, against order of Sub-Judge, Dacca, D/- 4th April 1928.

Civil P. C., O. 9, R. 13—If no case is made under O. 9, R. 13, Court has no power to restore suit by exercising inherent jurisdiction under S. 151—O. 9, R. 13, does not apply to person who has no excuse for not being present or who is refused adjournment for not having his witnesses ready—Civil P. C., S. 151.

If no case is made out to satisfy R. 13, O. 9, it is not open to the Court to enlarge the rule by taking recourse to S. 151. The rule deals not with a person who has no excuse for not being present or who, as a reason for not having all his witnesses, asks for an adjournment for the purpose of calling further evidence and is refused. That is not the subject-matter of the rule at all.

Where, therefore, an ex parte decree is set aside in such a case by the Court on an application under O. 9, R. 13, the Court also invoking the inherent jurisdiction under S. 151 it is an instance of decree being set aside irregularly. The Court purports to exercise powers which it does not possess and the order is liable to be set aside. [P 490 C 1]

Jogesh Chandra Roy and *Rajendra Chunder Guha*—for Petitioner.

Nurul Huq and *Biraj Mohan Majumdar*—for Opposite Party.

Rankin, C. J.—In my opinion, this rule should be made absolute. It appears that the plaintiff filed a suit against a very great number of defendants in October 1923 asking, in substance, for a declaration of title to a certain property and for certain reliefs as regards possession and rents. Certain of the defendants filed written statements but none of the opposite parties to this rule except defendant 17 filed a written statement. A local investigation was ordered in 1924 and it appears that in 1925 various local enquiries were directed and were prosecuted. The commissioner made more than one report and, in May 1926, certain of the defendants filed objections to the report. The case was being tried before a Subordinate Judge of Dacca and, in that town, there is apparently more than one Subordinate Judge. In November 1926, it appears that the case had been transferred from one Judge to the other more than once and the position was, when we come to March 1927, that the case was on the file of the Second Subordinate Judge. It appears that on 30th June 1927, it was transferred to the file of the Fourth Subordinate Judge, a Mr. Ghose. Before that time the final date for hearing, 18th July 1927, had been fixed. There is no doubt that all the parties knew or had the usual means of knowing that 18th July was the hearing date. It is said that some of them had not become aware of the fact that instead of one Judge trying the case it was to be tried by another. But the two Judges were not sitting in different towns and I am entirely unable to see on the facts of this case that that matters very much.

Now, what happened on the date in question was that the Subordinate Judge, first of all, was asked by both sides to give an adjournment and he refused. I need not say that it is often very right indeed for a Judge to refuse adjournments which are asked for by both sides. The commonest experience in the District Courts is that for no reason at all cases are adjourned again and again and again and nearly always on petitions of both sides. The plaintiff was able in spite of that refusal to collect certain witnesses and he did, in fact, call four witnesses when the case was taken up on that day. One of the defendants, defendant 13, called a witness. The other defendants were in this position, it would seem, that when they found that the case was being taken up they too wanted an adjournment. They had not any excuse whatever for themselves not being properly present or not having properly instructed a pleader or anything of that kind; but they alleged before the Judge that there were certain witnesses against whom they desired processes to issue.

The learned Judge was not satisfied that there was any reason why the case should not go on and he determined that it should go on. The plaintiff called his four witnesses and defendant 13 called his witness. Anybody

who desired to take part was heard in argument, but the particular defendants with whom we are concerned did not take any part in the proceedings. When they found that the Judge was going to go on with the case, neither they nor their pleader took any further part in the proceedings. Thereafter, the plaintiff's suit having been decreed as against them ex parte, certain of these defendants on 16th August 1927 applied, it would seem, under R. 13, O. 9, Civil P. C., for restoration of the suit. As the decree was an ex parte decree against them, they were entitled to apply under that rule. They put forward a Bengali petition which contained no reasons whatever of the character required by R. 13. They made a case that the value of the suit was high and that it was a great pity that it was decided against them ex parte but any relevant reason why they were not ready on 18th July was not disclosed by the petition. They supported that case by calling two witnesses. One was a gentleman who had recently been appointed guardian ad litem of a certain party who was not one of the applicants. The evidence of the other witness disclosed no reason, so far as I can discover, why these defendants were not ready to appear and take part in the case on 18th July.

In these circumstances, it has to be observed that all the persons applying to the learned Judge in the Court below except one were defendants who had not even filed a written statement, but defendant 17 one of these applicants had filed a written statement. Now, the learned Judge when he dealt with this somewhat curious application most inadequately supported by evidence proceeded on this principle: he first of all, enlarges on the fact that the plaintiff himself was not ready on the date in question. Well, if the plaintiff had not been able to produce evidence in support of his case, he would have suffered for his unreadiness. In fact, however, he was able to call and did call his witnesses. The learned Judge says that the suit is an old one no doubt, but big properties are at stake and that one more opportunity by way of warning should, in his opinion, have been given to these defaulting defendants. He then says that it was urged that the grounds stated were not proper grounds under O. 9, R. 13. He says:

"There may be some force in their contentions, but they also narrowly escaped dismissal of the suit; this plaintiff also applied for time as he was not ready."

These reasons do not appear to be relevant to the objection that the grounds relied upon were insufficient under R. 13. The learned Judge goes on:

"It is a fit case also under S. 151 where inherent jurisdiction of the Court should be exercised to set aside the ex parte decree. I find sufficient cause. It is ordered that the ex parte decree be set aside."

I am by no means satisfied that the learned Subordinate Judge found or intended to find that there was a case made out to satisfy R. 13, O. 9 and I entirely dissent from the view that, if no case is made out under that rule, it is open to the learned Judge to enlarge the rule by talking about S. 151. The rule deals not with a person who has no excuse for not being present or who, as a reason for not having all his witnesses, asks for an adjournment for the purpose of calling further evidence and is refused. That is not the subject-matter of the rule at all. The rule is dealing with a case where a decree is passed ex parte and it says that, if summons is not served or if the party is prevented by any sufficient cause from appearing when the suit is called on for hearing, the Courts shall make an order restoring the suit. In my judgment, so far as this batch of applicants, only one of whom filed a written statement, is concerned, the case does not come within R. 13, O. 9. It appears to me that the learned Judge has restored the suit purporting to exercise powers which are not to be found in R. 13, O. 9.

It may be perfectly true that a defendant who has not filed a written statement may take part to a certain extent in the hearing of the case, but an application to restore, when made at the instance of such a defendant, is in a particularly weak position because people who do not trouble to file written statements are not generally very diligent in other features of the defence. I entirely agree with the argument that, if this were a mere question whether or not certain cause was suffi-

cient it would be a matter which we should not discuss under S. 115, Civil P. C. In my judgment, in this case the learned Subordinate Judge has purported to exercise powers which he does not possess. His duty was to exact from the particular applicants before him satisfactory evidence of sufficient cause why they were unable to appear when the case was called on for hearing. I say nothing now about the exact meaning of the word "appearing." They must show what the rule exacts. In my judgment, this case is an instance of a decree being set aside irregularly. It appears to me that the rule should be made absolute with costs. The hearing-fee in this Court is assessed at three gold mohurs.

C. C. Ghose, J.—I agree.

R.M./R.K. *Rule made absolute.*

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* A. I. R. 1930 Calcutta 490

RANKIN, C. J. AND C. C. GHOSE, J.

Jugal Chandra Anuni—Petitioner.

v.

Ramesh Chandra Chakravarty and *others*—Opposite Party.

Civil Revn. Petn. No. 1272 of 1929, Decided on 10th January 1930, from an order of the District Judge, 24-Perganahs, D-/25th May 1929.

*** Bengal Tenancy Act, S. 153—Substance of the matter involved in petty case relating only to irreguliraty of proceedings under Civil P. C., O. 21, R. 90—Question under Limitation Act, S. 18 incidentally involved—Still no appeal lies.**

When S. 153 says that the question as to the irregularity of the proceedings in publishing or conducting a sale is not a question relating to title to land, it does not mean that in every case under R 90, O. 21, Civil P. C., there is nevertheless to be an appeal, because in every case under R 90 there must be a finding not merely as to the regularity of the proceedings but also as to substantial injury. Such an interpretation would give no meaning to the Explanation consistent with the exception. Again, the Explanation does not mean that, if in the course of deciding the question of regularity under R. 90 the Munsif has to decide a question of limitation incidental to the application before him, then the Explanation ceases to take effect and the right of appeal emerges. The meaning of the Explanation must at least be this that where the decision holds that on the ground of irregularity in the sale proceedings the sale is to be set aside or that the sale must stand notwithstanding the allegations of irregularity therein the case is not to be deemed to be one within the exception and consequently no right of appeal will exist. [P 494 C 1,2]

Where the trial Court's ultimate finding and the whole of the ultimate effect of his order in a petty case were to set aside the sale on the ground of irregularity and dealt with the question of fraud while dealing with the question of limitation under S. 18.

Held: that the Explanation to S. 153 means that there was to be a right of appeal in these cases, where any incidental matter such as limitatation or locus standi had to be decided before the application under R, 90 could be disposed off. Such proceedings were intended to be proceedings which in petty cases were to be disposed of without appeal. (*Case law discussed.*) [P 495 C 1]

Narendra Kumar Das and *Bhupendra Nath Das*—for Petitioner.

Hira Lal Chuckerbutty—for Opposite Party.

Rankin C. J.—I think this Rule must be made absolute. The petitioner before us is a tenant against whom his landlord brought a rent suit for a sum under Rs. 50 before a Munsif who was specially empowered under S. 153, Ben. Ten. Act. Having recovered his decree, the plaintiff landlord proceeded in execution to put the tenancy to sale and purchased it himself at a sale in execution on 12th April 1926. On the 16th March 1928, some two years later, the tenant, petitioner before us, applied before the specially empowered Munsif under O. 21, R. 90, Civil P. C., to have the sale set aside. He made no case in his application that the sale was null and void apart from the circumstances which were properly within the scope of R. 90 no case to the effect that the parties had not been brought before the Court or that the proceedings were entirely without jurisdiction. His case was that there had been suppression of processes and that the sale was held at a gross under-value. The matter was tried by the Munsif whose order is dated 18th March 1929. There was in this case not only a delay of two years before the application was brought but a delay thereafter of one year before it was disposed of in the trial Court.

It appears that the suit when brought against the tenant was brought against him on the footing that he was a minor and a certain person was appointed his guardian-ad-litem. In the execution proceedings, to procure a sale, another person was described as the guardian of the minor, but no steps were taken in the execution proceedings to

constitute this other person as guardian of the minor.

The Munsif dealt with the case as being one on the usual grounds of material irregularity, fraud and substantial injury. He found that the judgment-debtor was a minor and that, although in the execution proceedings one Malik Kola was described as the guardian of the minor, no notice was served on him nor was any step taken to appoint a Court guardian. He said that this was a serious defect in the proceedings in the execution case. It is clear to me that he treated that as an irregularity within the meaning of R. 90, O. 21, Civil P. C. He pointed out that the value in the sale proclamation was stated as Rs. 50. There were 7½ bighas of land and the Munsif was of opinion that something like Rs. 100 per bigha was on the evidence the reasonable price. He treated this under-valuation as a deliberate misstatement and he said that this deliberate misstatement of the valuation was also a material irregularity. So, he dealt with that element too as a finding of material irregularity. On the question whether proper notice of attachment was given and proper service of sale proclamation had been made he said :

> I am not satisfied about the proper service of these processes,"

and his conclusion was :

> "I find that there is material irregularity and considering that the 7½ bighas land was sold for Rs. 70 only, I hold there was substantial injury."

So far, therefore, it is clear that the findings of the Munsif were confined to a finding of material irregularity. It is true that he noticed that the allegations of the petitioner were embroidered with certain insinuations as regards fraud and it is true that he described the under-valuation as a deliberate misstatement ; but his finding and his treatment of the case was on the footing that this was an unessential element and that the substantive right to relief shown by the petitioner was material irregularity followed by substantial injury.

There was, however, a further question before the Munsif. The petitioner tenant had to explain the two years' delay between the sale and the application. His case was that all notices had been suppressed, that the purchase by the decree-holder had been deliberately kept back from him and that he found it out only when reading a written statement filed by an under-tenant of his own in a suit for rent in which that under-tenant objected to the plaintiff's claim for rent, that the petitioner's interest had been sold in execution. The Munsif took the view that the petitioner's story on that point was true and that, owing to the decree-holder's fraud, the petitioner was kept out of knowledge in this regard till the date of the filing of the present petition. On that finding, he gave to the petitioner the benefit of S. 18, Limitation Act.

Now, the question, in these circumstances is : Did an appeal lie to the District Judge from the order of the Munsif which I have attempted to describe with precision ? We need take no notice of what the District Judge said. The question is on these materials, did an appeal lie to the District Judge at all? Ordinarily, a first appeal does lie from a decision under R. 90, O. 21, Civil P. C. and that by the plain terms of the Code of Civil Procedure itself. But by S. 153 Ben. Ten. Act, (I am referring for the present to the Act before the amendment of 1928) a restriction is put upon appeals. I observe that the sole function of the section is to restrict appeals and that that section gives to noboly any right of appeal to any Court. I make this observation because in the case of *Aswini Kumar Dutta* v. *Raj Kumar* (1), the learned Judges seem to have struggled with a contention that S. 153, Ben. Ten. Act, gives a right of second appeal from an order under R. 92 O. 21, which is unknown to the Civil Pro. Code. That contention appears to me to be altogether out of the question.

Now, by S. 153, Ben. Ten. Act, in a case such as the present, the right of appeal is prima facie taken away and there is no right to first appeal unless the appellant can bring himself within the exception contained in the following words:

> "Unless the order has decided a question relating to title to land as between parties having conflicting claims thereto."

Those words were first interpreted by this Court for the present purpose by

(1) A. I. R. 1927 Cal. 845=54 Cal. 1050.

the well-known decision of the Full Bench in the case of *Kali Mondal* v. *Ramsarbeswar Chakravarti* (2). The general principle of that ruling was that where a decree-holder says: "the land is mine because I have purchased it" and the judgment-debtor says: "The land has not been validly sold to you and is still vested in me," that is a question relating to title to land as between parties having conflicting claims thereto. After this decision, in the year 1907, the effect of that rule was cut down, to use a neutral expression, by the explanation added at the end of the section:

"A question as to the regularity of the proceedings in publishing or conducting a sale in execution of a decree for arrears of rent is not a question relating to title to land between parties having conflicting claims thereto."

At the time this explanation was enacted, S. 311 of the Code of 1882 referred to material irregularity only. In 1908 the corresponding section, now R. 90, O. 21, added after the words "material irregularity" the words "or fraud", the reason being that most of the applications to set aside sales were based on suppression of process and most of the allegations of suppression of process were accompanied by allegations of fraud. Accordingly it was contended that, where an application to set aside a sale was based on the ground of fraud, it was outside the scope to some extent of S. 311 of the Code of 1882 and had to be regarded as a matter coming within S. 47, so that in the presence of allegations of fraud there was a second appeal which was not granted by the Code to a case based on material irregularity alone. By adding the words "or fraud" to the corresponding section the Code made it clear that allegation of fraud would not result in giving a party the benefit, if it be a benefit, of an additional appeal. Looking at the matter, however, at the time the explanation to S. 153 was enacted, it is clear that the terms of that explanation had reference to the language of the old Code and consequently we find that the provision of S. 153, Ben. Ten. Act, is a provision to the effect that a question as to the regularity of the proceedings in publishing or conducting the sale is excluded from the category of questions which relate to title to land as between parties having conflicting claims thereto. In these circumstances the cases in which there are allegations of fraud have given rise to difficulties, no longer upon the question of the existence of the right of second appeal under O. 21, R. 90, but upon the question of the existence or non-existence of an appeal in cases of small value under S. 153, Ben. Ten. Act, I may observe that no amendment of this Act not even the recent amendment of 1928, has in any way brought the language of this explanation into conformity with the amended language of O. 21, R. 90, Civil P. C.

The cases in which this difficulty has arisen have been laid before us. The first case, the case of *Beni Madhab Roy* v. *Bissesswar Bharti* (3), was not a case under O. 21, R. 90, Civil P. C., at all. It was a case under the provisions of S. 174, Ben. Ten. Act, as it then stood, namely a question whether a judgment-debtor had brought into Court a sum adequate for the purpose of having the sale set aside on payment of the amount required by S. 174, and the decision in that case was that the case raised no question of regularity of the proceedings in publishing or conducting the sale. The only question in that case was whether or not the judgment-debtor had brought into Court a sufficient sum to entitle him to have the sale set aside under S. 174. I see no reason to doubt the correctness of that decision. The next case was the case of *Arjun Dass* v. *Gunendra Nath Basu* (4). It was a case where execution proceedings had been started against a man who was dead and no notices had been served under O. 21, R. 22. The view taken by the Court was that the sale was not merely voidable but void and that the question at issue in that case was not a mere question of the regularity of the proceedings in publishing or conducting the sale; so that the terms of the explanation of 1907 did not apply to that case. I see no reason to quarrel with that decision. Indeed it appears to me that there is much to be said for the view that R. 90, O. 21, contemplates a valid decree and the

(2) [1905] 32 Cal. 957=9 C. W. N. 721=1 C. L. J. 476 (F.B.).

(3) [1912] 17 C. W. N. 84=15 I. C. 436=16 C. L. J. 542.

(4) [1914] 18 C. W. N. 1266=27 I. C. 294=20 C. L. J. 341.

Court validly entertaining execution proceedings for the enforcement of the decree. In the case of *Nobin Chandra* v. *Bepin Chandra Roy* (5), however, we came to a decision that does bear closely upon the question now before us. In that case, as in this, a judgment-debtor applied out of time to set aside a sale on the ground of suppression of processes and he made a case that the fact had been kept from him by the fraud of the decree-holders with the result that he was entitled to the advantages conferred by S. 18, Lim. Act. The Munsif before whom the case was tried decided one question only whether or not concealed fraud within S. 18, Lim. Act, had been shown. He did not decide any question as to the regularity of the sale proceedings but dismissed the application as out of time. The case being otherwise within S. 153, Ben. Ten. Act, Chatterjea, J., took the view that the order of the Munsif decided nothing about the regularity of the sale proceedings so that the explanation to S. 153, had no bearing on the case; but he went further and held that the sale having been attacked on the ground of fraud as well as on the ground of irregularity, any decision which dealt with question of fraud was not within the scope of the explanation. He held therefore, that there was a right of an appeal because the question was a question not merely of irregularity but also a question of fraud.

Mullick, J., thought that the finding that there was no concealed fraud such as to confer an extension of time under S. 18, Lim. Act, was a finding which did not come within the explanation and that an appeal was accordingly competent. He disagreed, however, with Chatterjea, J., on the other point, holding that the mere fact that the irregularity was alleged to be or was, in fact, tainted with fraud did not exclude the case from the scope of the explanation. This case has been dissented from in two subsequent cases; but it appears to have been followed more than once. It appears to have been followed by Newbould and B. B. Ghose, JJ., in *Midnapore Zemindary Co.* v. *Fakir Bisui* (6). In that case there was an allegation of fraud. The Munsif dismissed the application on a mere question of defect of parties. It was held that, notwithstanding S. 153, Ben. Ten. Act, the case was appealable, although the Munsif had given no decision on the question of fraud. A similar decision appears to have been given by Greaves, J., in the case of *Jatiram Gayan Das* v. *Dina Nath Samanta* (7). In the case of *Maharaj Bahadur Singh* v. *Kurani Mai* (8), Mukerji, J., and Roy, J., dissented from the doctrine of *Nobin Chandra's* case (5) saying that fraud in publishing or conducting a sale is not meant to be kept separate from irregularities in the publication or conduct thereof for the purpose of the explanation to S. 153; and a similar view was taken by B. B. Ghose, J., and N. K. Basu, J., in the case of *Jahir Mondal* v. *Radha Rangini Devi* (9), who held that the question as to regularity or irregularity of the proceedings in publishing or conducting a sale falls within the explanation to S. 153 whether the irregularity is due to fraud or negligence or any other reason ; the explanation includes every ground affecting the regularity. In a subsequent case *Mujibar Choudhury* v. *Reajuddi Matbar* (10), the matter came again before Mukerji J., and that learned Judge repeated the view which he had previously expressed in *Maharaj Bahadur's* case (8).

In these circumstances Mr. Hiralal Chuckerbutty for the opposite party decree-holder contends before us that there was a right of appeal to the District Judge, notwithstanding the terms of the explanation to S. 153, Ben. Ten. Act, and he contends, in the alternative, that if we are not satisfied as to his right of appeal, the authorities are in such a condition that it would be reasonable to refer this question to a Full Bench in order that the differences of opinion disclosed by the cases to which I have referred may, if possible, be settled. It appears to me that, in the case before us, the position is that, while there was an allegation in the petition before the Munsif to the effect that the irregularities complained

(5) [1915] 22 C. L. J. 244=29 I. C. 308=19 C. W. N. 958.
(6) Civil Revn. No. 393 of 1924.
(7) A. I. R. 1922 Cal. 163=77 I. C. 520.
(8) A. I. R. 1927 Cal. 633=101 I. C. 199.
(9) A. I. R. 1928 Cal. 859.
(10) [1928] 107 I. C. 471.

of were intentional and motived by fraud, the case made before the Munsif upon the substantive question of the petitioner's right to relief was a case based upon irregularity. The fact that notices of attachment were not served, that the sale proclamation was not served, the fact that no notice was given to the person put forward as the guardian ad litem these were the facts which, according to the petition, entitled the petitioner to relief. The Munsif has dealt with this part of the case entirely in that way. On this part of the case, there is no finding which goes beyond a finding of material irregularity and it is not until we come to the question of limitation that the Munsif in this case has acted in any way upon the view that fraud existed. The fraud that is material upon the question of limitation is not the fraud which occurred in the course of the sale proceedings but fraud by which there was concealed from the petitioner the fact of the sale and the methods which had been employed to effect it. It is fraud upon a different matter at a different time.

Having made that clear, it seems to me that we have to ask ourselves whether this is a case in which it is necessary or advisable to refer the matter to a Full Bench. It appears to me that, looking at the case for a moment apart from the decision upon the question of limitation, the present case is reasonably plain according to any interpretation of the section with which we are concerned. The decision of the Munsif was a decision entirely as to the regularitly of the proceedings. He set them aside as being irregular and accompanied by substantial injury and, so far, it seems to me that this case is plainly within the meaning of the explanation. It is quite true that a sale cannot be set aside merely on the ground of irregularity. There has to be substantial injury as well. But when the Bengal Tenancy Act says that the question as to the irregularity of the proceedings in publishing or conducting a sale is not a question relating to title to land, it does not mean that in every case under R. 90, O. 21, Civil P. C., there is nevertheless to be an appeal because in every case under R. 90 there must be a finding not merely as to the regularity of the proceedings but also as to substantial injury. Such an interpretation would give no meaning to the explanation consistent with the exception. Again, the explanation does not mean that, if in the course of deciding the question of regularity under R. 90 the Munsif has to decide a question of limitation incidental to the application before him then the explanation ceases to take effect and the right of appeal emerges. The meaning of the explanation must at least be this : that where the decision holds that on the ground of irregularity in the sale proceedings the sale is to be set aside or that the sale must stand notwithstanding the allegations of irregularity therein, the case is not to be deemed to be one within the exception and consequently no right of appeal will exist. All we are concerned with in the present case is whether or not the Munsif in setting aside these proceedings for irregularity made an order which is contemplated by the explanation. In my judgment, he did. If, in this case, the Munsif had proceeded on the ground of fraud, certainly, if he had proceeded upon any ground of fraud which could be said to be independent of any irregularity in the proceedings, it might perhaps have been advisable to refer this case to a Full Bench. In view, however, of the scope and character of the judgment of the Munsif, it does not seem to me that it is necessary or that it would be useful to treat this case as one in connexion with which the law on this subject could usefully be revised as a whole.

Reverting to the question under S. 18, Lim. Act, it is quite true that observations were made in *Nobin Chandra's* case (5) upon that very matter. In that case, however, the Munsif had dismissed the petition holding that it was out of time, and he had made no finding on any question of regularity of the proceedings. Now I do not think that the case was rightly decided on that ground, but that case is not this case. In this case the Munsif's ultimate finding and the whole of the ultimate effect of his order is to set aside the sale on the ground of irregularity. He has dealt with the question of limitation under S. 18 just as he might have had to deal with an ordinary question of

limitation, or defect of parties or estoppel or whether the petitioner had a locus standi to ask that the sale be set aside or with a number of other incidental questions which might be advanced by way of illustration. Does the explanation mean that there is to be a right of appeal in these petty cases in every case where any incidental matter such as limitation or locus standi has to be decided before the application under R. 90 can be disposed of? The answer to that question must, in my judgment, be in the negative. In the end, the substance of the matter is that the question as to the regularity of the proceedings has been decided and the sale has been set aside for irregularity. Such proceedings, in my opinion, are intended to be proceedings which in petty cases are to be disposed of without appeal.

In these circumstances, it seems to me that the present rule should be made absolute.

I ought to add that, when this case came on for hearing originally, it came before me sitting singly and, on that occasion, it was intimated on the part of the opposite party that there were matters to consider under the Ben. Ten. Amendment Act, 1928, in view, particularly of the amendments made in S. 174 of the Act. It runs out, however, that nothing turns upon the amending Act. To begin with it appears that the application in this case was filed on 16th March 1928. The amending Act came into force on 21st February 1929. The order of the Munsif was on 18th March 1929. It would seem, therefore, that prima facie the matter, so far as rights of appeal are concerned, must be governed by the state of the law as it was on 16th March 1928: *Delhi Cloth Co.* v. *Income-tax Commissioner, Delhi* (11). But, apart altogether from that, it does not appear that for the present purpose the amending Act makes any difference. The amending Act has left the explanation to S. 153 standing side by side with the provisions of Cl. 5, S. 174, which gives a right of appeal from decisions upon orders to set aside sales which orders under the new Act are to be made under the section and no longer under R. 90, O. 21, of the Code. These two sections have to be read together and there can in my judgment be no difficulty in saying that the special provisions of S. 153 with reference to cases of very small value are intended as exceptions to the general right of appeal which is dealt with by Cl. (5), S. 174. It has to be remembered that prior to the amending Act the right of appeal in cases under S. 174 depended upon various facts on which in turn depended the question whether the case was one within the terms of S. 47, Civil P. C. Complications have been swept away by making a clean provision that, in all cases dealing with setting aside of sales under the new S. 174, there is to be a right of appeal, and that is in itself a valuable amendment of the law. But there is no reason for thinking and, indeed, there is no possible way of construing the Act to the effect, that the explanation to S. 153 does not remain in full force and effect so far as regards cases of small value to which the section refers. There will be no order as to costs.

C. C. Ghose, J.—I agree.

M.N/R.K. *Rule made absolute.*

(11) A. I. R. 1927 P. C. 242=106 I. C. 156=54 I. A. 421 (P.C.).

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RANKIN, C. J. AND C. C. GHOSE, J.

Ashutosh Seal — Defendant—Appellant.

v.

Benode Behary Seal and *others*—Plaintiff and Defendants—Respondents.

Appeal No. 16 of 1929, Decided on 30th July 1929 from original decree of Gregory, J., D/- 2nd September 1928.

(a) Hindu law—Religious endowment—Term of office of shebait appointed by testator ending—Shebaitship goes to heirs of testator without clear words directing otherwise—Will—Construction.

Without clear words to that effect it is impossible to impute to the testator the intention that from time to time persons might be appointed to the office of shebait of his family idol merely by virtue of their being chosen to act as trustees of his trust fund. When for any reason, the term of office of the shebaits appointed by the testator comes to an end, the rule of Hindu law gives the office of shebait to heirs of the founder. A fundamental change in the normal devolution of the office is not to be read into a clause which finds place in a will merely as one of a series of directions to the trustees of the testator's trust fund as to the payments by way of legacy which are to be made thereout. A clause in a will declaring that "the trustees or trustee for the time

being shall be competent to exercise all the power and discretion hereby confided to the trustees herein named" cannot be applied beyond the immediate intention which is confined to the residue of the testator's estate, and has no reference to the property dedicated: 19 *Cal.* 513 (*P. C.*) and 17 *Cal.* 3 (*P. C.*), *Rel. on.* [P 497 C 1,2]

(b) Hindu law—Religious endowment — Shebait not founder adding to dedicated properties—He cannot change line of succession prescribed under original grant or in its absence under Hindu law.

Additions to an existing foundation are not uncommonly made by persons who hold the office of shebait and it is not uncommon for them to purport to give directions which would alter the devolution of the office, making the course of succession to depart either from the course laid down by the terms of the original dedication or from the course in which the Hindu law, in the absence of any direction by the founder, would require it to go. But such a shebait who is not the founder of the endowment or the dedicator of the idol cannot at his own hand alter the line of succession to the office of shebait: 17 *Cal.* 3 (*P. C.*) and *A. I. R.* 1926 *Cal.* 561, *Rel. on.* [P 497 C 1]

(c) Hindu law— Religious endowments— Though gift is to deity, right to office of shebait is substantial — Donor's intention that the office should remain in family is important ingredient.

While in form and according to Hindu ideas, in truth, the gift is made directly to the deity, the enjoyment of the office of shebait is regarded as a matter of some distinction and advantage. So far from being regarded as a minor or extraneous question whether the office of shebait shall be held by one person or another, the intention that the members of the donor's family shall have the right of acting as shebaits is, in general, part of the very texture of the donor's gift: 2 *I. A.* 145 (*P. C.*) and 32 *Cal.* 129, *Rel. on.* [P 500 C 2]

(d) Hindu law—Religious endowments— Persons acting on behalf of idol accepting gifts with conditions, not impossible to perform, cannot repudiate the conditions— Estoppel.

A bequeathed certain property X to an idol without leaving directions as to succession of shebaits. *B*, a shebait, added certain properties Y providing for the line of shebaits and certain restrictions which were not impossible to perform. In a contest between successors of *A* and *B*:

Held: that regarding property Y, that the provision as to who should be shebait should be regarded as a condition. The successors of *A* need not take advantage of the gift, but if the gift is taken and the conditions insisted on, it must be observed and they cannot claim any right in the additional property Y, while repudiating the conditions attached: *A. I. R.* 1926 *Cal.* 561, *Dist.* and 17 *Cal.* 3 (*P. C.*), *Rel. on. Case Law Referred.* [P 501 C 1]

Advocate-General, D. N. Bose and *S. C. Mitter*—for Appellant.

B. K. Ghose, N. C. Chatterji, D. N. Basu, Kanjilal and *Surita* for *Moore*—for Respondent.

Rankin, C. J.—The dispute in this case has reference to the shebait right in respect of the deity Sri Sri Raj Rajeswar founded and established by one Madhab Chandra Seal, a Hindu inhabitant of Calcutta who died in 1866. By his Will made in 1861 and a codicil thereto he had dedicated a certain house, now known as No. 12, Madan Dutt's Lane, and made certain provisions in that behalf.

The first question which arises upon this appeal is the question whether upon a true construction of this will the persons who from time to time should be trustees under the Will were made shebaits and were given power to appoint new shebaits from time to time. It is expressly conceded on behalf of the appellant Ashutosh Seal, one of the defendants to the suit, that if this question of construction be answered in the negative, he cannot claim under the original foundation any greater right than the decree under appeal has given to him in the office of shebait. The learned counsel for the appellant has also stated before us that in this Court he does not contend that the plaintiff's suit should fail by reason that the Thakur itself has not been made a party to the suit. I propose, therefore, to address myself in the first instance to this question of construction and to postpone the examination of the facts and circumstances of the case until I have stated my conclusion as to the meaning and effect of those directions in the Will which have reference to the appointment of shebaits.

The testator having devised the house in question to the use of his wife Luckhymoney and his nephew Kalidas during their joint lives and to the survivor during life, with remainder to the use of the sons of Kalidas and their heirs male as tenants-in-common in equal shares, makes it clear that this bequest is subject to a trust to permit such part or portion of the said house and premises as had been used as Thakurbari or for religious purpose to continue to be so used for the worship of the deity. He proceeds "I direct the executrix and executor of this my Will (whom I hereby appoint shebaits of my said Thakur) to allow the silver articles which have been used in the worship of the said Thakur during my

lifetime to continue to be so used after my death."

This is the only passage in the Will making in express terms any appointment of shebaits. At the end of the Will the testator's wife and Kalidas are appointed executrix and executor. There is nothing in the codicil which can be construed as an appointment of shebaits. The contention for the appellant, however, is that in subsequent passages of the Will the testator has in effect appointed his executors to be trustees and has entrusted to his trustees for the time being the right to appoint their successors. In this way it is said that though the executors as such had been made original shebaits, the Will, upon a true construction, gives to the shebaits for the time being the right to appoint successors to the office of the shebaits. Now, the passage which follows the words which I have quoted bequeaths the residue of the testator's estate to his said wife and nephew upon trust for conversion and investment. It proceeds to direct the

"trustees or trustee of this my Will to expend the sum of thirty rupees per mensem for daily poojas in the said thakur bari and the additional sum of five hundred rupees per annum for poojas therein on extraordinary occasion..... and to pay to my Gooroo the sum of four rupees per mensem during his life and the sum of ten rupees per annum for pooja times and to pay the said Kalidas Seal the sum of one hundred rupees per mensem during his life and so forth."

In the end two-thirds of the ultimate residue of the trust fund is given to the testator's wife and Kalidas in equal shares, the other third being bequeathed to Panchkauri Seal and his brother Prosaddas Seal in equal shares.

In my judgment there is no room upon the face of this Will for the construction which the appellant asks us to put upon it. The only appointment of shebaits is the appointment to that office of the executrix and executor of his Will as such. The residue of the testator's estate and effects is bequeathed to "my said wife and nephew" who are made trustees thereof for the purposes immediately thereafter described. The circumstances that one of the trusts upon which the trust fund is to be held by the wife and nephew is:

"to expend the sum of thirty rupees per mensem for daily poojas in the said thakur bari and the additional sum of five hundred rupees per annum for poojas therein on extraordinary occasion"

in no way shows that it was any part of the testator's intention that whoever should become from time to time trustee of his trust fund should succeed to the office of shebait. The appointment of executrix and executor is made in the last passage of the Will. No other person save the wife and Kalidas could, under that Will, be executors. The Court might appoint an administrator with the Will annexed and the trustees might vary from time to time, but the appointment of the executrix and executor to the office of shebaits is a definite appointment of two near relations and of nobody else. In order to supply funds for the worship of the deity it was necessary that trustees should be appointed and directions given for the creation of a trust fund. Out of that fund the money for the upkeep of the worship had to come and it must be paid in the first instance by the trustees of the fund. The language "to expend the sum of thirty rupees per mensem for daily poojas" in no way involves that the trustees should themselves be at all times shebaits. If and when the time should come when other people should be constituted trustees of the trust fund, it is reasonably plain that prima facie they would execute this direction by paying over the monthly and annual sums to the shebaits. Without clear words to that effect it is impossible to impute to the testator the intention that from time to time persons might be appointed to the office of shebait of his family idol merely by virtue of their being chosen to act as trustees of his trust fund. When, for any reason, the term of office of the shebaits appointed by the testator comes to an end, the rule of Hindu law gives the office of shebait to heirs of the founder: *Gossami* v. *Romanlalji* (1), as the appellant in this case expressly concedes. A fundamental change in the normal devolution of the office is not lightly to be read into a clause which finds place in the Will merely as one of a series of directions to the trustees of the testator's trust fund as to the payments by

(1) [1890] 17 Cal. 3=16 I. A. 137=5 Sar. 350 (P.C.).

way of legacy which are to be made thereout. The clause which is at the end of the Will which declares that

"the trustees or trustee for the time being shall be competent to exercise all the power and discretion hereby confided to the trustee herein named"

cannot in my judgment be applied beyond its immediate intention which is confined to the residue of the testator's estate and has no reference to the property dedicated to the Thakur. In *Surendro* v. *Doorgasoondery* (2) the testator bequeathed all his property to a family Thakur and directed that his two widows should each adopt a son to him, the sons to become shebaits of the property dedicated. The adoption made by the widows turned out to be invalid and a question arose whether the plaintiff (one of the two persons adopted) could take anything under the Will which contained no gift to him except in the character of shebait. Lord Hobhouse delivering the opinion of the Judicial Committee said :

"There is no gift to the adopted sons except in the character of shebaits and it would require very strong and clear expressions indeed to show that a Hindu gentleman contemplated introducting as shebaits of his family Thakur two persons unknown to himself and strangers to his family."

In my judgment, therefore, this Will contained no power on the part of Kalidas or any other person to appoint successors to the office of shebait.

The testator's widow relinquished her right in the shebaiti to Kalidas in 1882 and as there is no proof of any corrupt or objectionable feature in this transaction, Kalidas may safely be taken to have been sole shebait until his death in 1914. Thereupon the office of shebait vested in the heirs of Madhab the plaintiff, and his brothers then living becoming entitled to a pala or turn of worship as well as the sons of Kalidas. The plaintiff's share, so to put it, in Madhab's endowment is, on this footing a one-eighth share and it is on this basis that he has recovered judgment before the learned Judge.

The second question in this case is of greater difficulty. In 1884 Kalidas, who was then sole shebait, executed an instrument of debutternama, or deed of endowment in favour of a deity, whereby he dedicated to the Thakur Raj Rajeswar five items of immovable property described in the schedule thereto. Item 5 is the house and premises 12, Madan Dutt's Lane, which had been dedicated to the idol by Madhab himself. Kalidas in this deed treats this property as though it were his own and dedicates it together with the other four items of property to the deity purporting to vest them all by the deed in the Thakur and to divest himself of all interest therein. On this footing he gave directions first that the house 12, Madan Dutt's Lane, should be the thakurbari or temple where the idol should be located ; secondly, that the employees and shebaits of the idol should stay and live there and, thirdly, that the worship should be performed in that house with the income available from the other properties, any surplus of income to be invested in immovable property in the name of the idol as being debutter property of the idol. With regard to the office of shebait, the deed provides as follows :

"The charge of performing the "parvas" sheba and rites and ceremonies as aforesaid of the said Sri Sri Iswar Raj Rajeswar Thakoor and the charge of looking after, making settlements and arrangements, collecting and realizing the income and paying in the taxes and revenues, et., and all such other necessary duties are entrusted so long as I shall remain alive to me and I remain appointed shebait of the said Thakur and on my passing away to the next world my two sons Sriman Durga Das Seal Babajiw and Sriman Bhagabati Das Seal Babajiw both jointly will remain appointed shebaits for life . . . . and each of them will at the time of passing away to the next world appoint one person as shebait from amongst my family descendants and the person so appointed will remain appointed shebait together and jointly with the other shebait then existing, and in this manner from amongst my family descendants two persons at a time will remain appointed as shebaits on being nominated by the two appointed shebaits."

The case for the appellant Ashutosh Seal is laid under this deed. He says that upon the death of Kalidas in 1914 his two sons Durga and Bhagabati became shebaits; that Bhagabati died in 1918 having made no appointment of a shebait in his stead; that Durga continued thereafter as sole shebait until his death in 1925; and that by Durga's Will the appellant was appointed sole shebait and as such has become entitled to the office and the plaintiff has no claim therein.

(2) [1892] 19 Cal. 513=19 I. A. 108=6 Sar. 150 (P.C.).

Now, the learned Judge by his decree has not merely declared the right of the plaintiff Benode Behary Seal to a one-eighth share in the worship of the Thakur and in the management of the property which was dedicated by Madhab, but has given to the plaintiff the like right in the property dedicated by the deed of endowment executed by Kalidas in 1884 and on this latter point the appellant Ashutosh Seal takes exception to the judgment and decree. The judgment of the learned Judge upon this point is as follows:

"Kalidas Seal divested himself of all interest in the properties dedicated, the gift was complete and unqualified, and the appointment of shebaits after his death appears to me to be more in the nature of directions superadded. In my view Kalidas Seal did not, by virtue of his gift, become a founder and he was not competent to alter the line of shebaits. The gift was simply an "accretion to an existing foundation." I hold it was unqualified and was not affected by the appointments made. In my opinion this case falls within the principles of Hindu law as enunciated by Page, J., in the case of *Lalit Mohan Seal* v. *Brojendra Nath Seal* (3) which was affirmed by the Court of appeal, and I hold that the appointments of shebaits made by Kalidas Seal were void."

The case law shows that additions to an existing foundation are not uncommonly made by persons who hold the office of shebait and that it is not uncommon for them to purport to give directions which would alter the devolution of the office making the course of succession to depart either from the course laid down by the terms of the original dedication or from the course in which the Hindu law, in the absence of any direction by the founder, would require it to go. This matter has been considered by the Judicial Committee first of all in *Gossami* v. *Romanlalji* (1), which I regard as the leading authority upon this point and indirectly in *Pramatha Nath* v. *Pradyumna* (4) on an appeal from a decision of this Court reported in *Pradyumna Kumar* v. *Pramatha Nath* (5). It was canvassed at some length by a learned Hindu Judge in *Sripati Chatterjee* v *Khudi Ram* (6). The learned Judge in this case has followed the decision of Page, J., in *Lalit Mohan Seal* v. *Brojendra Nath Seal* (3) which was affirmed on appeal by a judgment to which I was a party: *Brojendra Nath* v. *Lalit Mohan* (7). Now the reasoning adopted by the learned Judge from the case last mentioned and applied by him to the present case may be stated as follows: The first proposition is that Kalidas not being the founder of this endowment or the dedicator of the idol, could not at his own hand alter the line of succession to the office of shebait. This proposition is well covered by authority and in the case last mentioned is to be found a re-statement of the principle by Ghose, J.:

"I am of opinion that the learned Judge was right in the view he took that, while it was open to Gopal Chandra Seal who was a shebait but not the founder of certain ancestral idols, to endow property for the use and benefit of the said idols, he could not in any way alter the line of shebaits as laid down by the founder of the idols, nor affect in any way the dispositions created by the original founder."

The second proposition is that upon the construction of the deed of 1884 the directions purporting to control or determine the appointment of shebaits do not amount to conditions upon which Kalidas was making a dedication of the properties comprised in the deed. In the view of the learned Judge they are "more in the nature of directions superadded" and the gift of the properties was unqualified and was not affected by the directions as to the devolution of the shebait right. In the case to which the learned Judge refers, Page, J., came to a like conclusion but of course upon a different deed. Confining myself to the deed before us, I am of opinion that the view taken by the learned Judge is untenable.

A third proposition is perhaps involved in the learned Judge's reference to the previous case. In that case Page, J., was of opinion that directions as regards appointment of shebaits, if they were conditions were conditions subsequent and that they were void for impossiblity. I respectfully dissent to the application of this principle to the deed of endowment before us.

In my opinion the principles upon which the present question must be decided are the principles which were applied by the Judicial Committee in *Gossami* v. *Romanlalji* (1) already mentioned. In that case in 1866 Munni Bibi was minded to provide a suitable

(3) A. I. R. 1926 Cal. 561=53 Cal. 251.
(4) A. I R 1925 P. C. 139=52 Cal. 809=52 I. A. 245 (P.C.).
(5) A. I. R. 1928 Cal. 708.
(6) A. I. R. 1925 Cal. 442.
(7) A. I. R. 1927 Cal. 262.

habitation for an existing idol. At that date the plaintiff was shebait of the idol, but one Purushottam, a holy man and a cadet of the same family as the plaintiff, was taking an active part in the worship of the idol, the plaintiff not having been near it. The deed was addressed to Purushottam and the dedication was made to both of two idols. The tenor of the deed was, first, to make debutter the property in question and then to provide that Purushottam and his heirs were to have charge of the property subject to the gift and perform all necessary sheba or worship. There were other directions, but the essence of the matter was that there was an out and out gift by way of dedication followed by the appointment of Purushottam and his heirs as shebaits. The house so granted was used, the Thakurs were removed to it and a new and better temple was erected on the site for their location. When the plaintiff brought his suit to establish his right to the office, to the custody of the idol and to the temple, their Lordships of the Judicial Committee, having repelled a plea that the plaintiff's suit was barred by limitation, affirmed the decree of the High Court holding that the plaintiff was entitled to succeed in his claim to the portrait and the valuables. In agreement with the High Court, however, they held that his claim to the temple failed:

"Their Lordships are of opinion that this part of the case must be governed entirely by the terms of Munni Bibi's dedication. She gave the house and land to the two Thakurs but with the condition attached that Purushottam should be shebait. The Thakur Daoji, or those who speak for him on earth, need not take advantage of this gift. Munni Bibi could not, of her own authority, alter the shebaitship of the Thakur. But if the gift is taken and the condition insisted on, it must be observed. It has now been insisted on, and Deoji must elect whether to change his habitation or to change his shebait."

In the present case the main features of the deed of dedication of 1884 are the provisions giving a right to the shebait to stay and live in the thakur bari which the deed treats as being dedicated for the first time, that the appointment of shebaits made by the deed is intended to be an appointment of shebaits in the full sense, not that the shebaits are in this family to act as their own pujaris, but that they are to have not merely the duty of a trustee administering property, but:

"the charge of performing parvas, sheba and rites and ceremonies aforesaid of the said Thakur."

It appears to me that to treat the gift as a good gift to the deity and to treat the provisions as regards the office of shebait as though they were unessential terms or superadded directions by which it can be said that the gift to the idol is not affected as by a term or qualification is unreasonable in itself and in disconformity with ordinary Hindu ideas upon these matters. In *Vidya Varuthi* v. *Balusami* (8) the Judicial Committee gave a full and careful exposition of certain cardinal features of the Hindu law with reference to such gifts, distinguishing the principles upon which gifts are made to an idol as a juristic entity vested with the capacity of receiving gifts and holding property, from the conceptions upon which the English law relating to trusts is based. They said:

"Neither under the Hindu law nor in the Mahomedan system is any property "conveyed" to a shebait or a mutawalli, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage."

Apart from the right of residence, it is true that no specific beneficial interest is given by the deed of 1884 to the shebait as such though there is no prohibition in Hindu law against the gift of a beneficial interest to the shebait as part of the terms of a dedication. It must, however, be conceded that while in form and, to Hindu ideas, in truth the gift is made directly to the deity, the enjoyment of the office of shebait is regarded as a matter of some distinction and advantage. So far from being regarded as a minor or extraneous question whether the office of shebait shall be held by one person or another, the intention that the members of the donor's family shall have the right of acting as shebaits is in general part of the very texture of the donor's gift. The theory of law is clear, but it is also clear as was said by Sir Montague Smith in *Prosonna Kumari* v. *Golab Chand* (9)

(8) A. I. R. 1922 P. C, 123=44 Mad. 831=48 I. A. 302 (P. C.).

(9) [1875] 2 I. A. 145=23 W. R. 253=4 B. L. R. 450=3 Suther 102=3 Sar. 449 (P.C.).

and again by Sir Arthur Wilson in *Jagadindra Nath* v. *Hemanta Kumari* (10) at p. 140, "it is only in an ideal sense" that property can be said to belong to an idol, and if the fact, that gifts for religious purposes take the form of gifts to an idol is to be regarded as a reason for regarding the terms with which the gift is coupled as unessential feature of the donor's intention, we will depart very widely from actualities. In my judgment it is as true of the dedication of Kalidas as it was true of Munni Bibi's dedication in the case cited, that the provision as to who should be shebait should be regarded as a condition. The Thakur Raj Rajeswar, or those who speak for him on earth, need not take advantage of the gift, but if the gift is taken and the condition insisted on, it must be observed. In this case, as in *Munni Bibi's* case, I see no question as to impossibility of performance. I fail to understand how in law, or in right reason, plaintiff can claim any right in the additional property dedicated by Kalidas while repudiating the conditions attached by Kalidas to his gift.

The cases referred to by Page, J., in *Lalitmohan's* case (3) are cases with reference to a name and arms clause. In *Greenwood's* case (11), as a condition of enjoying the testator's property, the testator required the object of his bounty to use his name but only from the date to which he succeeded to the property. The donee died before his interest became vested in possession, i. e. before the death of the tenant for life. The condition being one requiring something to be done by the donee the Court applied the rule that when the condition becomes impossible by an act of God it is discharged and gone for ever and the estate is absolute. In *re. Croxon* the condition subsequent was that the devisee should bear and lawfully assume the testator's name and coat of arms. Kekewich, J., held that as it was not possible for the devisee to obtain lawful authority to use the arms in question the performance of the condition was impossible and he was not bound to comply with it in order to retain the estate. In my opinion the reasoning in *Gossami* v. *Romanlalji* (1) is an authority inconsistent with the application of such principles to the question before us. In *Pramatha Nath Mullik's* case (4) the observations of Lord Hobhouse to which I have already referred were recalled and applied and the principle was laid down that the will of the idol in regard to location must be respected. In that case, however, the Court was not dealing with a dedication such as we have before us in this case, but was dealing with a gift to trustees in trust for the idol—a form of conveyance which adapts itself with less difficulty to the principles of English law.

As regards the case of *Lalitmohan* v. *Brojendra* (6) I desire to point out that in that case Gopal Chandra Seal had, with reference to the premises, 6 Damzen's Lane, made two inconsistent dispositions : first by a deed of arpanama in 1897; and secondly by his Will. In each he laid down a line of shebaits to take effect after his own death, but these differed very little from each other or from the line laid down by the founder or by Hindu law. The Will clearly could not alter the provisions of the arpanama and it would not be necessary to refer to the Will at all but for the fact that the line of shebaits laid down by the arpanama was laid down subject to a right of appointment by the donor in his lifetime. The decree of the learned Judge gave the shebaiti right to the plaintiff, the defendant Dulal Chunder Seal, and to the two sons of Akshoy Chandra Seal, namely Brojendra and Bonomali. Apart from a variation by appointment the arpanama had given the shebaiti right to these very people, Nilmoni Seal having long ago died childless. Unless, therefore, it was contended that Gopal by his Will had made an appointment under the powers contained in the arpanama, it will be readily intelligible that no discussion was embarked upon in the judgment on appeal as regards the question whether the conditions of the arpanama could be insisted on. Now the Will was altogether inconsistent with the arpanama as regards this property. It purported to give the widow a life-interest for her absolute use and benefit and it made other provisions to take effect thereafter. The learned Judge had put the Will aside as inoperative by reason that the property was covered

(10) [1904] 32 Cal. 129=31 I. A. 203=8 C. W. N. 809=8 Sar. 698 (P.C.).
(11) [1903] 1 Ch. 749.

by the previous deed. The judgment in appeal contains no discussion of this matter and though I appreciate that the learned Judge in the present case may well have been misled into thinking that the whole of the reasoning of Page, J., had been approved, the decision of the appellate Court did not extend so far.

Upon the question raised by Page, J., as to the correctness of the decision in *Sripati Chatterjee's* case (6), it is not necessary to pronounce. That the dedication of additional properties to a deity and the appointment of a line of shebaits inconsistent with the original line of succession can be dealt with by treating the new line of shebaits as though they were mere trustees for the management of property and for payment of the income to those who are shebaits under the original dedication is a proposition by no means easy to accept.

In conclusion I desire to observe that it was contended in this appeal that although Kalidas in his lifetime could not on behalf of the idol accept the dedication of 1884, so as to alter the line of succession to the office of shedait, it was possible to maintain that upon his death his sons Durga and Bhagabati had effectually accepted the conditions of the deed so as to alter the line of shebaits. This contention is without substance, because on the death of Kalidas the plaintiff's branch became entitled to an interest or share in the office and there is no evidence that the shebaits as a whole, and still less those interested in the worship of the deity, have done anything to effect so important a change. I see no reason to differ from the observations of the learned Judge in which he points out that Kalidas Seal, the donor, cannot be treated as having on behalf of the idol accepted the new endowment with the conditions laid down by himself. In *Pramatha* v. *Prodyumna* (4), already cited, where the question related to a condition as to the location of the image, it was thought in this Court that the Court might sanction the donor's acceptance of the condition on behalf of the idol on the ground that it was "for the benefit of the idol." This, as I read the judgment of the Judicial Committee, was not approved, the principle being adhered to that the will of the idol must decide the matter.

In my judgment this appeal should be allowed and the decree of the learned Judge should be varied by excluding from it all reference to the properties other than 12, Madan Dutt's Lane comprised in the deed of 1884. As the appellant and respondents have each succeeded in part I think there should be no order as to costs of this appeal. The appellant must pay the guardian ad-litem his costs of the appeal.

C. C. Ghose, J.—I agree.

M.N./R.K. *Decree varied.*

A. I. R. 1930 Calcutta 502

RANKIN, C. J. AND C. C. GHOSE, J.

(*Raja*) *Promothanath Malia* — Appellant.

v.

H. V. Low and *Co.*—Respondents.

Appeal No. 33 of 1929, Decided on 17th July 1929, against original order of Lort-Williams, J., D/- 20th February 1929.

(a) Civil P. C., Ss. 38, 39 and 51 (b) and (d) —Rule that sale in execution of immovable property should be carried out by Court having territorial jurisdiction has primary reference to execution as defined in S. 51 (b) and is not applicable to sales by receivers—But the principle would apply for appointment of Receiver when main purpose is to effect sale in execution.

The rule that sales in execution of immovable property shall be carried out by Courts having territorial jurisdiction over such property has primary reference to execution which takes the form defined in S. 51 (b) and is prima facie not applicable to sales by a receiver appointed by Court, but the principle would apply to an application for the appointment of a Receiver when the main purpose of the appointment is to effect a sale in execution. [P 503 C 1; 504 C 2]

(b) Civil P. C., S. 51 (d)—Before appointment of Receiver by way of execution case should be made out that ordinary execution is not advantageous—Application for appointment should be made as application in execution to local Court.

Before an appointment of a Receiver by way of execution can be obtained a case should be made out that ordinary execution cannot be effected with advantage in the case. Even when such a case is made and the sole purpose of the appointment is to have immovable property realized by sale, application for such appointment should prima facie be made as an application-in-execution to the Court within whose territorial jurisdiction the property is situate. [P 504 C 2; P 505 C 1]

(c) Civil P. C., Ss. 38 and 51 (d)—High Court on its original side can appoint receiver by way of execution in respect of

property situated outside territorial jurisdiction—But power should be carefully and sparingly used.

The Calcutta High Court on its original side has the power to appoint a receiver by way of execution in respect of property situated outside its ordinary original jurisdiction. But it should be careful and sparing in the exercise of this power and should exercise it only on a proper case being made out that the appointment is necessary or advantageous. It cannot make an appointment on the sole ground that it is the only form of execution open to it which can be availed of to enforce its decree: 15 *B. L. R.* 318, *Rel, on.* [P 505 C 2; P 508 C 1]

(d) Execution—Duty of Court—Equitable execution should not ordinarily be allowed when ordinary execution is possible.

Although it is not always necessary that legal execution should be exhausted before the appointment of a Receiver by way of equitable execution can be obtained, "equitable execution" should not under ordinary circumstances be allowed when there is no impediment to execution being levied in the ordinary way. [P 506 C 2; P 507 C 1]

S. N. Banerjee, C. C. Biswas and *P. C. Basu*—for Appellant.

N. Sarkar and *A. K. Ray*—for Respondents.

Rankin, C. J.—This is an appeal from an order made by Lort-Williams, J., appointing a receiver by way of execution of a colliery called the Challeulpur colliery belonging to the defendant. The plaintiffs on 25th August 1925 obtained a consent decree against the defendant for the sum of four lakhs with certain interest payable by certain instalments. The suit was only a money suit, but the consent decree provided that the decretal amount should be secured by a first charge upon the Challeulpore Colliery with all fittings and fixtures and that in default of payment of any instalment, the plaintiffs should be entitled to execute the decree and

"at their option to have the said colliery which is hereby charged sold in execution of the decree made in this suit."

The plaintiffs on 5th January 1929 applied for execution of the decree and asked by their tabular statement for an order directing a sale by the Registrar of this Court of the said colliery. This application was clearly misconceived both because sales in execution are not held by the Registrar and also because the colliery being within the district of Burdwan, a sale in execution could only be obtained by transfer of the decree for that purpose to the local Court. These objections being taken (together with certain others which are without substance and to which I need not refer) the plaintiffs proposed to amend their application by asking in the alternative:

"that a receiver may be appointed of the said properties with liberty to him to sell the same by public auction to the highest bidder."

The learned Judge has made an order appointing a member of the Bar to be receiver of the colliery with power to him to get in and collect the outstanding debts and claims due in respect thereof. He has ordered the defendant to deliver up quiet possession together with all account books, papers etc., relating thereto. He has also directed the receiver to take possession and to collect the issues and profits and has further ordered that the receiver do forthwith sell the said property by public auction to the best purchaser or purchasers that can be got for the same provided he considers that a sufficient sum has been offered.

The defendant on this appeal contends that the property not being situate within the ordinary original jurisdiction and the defendant not being resident within the jurisdiction of this Court, the learned Judge had no jurisdiction to appoint a receiver by way of execution or at all; secondly that if the learned Judge had jurisdiction no case can be made to the effect that there was any legal or practical difficulty in procuring the sale in execution in the ordinary course, namely by transfer of the decree for execution to the local Court, and that the order passed is improper and uncalled for.

Now while there does not appear to be in the Code any express provision to the effect that immovable property shall only be sold by the Court within whose territorial jurisdiction it is situate and while it cannot be contended that there are not exceptions to this principle, it has frequently been held that the course contemplated by the Code is that sales of immovable property in execution shall be carried out by the local Courts. The leading case on this point is *Prem Chand* v. *Mokhoda* (1). Following that case in *Begg Dunlop & Co.* v. *Jagannath* (2) it was said:

(1) [1890] 17 Cal. 699 (F.B.).
(2) [1912] 39 Cal. 104=16 C.W.N. 402=11 I.C. 417=14 C.L.J. 228.

"These provisions of S. 38 read along with those of S. 39 plainly indicate the acceptance by the legislature of the general principle that no Court can execute a decree in which the subject-matter of the suit or of the application for execution is property situated entirely outside the local limits of its jurisdiction."

In *Sivakanda Raju* v. *Raja of Jeypore* (3), (at p. 886 *of* 50 *Mad.*) the balance of authority is summarized as follows:

"The proposition generally laid down in the reported authorities is that a Court has no power to sell property outside its territorial jurisdiction. Territorial jurisdiction is a condition precedent to the Court selling property."

Again, in the recent case of *Ambika Ranjan* v. *Manikganj Loan Office Ltd.* (4), (at p. 849 *of* 33 *C.W.N.*) it was said:

"Where it is necessary in execution of a decree for money to sell property not within the local limits of the jurisdiction of the Court which passed the decree, the sale of the property can only be effected by the Court within the local limits of which the property is situate."

These dicta, however, have a primary though not exclusive reference to execution which takes the form defined in Cl. (b), S. 51, namely, execution

"by attachment and sale or by sale without attachment of any property."

When a Court appoints a Receiver, the order merely operates to put the Receiver in possession of the interest of one or more of the parties and a sale by the Receiver is clearly a very different thing from a sale by the Court itself. The principle by which the action of a Court in effecting sales in execution is confined to immovable or other property within its territorial jurisdiction is prima facie not applicable to a sale by a Receiver which need not necessarily be a sale by public auction as distinct from private treaty.

Again, as regards the contention that this Court has no jurisdiction in any case to appoint a Receiver of immovable property situated outside its local jurisdiction, it must be conceded that this Court has always made such orders and that authority is against the appellant. There is the decision of Markby, J., in *Juggodamba* v. *Puddomoney* (5), followed recently by Mitter, J., in the case referred to by the learned Judge (Suit No. 145 of 1927). There is, in my opinion, no ground for the proposition that the defendant, although a resident of the District of Burdwan, can resist the appointment of a Receiver upon the ground that he is not ordinarily resident within the limits of the ordinary original jurisdiction of this Court.

In England the appointment of a Receiver is often regarded as a form of equitable execution, but in *re, Sheppard* (6), the Court of appeal pointed out that the expression tends to error. What a creditor gets by the appointment of a Receiver is not execution but a substitute for execution, a form of equitable relief which is granted on the ground that there is no effective remedy by execution at law. Accordingly there is authority for the proposition that a person seeking "equitable execution" must show that he was met by difficulties arising from the nature of the property which prevented his obtaining relief at law. In India the distinction between legal and equitable interests is not observed in the full sense in which it is part of the law in England. Since 1908, at all events, provision has been made by the Code for the appointment of a Receiver as a form of execution (S. 51). It is not contended for the respondents on this appeal that the appointment of a Receiver is a matter of right or that a proper case is not required to justify the exercise of the Court's discretion to appoint a Receiver by way of execution. The question which demands our consideration is in my opinion the question whether there were in evidence before the learned Judge circumstances which called for the appointment of a Receiver and justified the learned Judge in doing so at his own hand instead of leaving the plaintiff to apply in the local Court.

The main difficulty arises from the circumstance that the respondent's application was amended and converted into an application for a Receiver without any proper statement of facts being included in the affidavits so as to make a case for that form of relief. The evidence before the learned Judge was extremely meagre. From the consent decree itself it would appear, however, that the plaintiffs had been managing agents of the colliery in question. It may be taken, therefore, that the refer-

(3) A.I.R. 1927 Mad. 627=50 Mad. 882.
(4) A.I.R. 1929 Cal. 818=57 Cal. 67.
(5) [1875] 15 B.L.R. 318 (330).
(6) [1889] 43 Ch.D. 131=59 L.J.Ch. 83=38 W.R. 185=62 L.T. 337.

ence to the colliery in the consent decree is a reference to something which has been a going concern and which is, potentially at all events, a going concern. In these circumstances I cannot doubt that the most appropriate method to employ in order to realize plaintiff's decree out of the colliery is the appointment of a Receiver. In the muffasil no doubt it would not be unusual to sell a colliery by the ordinary process of attachment and Court sale without the intervention of a Receiver. This, however, is not a method which has any merits and it may well be highly improvident again. The agreement between the parties was in substance that the plaintiffs should have a charge and should be able to realize that charge without bringing another suit for the purpose. To enforce a charge by a Court sale in execution is again an ordinary feature of muffasil practice though I am glad to say that it is not a procedure normally applicable under the rules of the original side of this High Court. I am not prepared to read the consent decree as though the only right given to the plaintiffs was a right to have a Court sale of the colliery. It seems to me that it is open to the Court to have the colliery sold in execution in such way as the Court may think most appropriate to the circumstances of the case.

Upon the question whether the learned Judge had materials before him upon which to exercise a sound discretion to appoint the Receiver at his own hand, it appears to me that this aspect of the matter has been overlooked and that there is little or nothing in the evidence before the learned Judge bearing upon this question. Where the sole purpose of an application is to have immovable property realized by sale, I consider that even where it appears that the appointment of a Receiver with power to sell will be the most appropriate course, prima facie at all events, this application should be made as an application in execution to the Court within whose territorial jurisdiction the property is situate. The Receiver of a colliery, and indeed many other persons interested therein or affected by his appointment directly or indirectly, may have occasion to apply to the Court which appointed the Receiver for directions upon any one of a large number of matters. If the Receiver is appointed by this Court any directions that may be required must be obtained here. There may be all sorts of reasons for which attorneys of this Court and their clients seeking the appointment of a Receiver may find it not inconvenient that any person dissatisfied with any act of the Receiver and desirous of obtaining a direction from the Court should be obliged to incur the additional delay, trouble and expense involved in coming to Calcutta for the purpose. The same reasons, which have induced the Courts to regard with disfavour any departure from the general scheme of the Code even as regards, e. g., the attachment of debts in execution: cf. *Begg Dunlop & Co.* v. *Jagannath* (2), apply to an application for appointment of a Receiver, when the main purpose of the appointment is to effect a sale in execution. It is the duty of this Court on its original side to be both careful and sparing in the exercise of its power to make such appointments where the primary subject matter is immovable property outside its jurisdiction. I think it right to lay the greatest stress upon this because I consider that any looseness in practice upon such a matter is likely to lead to confusion and abuse. In the present case I cannot say that upon the evidence there is any proof that it was necessary or even advantageous that this Court should make the appointment of a Receiver.

The learned counsel for the respondents contended at the Bar that it was no more than common knowledge or common sense to say that the sale of a colliery was much more likely to be effected at a proper price if conducted in Calcutta. This certainly seems reasonable, though it is not clear to me that a Receiver appointed by the local Court could not, if necessary, be given by that Court proper directions as to the place of sale. Another consideration, however, is that the machinery of this Court on its original side, if properly applied, would be more effective for the purpose of controlling the Receiver. Thus, it would be possible to direct that the Receiver should act under the directions of the Registrar in getting a proper valuation made of the property in deciding whether the highest bid was

sufficient and in other matters. The order under appeal, it may be noted, leaves everything to the Receiver from which I gather that the advantages I have mentioned were not any part of the reasons for which this Receiver was appointed by the High Court. The appointment, so far as I can gather was made because it was the only form of execution open to this Court and it was made, I should judge, on the footing that this Court, as the Court which passed the decree, would enforce its decree if it could as a matter of course. In my judgment, for the reasons I have given, this is not quite the position.

It appears to me that it may well be of great importance to both parties that this colliery should be sold in the manner most calculated to produce its true value and that before disposing of this appeal, we should give to the plaintiffs a chance by a further affidavit to show us good reasons why the Receiver should be appointed by this Court. The plaintiffs will have ten days from this date in which to file their affidavit, the defendant within six days thereafter may file an affidavit in answer and the plaintiffs within four days thereafter may file an affidavit in reply. This case will stand adjourned to Monday, 12th August next.

C.C. Ghose, J.—I agree with my Lord in the order proposed to be made by him and it is unnecessary for me to set out once again the facts giving rise to this appeal. In view, however, of the importance of the questions which were argued before us, I desire to say a few words.

It was contended on behalf of the defendant-appellant that this Court on its original side has no power to execute a decree like the one in question, because it was a money decree and the defendant was a resident outside Calcutta and this Court is incompetent to realize the decretal amount by the appointment of a Receiver to take charge of immovable property outside the territorial jurisdiction of the Court. It was further argued that although a receivership order may be made by way of "equitable execution," the circumstances present on this record did not and could not justify the Court in making the order which is the subject matter of the appeal. On the other hand, it was contended on behalf of the respondent company that the procedure adopted by them is one which is sanctioned by the Civil Procedure Code in S. 51 thereof and that the circumstances showed that it was just and convenient that execution should be levied by means of the appointment of a Receiver.

No doubt the appointment of a Receiver has often been described as one by way of "equitable execution," but "equitable execution" is not execution within the strict meaning of the term. It is really not execution but it is equitable relief which the Court gives because execution at law cannot be had: see in this connexion *Morgan* v. *Hart* (7); *In re, Shephard Atkins* v. *Shephard* (6); and *Levasseur* v. *Mason and Barry* (8). Lord Coleridege, C. J., observed as follows:

"A receivership order has been called a step or process of equitable execution. Using language which, to my mind, is plainer and less likely to mislead, I should say that it is an order which shews that, in the judgment of the Court, the person obtaining it would be entitled to execution, but that from some legal impediment execution cannot be had."

Lord Esher, M. R. in the same case observed as follows:

"Formerly the judgment-creditors under such circumstances as these, would have gone to the Court of Chancery, and would have said: "There is a difficulty a fact existing which prevents us getting the execution to which we should be entitled at common law. Will you assist us to get that which belongs to us subject to the lien? We cannot get it by the sheriff's execution, and we require a process which will enable us to get it otherwise." The process adopted by the Court of Chancery was to make a receivership order and appoint a Receiver. The Receiver could not, of course, get the goods until the lien was satisfied, but the moment it was satisfied he could get them. The object of the process was to remove the difficulty of the judgment-creditor being unable to get possession of that to which he had a right, and the moment the difficulty was removed to give the thing in question to the judgment-creditor. That process has been called "equitable execution." In one sense it is not execution at all. It is a process which gives to the judgment creditor that to which the judgment has given him a right, and does away with the difficulty of his getting possession of it."

It has, however, been held that it is not always necessary that legal execution should be exhausted before the appointment of a Receiver by way

(7) [1914] 2 K. B. 183=83 L. J. K. B. 782=30 T. L. R. 286=110 L. T. 611.
(8) [1891] 2 Q. B. 73=60 L. J. Q. B. 659=39 W. R. 595=64 L. T. 761.

of "equitable execution" can be obtained. For instance, if it is shown that legal execution would be futile, but that there is property which could be reached by "equitable execution," a Receiver may be appointed without legal execution being issued: see in this connexion *Hills* v. *Webbar* (9). No doubt in this country there has not been for many years past that rigid distinction between law and equity as used to prevail in England; but there can be no doubt that the rule holds good in India that under ordinary circumstances "equitable execution" ought not to be allowed to be resorted to where there is no impediment to execution being levied in the ordinary way as provided by the statute.

Turning now, however, to the provisions of the Civil Procedure Code, it may be stated at once that at any rate since 1908 execution may be had by the appointment of a Receiver: see S. 51, Civil P. C., but, in my opinion, it is clear that the provisions of S. 51 must ordinarily be read along with the provisions of Ss. 38 and 39 of the Code. In other words, in ordinary circumstances territorial jurisdiction is a condition precedent to a Court executing a decree. I do not propose to go through the cases on this subject as they have been very fully dealt with by the learned Chief Justice in the judgment he has just delivered. In this case, however, the parties agreed that the respondent company would have a first charge on the colliery mentioned in the terms of settlement embodied in the decree for the purpose of satisfying the decretal amount and, further, that they would be entitled to have the colliery sold in execution of the decree made in this suit subject to what is hereinafter stated. If the decree-holder in such circumstances makes an application for the appointment of a Receiver and obtains an order as prayed for, such an order in my opinion is not a step or process of "equitable execution." In England it has been held that where a person has a right to payment out of a particular fund the Court could protect the fund in question by an injunction or by the appointment of a Receiver. That this was so held before the Judicature Act of 1873 is clear from the case of *Kearns* v. *Leaf* (10). In the case of *Cummins* v. *Perkins* (11), Lindlay M. R. refers to the case of *Kearns* v. *Leaf* (10), which was decided by Vice-Chancellor Page Wood. In *Cummins* v. *Perkins* (11) judgment had been given against the plaintiff, a married woman, for the payment of the defendants' costs which were by the judgment to be payable out of her separate property. As a matter of fact, she had no separate property, except a share to which she was entitled under her sister's will, which was admitted to belong to her for her separate use. Kekewich, J., before whom the matter came in the first instance held that a Receiver should be appointed and, accordingly, appointed a Receiver of the fund. The matter was taken to the Court of appeal and Lindley, M. R. observed as follows;

"The learned Judge did that which I think he had ample jurisdiction to do, he appointed a receiver to protect the fund and to preserve it in order that it may be applied in accordance with the judgment which the defendants had obtained. It is said that this order was wrong. It is said that it amounts to "equitable execution," and there has been some discussion upon that footing. But we are dealing with equitable estates and a judgment that a debt is to be paid out of a particular equitable estate. That being so, the authorities, which were very familiar 35 or 40 years ago, show plainly that, quite independently of the Judicature Act, 1873, if a plaintiff had a right to be paid out of a particular fund he could in equity obtain protection to prevent that fund from being dissipated so as to defeat his rights. He might not have had a specific charge on the fund so as to give him priority, but, after a long series of decisions, there was some doubt about it at one time, the Court settled that a person who had a right to be paid out of a particular fund could obtain an injunction (and if an injunction, it followed on principle that he could obtain a Receiver) in a proper case to protect the fund from being misapplied."

In the same case Chitty, L. J., observed as follows:

"It seems to me that the appointment of a receiver falls within the principle of the case to which the Master of the Rolls referred during the argument: *Kearns* v. *Leaf* (10). No doubt in that case the right to be paid out of the fund was by contract, but I can see no difference in principle between such a case and one in which the right is conferred by an order of the Court."

I have referred to these cases for the purpose of shewing that the appointment of a receiver in such circumstan-

(9) [1901] 17 T. L. R. 513.

(10) [1864] 1 H. & M. 681=12 W. R. 462=10 L. T. 185.

(11) [1899] 1 Ch. D. 16=68 L. J. Ch. 57=47 W. R. 214=79 L. T. 456.

ces is not a step or process of "equitable execution," but the present case is stronger in this that the respondent company had under the decree of this Court got a first charge on the colliery in question. The question, therefore, reduces itself into this whether the decree in question could be executed by the sale of the colliery which, admittedly is outside the jurisdiction of this Court on its original side. At this distance of time it is unnecessary to go into the history of the powers of this Court on its original side. This Court succeeded the Supreme Court and on its original side it had and has all the powers which the supreme Court had.

The supreme Court was a Court of equity and under Cl. 18, Letters Patent of the supreme Court, it assimilated its powers and authority to the Court of Chancery in England. The process of the Court of Chancery was in its origin against the person in order to enforce a decree, but in time from experience of the evils attendant on this mode of procedure, it had recourse to a species of process against the property itself by means of writs of sequestration. The supreme Court adopted these processes and exercised its jurisdiction over immovable property situate outside the limits of Calcutta. In other words, the supreme Court executed its decrees by the appointment of receivers of immovable property outside Calcutta.

This practice was adopted by this Court on its original side and has been exercised in numerous cases: see in this connexion the remarks of Markby, J., in *Jugadomba* v. *Puddomoney* (5). The view I take, therefore, is that this Court on its original side can in a proper case appoint a Receiver of property outside its territorial jurisdiction. Whether, however, a proper case has been made out in the present instance is another matter. It is unnecessary for me to elaborate that question because it has been referred to very fully by the learned Chief Justice. I entirely agree with him, if I may say so, that the present record shows a striking lack of materials upon which the appointment of a receiver could be justified, but in view of the peculiar nature of the property proposed to be sold by the appointment of a Receiver, I think an opportunity should be given to the parties to adduce before us fresh materials.

R.M./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 508

B. B. GHOSE AND S. K. GHOSE, JJ.

Upendra Nath Mukherjee—Defendant—Appellant.

v.

Gurupada Halder and *another*—Plaintiffs—Respondents.

Appeals Nos. 2306 of 1927 and 611 and 612 of 1928, Decided on 8th August 1929, against appellate decrees of Dist. Judge, 24-Parganas, D/- 1st August 1927.

(a) Hindu law—Widow—Compromise by widow in disputed litigation is binding upon reversioner.

A suit by a Hindu widow against mother-in-law for recovery of possession of her husband's property was referred to arbitration and according to the award the widow relinquished six annas share of the property in order to get possession of remaining ten annas; the mother-in law's right to maintenance was mentioned as a reason for the partial relinquishment. A decree followed which dismissed the suit as regards the six annas share. A reversioner of the original owner sued the lessee from the mother in-law to recover the six annas share, who claimed the share under a permanent lease from the mother-in-law.

Held: that as the widow had relinquished the six annas share as a matter of compromise to get possession of the 10 annas, that being a compromise of a disputed litigation was binding upon the reversioner unless he could show fraud or any other similar ground: 33 *All.* 356 (*P.C*) and *A. I. R.* 1922 *P. C.* 356, *Rel. on.* [P 510 C 1]

(b) Hindu law — Widow — Alienation — Presumption as to legal necessity does not arise when transfer is to reversionor himself.

The presumption of legal necessity which arises when a transfer is made with the consent of the next presumptive reversioner does not arise when the transfer is to such reversioner himself. [P 510 C 2]

(c) Hindu law — Widow — Alienation — Legal necessity recited in document and both parties dead—Presumption is that there was legal necessity.

Where a document itself recites the existence of legal necessity and both parties to it are dead, the presumption arises that there was legal necessity and unless rebutted the Court is entitled to act upon it. [P 510 C 2, P 511 C 1]

Sarat Chandra Roy Chaudhuri with *Ramgati Sarkar*, *Kali Kinkar Chuckerbutty*, *Upendra Kumar Roy* and *Saroj Kumar Maity*—for Appellant.

Basak with *Rupendra Coomar Mitter* and *Shyama Das Bhatta Charya* and *Biraj Mohan Majumdar*—for Respondents.

B. B. Ghose, J.—(*S. A. No.* 2306 *of* 1927). This appeal arises out of a suit for recovery of possession of a plot of land on the ground that the plaintiff was the reversionary heir of Pran Krishna Haldar who died so long ago as 26th January 1866. He left surviving him his mother Biswamoyi who died on 16th November 1899 and a widow Nitambini who died on 13th July 1919. The plaintiff brought the suit on 5th October 1923 as having succeeded to the property on the death of the widow Nitambini. The defendant claimed the property under a lease from Biswamoyi dated 20th July 1894. The lease was a permanent one. His plea was that Biswamoyi had an absolute interest in the property and that she was entitled to grant a permanent lease to the defendant. The short question, therefore, which arises in this case is whether Biswamoyi had the right to grant a permanent lease of the property in question. It appears that after the death of Pran Krishna the mother-in-law and the daughter-in-law were at loggerheads. In January 1868 Nitambini sued Biswamoyi for recovery of possession of various properties. The case was referred to arbitration and according to the award of the arbitrator a decree was made, under which Nitambini got 10 annas share of the property, the other six annas share remaining in the possession of Biswamoyi. The question for consideration would be whether, as a result of the decree, Biswamoyi had acquired any interest in the six annas share. With regard to the 10 annas share, the finding of the learned Judge on appeal was that Nitambini was unable to get possession of her 10 annas share. Then she sold the 10 annas interest to the then reversionery heir of her husband Kenaram Haldar who happens to be the father of the present plaintiff. The finding of the learned Judge is that Kenaram sold his interest in the 10 annas in his turn to Biswamoyi and thus Biswamoyi became entitled to remain in possession of the entire 16 annas share. The learned Judge found that this 10 annas share was sold by Nitambini to Kenaram, the then presumptive heir, for legal necessity. Upon the finding that Kenaram sold that share to Biswamoyi, he held that Biswamoyi had acquired an absolute interest to that 10 annas share reversing the decision of the Subordinate Judge to that extent. Upon this finding he dismissed the plaintiff's suit decreeing the appeal of the defendant against the judgment and decree of the Subordinate Judge to that extent; but he affirmed his decree with regard to the six annas share because, in his opinion, the six annas share appertained to the estate of Pran Krishna Haldar and the lady Biswamoyi had no right to grant a permanent lease of the property and, therefore, the plaintiff was entitled to succeed with regard to the six annas, thus varying in part the decree of the Subordinate Judge who decreed the entire suit in favour of the plaintiff. Now the appeal by the defendant is with regard to the six annas share and is numbered 2306 of 1927. The plaintiff has preferred an appeal with regard to the 10 annas share dismissed by the District Judge and that appeal is numbered 612 of 1928.

Various questions were discussed before the learned District Judge as regards limitation and so forth. But the short point upon which the decision of the right of the plaintiff must rest is with regard to the effect of the decree in suit No. 1 of 1868 brought by Nitambini against Biswamoyi. Nitambini brought the suit against Biswamoyi on the ground that Biswamoyi had dispossessed her. In the decree she got 10 annas share. Her suit with regard to the six annas share was dismissed. The question is whether having regard to the series of cases decided by the Privy Council, *Kattama Nauchear* v. *Raja of Shivagunga* (1), *Hari Nath Chatterjee* v. *Mothur Mohun Goswami* (2) and the last of these, viz., *Jaggo Bai* v. *Utsava Lal* (3) in which those cases were cited by their Lordships of the Privy Council with approval, the plaintiff is entitled, in spite of that decree, to recover possession of the property as the reversionary heir of Pran Krishna. It is contended on behalf of the plaintiff respondent that by reference to the award of the arbitrator it would appear

(1) [1861-63] 9 M. I. A. 539=2 W. R. 31 (P.C.).
(2) [1894] 21 Cal. 8=20 I. A. 183=6 Sar. 334 (P.C.).
(3) A. I. R. 1929 P. C. 166=51 All. 439=56 I. A. 267 (P.C.).

that the six annas share of the property was given by Nitambini to Biswamoyi for her maintenance only. That being so, on the death of Biswamoyi the property reverts to Nitambini and the plaintiff would be entitled to that share as the reversionary heir of Pran Krishna. In the reasons given by the arbitrator he stated that Nitambini was entitled to the 16 annas of the property left by her husband. But she gives up her interest to the six annas of the property because Biswamoyi was entitled to maintenanee out of her husband's estate. Upon that award a decree was made the effect of which was that Nitambini's suit with regard to the six annas interest was dismissed. Two difficulties arise in the way of the plaintiff under the circumstances.

If the construction contended for by him of the award were correct that it was only a maintenance grant which terminated at the end of Biswamoyi's life, then the decree was not in accordance with the award. But the decree was never set right by proper procedure and therefore, he cannot now say that there was only a grant of a life-interest to Biswamoyi for maintenance. Next the words are very clear in the award of the arbitrator that Nitambini relinquished six annnas share whatever the reason might be. The reason assigned was no doubt the right of maintenance of Biswamoyi. Biswamoyi was resisting her possession to the whole of the property. Under such circumstances, if Nitambini relinquished as a matter of compromise 6 annas share of the property in order to get possession of the 10 annas, that would be a compromise of a disputed litigation and according to the authorities of their Lordships of the Judicial Committee that compromise is binding on the reversioners: see *Khunni Lal* v. *Gobinda* (4), and *Ram Sumran* v. *Shyam Kumar* (5), where all the cases are reviewed. Of course, if the reversioner could show fraud or any other ground upon which a decree should be shown to be not binding upon him, that would be another matter. But there is nothing of the sort in this case. In my judgment, that is also not the way in which Nitambini understood the decree made under the award. If that was the correct interpretation of the decree, then after the death of Biswamoyi in 1899 Nitambini would get possession of the property, but it has never been said that for 20 years the period for which Nitambini survived her mother-in-law, she exercised any act of possession with regard to the property in question. In my judgment, therefore, the decree in suit No. 1 of 1868 is binding upon the plaintiff and he is not entitled to recover possession of the 6 annas share with regard to which the suit of Nitambini was dismissed. On this short ground this appeal must be decred with costs.

Appeal No. 612. — This appeal is by the plaintiff against that part of the decree of the learned District Judge by which he dismissed his suit with regard to the 10 annas share of the property. It is contended on behalf of the appellant that the learned Judge is wrong in holding that Nitambini's sale to Kenaram was for legal necessity. It is argued in the first place that no legal necessity was pleaded in the written statement. Then it is said that there is no actual evidence that there was any pressing necessity for which Nitambini had occasion to sell the property to the then reversioner Kenaram. It is contended that a sale with the consent of the next presumptive reversioner raises a presumption of legal necessity as was stated by their Lordships of the Judicial Committee in the case of *Rangasami Gounden* v. *Nachippa Gounden* (6) because the person who would be interested to object to the sale by the limited owner does not object to the sale. The person who was entitled to object was himself taking the property in this case and, therefore, the presumption of legal necessity by reason of the consent of the reversioner does not arise. This argument seems to me to be logical. But there is another point in the case which is against the plaintiff's contention and that is the document itself recites the existence of necessity and the document being dated 1877 and both the parties to it being dead, the presumption as

(4) [1911] 33 All. 356=10 I. C. 477=38 I. A. 87 (P. C.).

(5) A. I. R. 1922 P. C. 356=1 Pat. 741=49 I. A. 342 (P. C.).

(6) A. I. R. 1918 P. C. 196=42 Mad. 523=46 I. A. 72 (P. C.).

held by the Privy Council arises that there was legal necessity and, unless rebutted, the Court was entitled to act upon it. In this case, there is a further difficulty arising out of the fact that Biswamoyi seems to have been a masterful lady. Notwithstanding that Nitambini got 10 annas share under the decree the learned Judge finds that she was unable to get possession of the property, and after the purchase by Kenaram he also found it difficult to get possession as against that lady, and the finding of the learned Judge is that Kenaram finding his position like that transferred his right to Biswamoyi. With regard to the question that legal necessity was not specifically pleaded, it may be said that the defendant had asserted an absolute right to the property by reason of a transfer from a qualified owner. This connotes the idea of the transfer being for legal necessity. That is what the learned Judge has held. Unless a transferee from a qualified owner as a Hindu widow can establish legal necessity for the transfer, the reversioner would be entitled to get possession of the property. That is a well-understood proposition. The defendant in such a case as this, when he asserts his absolute right, is bound to prove legal necessity in order that he may succeed and when the defendant proved the kabala by Nitambini in favour of Kenaram, that was evidence of legal necessity which was put forward by him. The plaintiff then had the right to rebut that evidence. Apparently the plaintiff never exercised that right and, therefore, the contention of the learned advocate for the plaintiff-appellant that he should be given an opportunityto rebut the evidence adduced by the defendant as to the existence of legal necessity seems to me to be a belated prayer which cannot be allowed. Under these circumstances, this appeal must stand dismissed with costs.

Appeal No. 611 — In this case both the Courts below have found that the plaintiff has failed to prove that the property belonged to Pran Krishna whose reversionary heir the plaintiff claims to be. The learned Judge has recited the evidence which is very cogent in three sentences, and it is very difficult to attack the reasoning of the learned Judge. Dr. Basak on behalf of the plaintiff, however, urges that if the property belonged to the Haldars as a body, Pran Krishna being one of them, must have had some share in the property, and as this point of view was not pressed by the plaintiff's legal advisers in the Court below, the plaintiff is going to suffer, and therefore he asks leave to withdraw his suit with liberty to bring a fresh suit. That, however, cannot be allowed after the case has been fought on for so many years. This appeal must also stand dismissed with costs.

S. K. Ghose, J. – I agree.

R.M./R.K. *Appeals dismissed.*

A. I. R. 1930 Calcutta 511

MUKERJI AND GUHA, JJ.

Allauddin Ahmed Chowdhury and *another*—Appellants.

v.

Monoranjan Ray and *others*—Respondents.

Appeal No. 321 of 1926, Decided on 10th December 1929, against original order of Offg. Sub-Judge, 4th Court, Dacca, D/- 11th May 1926.

Civil P. C., O. 21, R. 90—Misrepresentation of value in sale proclamation is material irregularity.

Omission to mention the valuation of the property according to judgment-debtor and omission to give judgment-debtor a proper opportunity to state his valuation if it result in apparent loss to the judgment-debtor, is a material misrepresentation amounting to material irregularity in publication or conduct of sale within the meaning of O. 21, R. 90 : 20 *All.* 412 (*P. C.*), *Rel. on.* [P 512 C 2]

Dwarka Nath Chakraburty, *S. C. Basak* and *Kiron Mohan Sarkar*—for Appellants.

Gunada Charan Sen, *Radhika Ranjan Guha*, *Prokash Chandra Pakrashi*, *Nirmal Chandra Chakrabarty*, *Mohendra Kumar Ghose* and *Suresh Chandra Taluqdar*—for Respondents.

Guha, J.—The questions raised before us in this appeal directed against an order passed by the Subordinate Judge, 4th Court, Dacca, and arising out of an application for setting aside a sale made under the provisions of O. 21, R. 90, Civil P. C., are whether notice was given to the judgment-debtors for the purpose of supplying details in the fresh sale proclamation issued by the Court on 14th September 1925, and whether there was substantial injury

to the judgment-debtors owing to inadequacy of price fetched at the sale. This Court when the case came before it, at a previous stage, by an order passed on 19th August 1925 directed that the Subordinate Judge was to consider whether in the fresh proclamation for sale further details should be given so that the public might be informed more accurately of the nature of the mortgages on the properties to be sold, and so be in a better position to judge of the value of those properties.

When the case went back to the Subordinate Judge an order was passed on 14th September 1925 for issue of sale proclamation ; and the only information we have as to what actually happened in Court before the sale proclamation was issued, is that the decree-holders prayed for issue of the same, and the judgment-debtors' pleader was asked by the Subordinate Judge if proclamation of sale could issue and he (the pleader) said, it could. The pleader in his evidence says he did not know what he would have to do, meaning perhaps he had no instructions relating to the matter from his clients. The Subordinate Judge does not appear to have applied his own mind as to whether further details should be given in the sale proclamation. In the circumstances stated, fresh proclamation was issued without any further details than those already given in the one issued before the case came up to this Court previously. It would seem that in the matter of supplying further details as to mortgages on the properties to be sold, the judgment-debtors were not very much interested, seeing that these details would have discouraged bidders at the sale. There was, however, an apparent irregularity inasmuch as the direction of this Court was not complied with, and also because of the judgment-debtors not having been given notice enabling them to comply with the said direction. The question then is whether there was any inadequacy of price fetched at the sale. On the evidence placed before us, regard being specially had to Ex. B, the judgment-debtors have failed to make out that so far at least as lots 1 and 2 mentioned in the sale proclamation were concerned there has been an inadequacy of price and substantial injury. From the evidence placed before the Court, it cannot be said that any serious attempt was made by the judgment-debtors to prove that these properties were not sold at the proper price.

The case so far as it relates to lots 3 and 4 in the sale proclamation stands, however, on a different footing. It appears that approximate value of the properties as stated in the sale proclamation was that given by the decree-holders only. The judgment-debtors' valuation was not even mentioned, as was done in the case of lots 1 and 2 referred to above and furthermore we are not satisfied that the judgment-debtors had a proper opportunity to state what the values of these two lots were. It is apparent on the materials before us that these two items of property(lots 3 and 4) are more valuable than the amount realized at the sale indicates. There was in the words of their Lordships of the Judicial Committee of the Privy Council used in the case of *Saadatmand Khan* v. *Phul Kuar* (1) a material misrepresentation of the value of their properties contained in the sale proclamation, as it is manifest from the fact that the decree-holders themselves had offered higher bids. In this view of the matter the order of the Subordinate Judge, so far as it relates to the sale of the properties mentioned as lots 3 and 4 in the sale proclamation, should be set aside. The sale of the properties mentioned as lots 1 and 2 should stand for reasons stated above. It would be open to the decree-holders to bring lots 3 and 4 to sale if necessary, by means of proceedings in the Court below in accordance with law. We may state here that we have been told that by the sale of lots 1 and 2 the decree has been satisfied; and if that be so, it goes without saying that no further sale of lots 3 and 4 will take place. There will be no order for costs.

Mukerji, J.—I agree.

V.B./R.K. *Appeal partly allowed.*

(1) [1898] 20 All. 412=25 I. A. 146=7 Sar. 380 (P.C.).

A. I. R. 1930 Calcutta 513

JACK AND MITTER, JJ.

In re—A Pleader.

Civil Rule No. 223 of 1929, Decided on 28th March 1929.

Legal Practitioners' Act, S. 12—Where pleader is convicted of criminal offence, High Court is not bound to strike him off the roll—Junior pleader convicted of criminal breach of trust — To certain extent he being victim of his senior pleader—He paying back sums embezzled though after discovery of fraud — Subsequently he conducting himself well—One year's suspension from practice was sufficient.

Although where a pleader is convicted of criminal offences that prima facie renders him unfit to be a member of the lawyer's profession, still the Court is not bound to strike him off the roll. The word 'may' after the words 'the High Court' in S. 12 shows that the discretion of the Court in each particular case is absolute. [P 514 C 2]

A junior pleader of six years standing was convicted of criminal breach of trust and abetment of the same. But to some extent he was the victim of his senior pleader. He had also paid the sums embezzled by him though after the discovery of the fraud. He conducted himself well and had done nothing wrong since his last offence and had expressed his repentance.

Held : that instead of striking him off the roll he should be suspended from practising for one year : 22 *All.* 49 (*P.C.*), *Cons. In re, Weare*, (1893) 2 *Q. B.* 439, *Appl.* [P 515 C 1]

H. D. Bose, Saratkumar Mitter and *Anilchandra Ray Chaudhuri*—for Petitioner.

Jack, J.—By this rule under S. 12, Legal Practitioners Act, *S* pleader, has been directed to show cause why he should not be suspended or dismissed, on the ground that he has been convicted of two offences of breach of trust and abetment of the same, implying a defect of character unfitting him to be a pleader. He does not dispute the accuracy of the recitals of the two judgments of the Chief Presidency Magistrate in the cases in which he was convicted.

From these, we find that *C* his co-accused in one of these cases, was previously prosecuted for embezzlement and had been declared an insolvent and prohibited by the Court from withdrawing money on behalf of clients from the Court. Knowing all this, *S* withdrew, in each of these cases, a large sum on account of a client of *C* by virtue of a power-of-attorney, in which his name was entered, unknown to the client. These sums were not paid to the clients and hence his conviction in these two cases. Further, it appears, that when asked for the money, he told various untruths to explain the delay in payment.

In his application to be allowed to resume practice in the Small Cause Court, he urged : (i) that he always acted bona fide under the direction of his senior (i.e., his co-accused in one case, little knowing that he would be put to such trouble, and now repents his extreme indiscretion ; (ii) that he has paid up the amount of the defalcations ; (iii) that he has already suffered considerably through his prosecution and conviction.

These pleas indicate that he scarcely seems to appreciate the extent of moral delinquency indicated by his conduct. Such conduct is not compatible, as he seems to imagine, with bona fides and is not merely a matter of indiscretion. That he should have thought such pleas justified in the circumstances seems in itself an indication that his present character unfits him to be a member of an honourable profession and that he is not a man to whom the affairs of clients could be safely entrusted. His learned advocate very wisely does not now seek to justify his conduct, though he still seems anxious to put most of the blame on his co-accused.

He has, it is true, since he was convicted, paid up the amount of the defalcations and, putting the most favourable interpretation on this, some credit must be given to him for restoration of the amounts embezzled. But the fact that he did not act in a straight forward manner, after the defalcations occurred, is very much against him. An order of dismissal seems almost to be demanded in the interests of the profession and of the litigant public. So much so, that it is with some hesitation that we refrain from ordering that his name be struck off the roll of pleaders and adopt the alternative course suggested in the rule. Both the Chief Judge of the Small Cause Court and the Chief Presidency Magistrate regard, as a mitigating circumstance, the fact that he was apparently

led astray by *C* and in this view of the case we are disposed to treat him leniently, in the hope that, when he resumes practice, he will have been so impressed with the heinousness of such conduct that nothing of the kind will recur. We accordingly order that *S* be suspended from practice as a pleader for one year from this date.

Mitter, J.—This rule was issued by the Full Court, by virtue of the powers vested on the High Court by S. 12, Legal Practitioners Act (18 of 1879), by which *S*,a pleader practising in the Calcutta Small Cause Court, was called upon to show cause why he should not be suspended or dismissed on the ground that the offences of which he was convicted imply a defect of character which unfits him to be a pleader.

It appears that the pleader was charged with aiding and abetting another pleader,*C* in committing breach of trust of a sum of Rs. 1,002 withdrawn on 14th November 1925, by the said *C* from the Court, the sum being due to one Bholaram Kundulal. He was convicted under Ss. 406 and 109, I. P. C., by the Chief Presidency Magistrate and was sentenced to undergo rigorous imprisonment for six weeks. He was also charged under S. 409, I. P. C., with criminal breach of trust for misappropriation of a sum of Rs. 1,350 drawn on behalf of his client, one Sudarsanchandra Mallik, and he was sentenced to another six weeks' imprisonment on this charge. The pleader moved the High Court and C. C. Ghose and Gregory, JJ. reduced the sentences, observing in their judgment that he has tried to make amends after his conviction. Mr. H. D. Bose has appeared on behalf of the pleader and has argued that the money misappropriated had been paid up and that, as the pleader was a junior pleader of only six years' standing and that as regards the first offence, the Presidency Magistrate observed in his judgment that he was to some extent the victim of the co-accused *C* a merely nominal punishment should be given.

When a pleader does an act, which involves dishonesty, it is for the interest of the suitors that the Court should interpose and prevent a man, guilty of such misconduct, from acting as a pleader of the Court. In this case, the pleader had been proceeded against criminally and has been convicted of breach of trust and abetment of the same and, upon those convictions being brought to our notice, it is the bounden duty of the Court to act. It is not permissible to us to go behind the conviction, nor has learned counsel for the pleader asked us to do so. In our opinion, the convictions followed by the sentences were sufficient, without further enquiry, to justify the High Court in taking proceedings under S. 12 of the Act, for it is now firmly established that the pleader cannot be allowed to have indirect appeals against the judgment of the Chief Presidency Magistrate confirmed by the High Court : *In the matter of Rajendra Nath Mukerji* (1). Where a pleader has been convicted of criminal offences, for misconduct committed strictly in his professional character, that prima facie, at all events, renders him unfit to be a member of the honourable profession. I do not, however, mean to say that wherever a pleader has been convicted of a criminal offence the Court is bound to strike him off the roll. The use of the word 'may' in S. 12 after the words "the High Court" shows that the discretion of the Court in each particular case is absolute. In this connexion, the following observations of Lord Esher, Master of the Rolls, are instructive and may be usefully referred to :

> "Where a man has been convicted of a criminal offence, that prima facie, at all events, does make him a person unfit to be a member of the honourable profession. That must not be carried to the length of saying that, wherever a solicitor has been convicted of a criminal offence, the Court is bound to strike him off the roll. That was argued on behalf of the Incorporated Law Society in the case of *Re a Solicitor, Ex parte Incorporated Law Society* (2). It was there contended that, where a solicitor had been convicted of a crime, it followed, as a matter of course, that he must be struck off ; but Baron Pollock and Manisty, J., held that, although his being convicted of a crime prima facie made him liable to be struck off the roll, the Court had a discretion and must inquire into what kind of a crime it is of which he has been convicted, and the Court may punish him to a less extent than if he had not been punished in the criminal proceed-

(1) [1899] 22 All. 49=26 I. A. 242 (P.C.).
(2) [1889] 61 L. T. 842.

ing. As to striking off the roll, I have no doubt that the Court might, in some cases, say 'under these circumstances we shall do no more than admonish him', or the Court might say 'we shall do no more than admonish him and make him pay the costs of the application'; or the Court might suspend him or the Court might strike him off the roll. The discretion of the Court in each particular case is absolute. I think the law as to the power of the Court is quite clear: see *In re, Weare* (3)."

Bearing these observations in mind, let us consider what are the circumstances of mitigation in this case. There is the fact that he has paid the sums withdrawn by him. On the other hand, it is to be noticed that the repayment was after the discovery of the fraud. If he had spontaneously come forward and acknowledged the truth and of his own accord had made good the loss his clients had sustained through the embezzlement in question, I think that would have entitled him to much more favourable consideration than the mere fact of his payment on the discovery of the fraud. He paid the money more for the purpose of protecting himself from the consequences of his misconduct rather than from any contrition on his part and desire to make good the mischief he had done. But still, taking into consideration the facts that he has paid the money, that he was, to some extent, the victim of circumstances, in that he associated himself with his senior pleader, whose conduct was known not to be above board, that he has conducted himself well and had done nothing wrong since his last offence, that he, through his counsel, has expressed his repentance and has given us the assurance that he would lead an honourable life henceforth, we think we are not called upon to go to the extent of striking him off the roll; but we cannot pass the case over without marking our sense of the misconduct of the pleader in the two instances of misappropriation which are found to have taken place. The least that we can do is to say that he must be suspended from practising as a pleader for the period of one year from date. For these reasons I agree with my learned brother in the order which he proposes to make.

S.N./R.K. *Order accordingly.*

(3) [1893] 2 Q. B. 439 = 62 L. J. Q. B. 596 = 58 J. P. 6 = 69 L. T. 522.

A. I. R. 1930 Calcutta 515

SUHRAWARDY AND COSTELLO, JJ.

Fazlar Rahaman and *others*—Appellants.

v.

Emperor

Criminal Appeals Nos. 934 and 935 of 1929, and Criminal Revn. No. 29 of 1930, Decided on 5th May 1930.

(a) Criminal P. C., S. 253 — Magistrate can discharge accused at any time before recording evidence and in course of recording evidence if charge is groundless—Though as a general rule when a Magistrate proceeds to take evidence he must take the whole of the evidence.

A Magistrate can discharge an accused at any stage before recording any evidence or in the course of recording evidence if he is of opinion that the charge is groundless: 34 *I. C.* 305 and 10 *Cal.* 67, *Ref.*; *A. I. R.* 1928 *Mad.* 129, *Dist.* [P 517 C 2, P 518 C 1]

(b) Criminal P. C., Ss. 253 and 476—Cases held groundless and Magistrate's view supported by police report—Complainant need not be asked to prove his case.

Where the Magistrate has held that the case against the accused is groundless and has before him the report of the police in support of his view it is not necessary that he should again ask the complainant to prove his case which the Magistrate has disbelieved even before he examines the complainant and his witnesses: 5 *C. W. N.* 106, *Ref.* [P 518 C 2]

(c) Criminal P. C., S. 476—"Preliminary enquiry"—Meaning and scope explained.

Section 476 gives the discretion to the Court to hold or not to hold a preliminary enquiry. If the Court is of opinion that no preliminary enquiry is necessary it may at once make the complaint. If, on the other hand, it thinks that it is desirable to have a preliminary enquiry, it may adopt any course for the purpose of such an enquiry. The words "preliminary enquiry" under S. 476 may be coextensive with if not wider than the words "enquire into the case" in S. 202, Criminal P. C. *A. I. R.* 1928 *All.* 21, *Ref.*: *A. I. R.* 1925 *Pat.* 320; 43 *Bom.* 300 and 49 *I. C.* 917 *Dist.* [P 518 C 2, P 519 C 1]

(d) Criminal P. C., S. 476—Any person who appears to have committed an offence under S. 195 (1) (b) and not only parties to proceedings is contemplated by S. 476.

Section 476 is not restricted to the party making the complaint or actually before the Court, but is wide enough to include any person who appears to have committed an offence mentioned in S. 195 (1) (b) which is not restricted to parties to the proceedings like Cl. (c) of that section. The Court has therefore jurisdiction to prosecute a person who causes a false complaint to be lodged. All that S. 476 requires is that the Court should be satisfied that it is expedient in the interest of justice that an enquiry should be made into an offence

which appears to it to have been committed in or in relation to a judicial proceeding. It does not speak of a party to the proceeding. [P 520 C 2]

Mahendra Kumar Ghose and *Sures Chandra Talukdar*—for Appellants.

Debendra Narain Bhattacharjee—for the Crown.

Suhrawardy, J.—These two appeals and the revision case are connected and arise out of the same matter. Aziz Mia, the appellant in appeal No. 935 and the petitioner in revision case No. 29 of 1930, filed a complaint before the Chief Presidency Magistrate against one Afaq Ali on the allegation that he had given him Rs. 50 to be made over to Fazlar Rahaman, the appellant in appeal No. 934 of 1929, and the money was misappropriated by Afaq Ali. The learned Magistrate ordered the issue of a warrant on a charge under S. 406, I. P. C. The case was adjourned from time to time as the warrant was not returned. On 1st October 1929 the warrant came back executed, but as the accused did not appear a proclamation was ordered to be issued. The order was thus recorded:

"Proclamation dates: date of publication 21st October 1929 put up 28th October 1929. Date of appearance 21st November 1929."

On 21st October the accused appeared in Court, surrendered and was released on bail. The order passed was:

"Recall proclamation. Inform complainant fixing date 28th October 1929."

It was the date originally fixed for the matter to be put up before the Magistrate after the publication of the proclamation. On 28th October the following order was passed:

"Complainant absent said to have gone to his native country. Accused says that the complainant was seen in Court. Pleader for complainant now asks for a month's time. This is absurd. The accused is discharged under S. 253, Criminal P. C."

The certified copy of the order which has been placed before us shows that the accused was discharged under S. 203, but it appears from the Magistrate's explanation that the order was passed under S. 253; and as the original record is not before us we must take it that the order passed by the Magistrate on 28th October 1929 was under S. 253; and it is conceded that if it was passed under that section it must have been passed under Cl. (2) of that section. Thereafter Afaq Ali applied to the Magistrate to prosecute the complainant Aziz Mia for having brought a false case against him. The Magistrate examined Afaq Ali and sent the matter to the C. I. D. for enquiry and report. On receipt of the report the learned Magistrate lodged a complaint under S. 476, Criminal P. C., in the Court of the Third Presidency Magistrate for prosecuting Aziz Mia and Fazlar Rahaman under S. 211, I. P. C. The two appeals are by Aziz Mia and Fazlar Rahaman against this order passed by the Magistrate under S. 476, Criminal P. C. The revision case is directed against the order of the Magistrate dated 28th October 1929. It will be convenient to deal with the revision case first.

It is argued on behalf of the petitioner that the Magistrate was not justified in passing the order discharging the accused under S. 253 (2) in this case. The charge against the accused was cognizable and non-compoundable and hence the Magistrate could not pass an order under S. 259. It is contended that in a cognizable and non-compoundable case the Magistrate is bound to adjourn the case even if the complainant is absent and to carry on the prosecution on behalf of the State; and in support of this case reliance is placed on the case of *Maung Thu Daw* v. *U. Po Nyun* (1). There it was held, and rightly held, that where there is reasonable ground for believing that an offence has been committed, the Magistrate should not, because the complainant is absent, dismiss the case and discharge the accused but the final responsibility for the conduct of such case rests with the State, and once the machinery of the law has been set in motion the right of arresting its progress rests with the State alone. This brings us to the consideration of the question as to whether there was reasonable ground for believing that an offence had been committed. The case brought by the complainant against the accused is of a class of cases which are fairly common in Calcutta and such cases by their recurrence have won the name of "Noakhali cases." It is to be noted that both parties hail from Noakhali. In such cases the usual complaint is that

(1) A. I. R. 1927 Rang. 174 = 103 I. C. 105=28 Cr. L. J. 649=5 Rang. 136.

the complainant had entrusted some money to the accused who was going home to make it over to someone in the native village of the complainant but the accused instead of so doing appropriated the money to himself. Some of these cases may be true, but the learned Magistrate who has wide experience of these matters observes that many of them are brought for the purpose of satisfying private grudge. In the present case the defence of the accused was that he had never come to Calcutta and had never been entrusted with money by the complainant, that he was the maternal uncle-in-law of Fazlar Rahaman and had some disputes with him regarding some land and that this case was brought against him by Fazlar Rahaman through the complainant for the purpose of harassing him and putting him in trouble. The learned Chief Presidency Magistrate is of opinion that the case against the accused is not true considering the conduct of the complainant and the other circumstances in the case. It has further been broadly argued that the Magistrate had no power under S. 253 (2) to discharge the accused, without hearing the evidence for the prosecution merely because the complainant was absent on the date of hearing.

If the Magistrate is satisfied that prima facie there is a case against the accused or has reason to suspect that an offence has been committed he has power to proceed under S. 252, Criminal P. C., but if on the date of hearing he has reason to suspect that the case is a false one and that there is no reasonable ground for suspecting that an offence has been committed, he has the right to proceed under S. 253 which is couched in wide terms. That section makes it clear that if a Magistrate after taking evidence under S. 252 finds that no case has been made out he may discharge the accused, and it further says that nothing in that section (that is taking of the evidence under S. 252 and making such examination of the accused and finding that no case has been made out against the accused), shall be deemed to prevent the Magistrate from discharging the accused at any previous stage of the case if for reasons to be recorded by such Magistrate he considers the charge to be groundless. Under Cl. 1 the Magistrate may discharge the accused if after recording the evidence for the prosecution he finds that no case has been made out against him. Under Cl. 2 he may discharge the accused at any stage even before recording any evidence if he considers the charge to be groundless. The wording of the section is so plain that it is hardly necessary to cite any authority for the view thus expressed. But it has been so held in *Gobinda Das* v. *Dulall Das* (2), where the learned Judges say :

"Having regard to the terms of S. 259 we are of opinion that in warrant cases not coming within that section except under the last clause of S. 253, which is not applicable, a Magistrate is not competent to pass an order of dismissal or discharge in consequence of the absence of the complainant."

It is further remarked that a Magistrate can pass an order of dismissal or discharge an accused in consequence of the absence of the complainant under Cl. 1, S. 253. Our attention was also drawn to a recent decision of the Madras High Court in *Mahomed Sheriff Sahib* v. *Abdul Karim Sahib* (3). In that case the Magistrate had discharged the accused and refused to examine all the witnesses cited by the complainant holding that no case had been made out against him. It was held that the Magistrate could not hold that no case had been made out against the accused without examining all the witnesses for the prosecution ; and that if he purported to discharge the accused under the last clause of S. 253 he did not in his order say that the charge was groundless which was a different thing from saying that a case had not been made out. It is further observed there that where a complaint prima facie discloses an offence a Magistrate cannot hold the charge to be groundless unless he knows what is the sort of evidence that is going to be adduced to prove it. The rule that can be deduced from this case is that where the Magistrate proceeds to take evidence he must take the whole of the evidence before holding that no case has been made out against the accused. I do not quarrel with this view, but I hold that he can discharge the accused at any stage

(2) [1884] 10 Cal. 67.
(3) A. I. R. 1928 Mad. 129=23 Cr. L. J. 995=105 I. C. 819=51 Mad. 135.

before recording any evidence or if in the course of recording evidence he is of opinion that the charge is groundless: see the case of *V. R. Alexander* v. *P.W. Connore* (4). The order of the learned Chief Presidency Magistrate does not contain the word "groundless" but reading it as a whole and considering it with the explanation submitted by the Magistrate which we are bound to do under S. 441, Criminal P C., it seems that he believed that the charge was groundless in view of the absence of the complainant, the statement made by the accused and the further fact that no steps were taken by the complainant to have the sale proclamation issued. The learned Magistrate further disbelieved the story that the complainant had gone to his native country; and he found at the time when he passed the order that the case was one of the class which he characterizes as Noakhali cases was brought for the purpose of settling private disputes. This ground accordingly must fail.

The next ground taken in the revision case by Mr. Ghose is that full opportunity should have been given to the complainant before ordering his prosecution for an offence under S. 211. It appears that on 6th December the complainant applied to the learned Magistrate to revive his complaint which the Magistrate declined to do. It is not necessary for us to consider that order. The present rule is directed against the order discharging the accused. Mr. Ghose has relied on certain cases of which it is enough to cite one, namely the case of *Lalji Gope* v. *Giridhari Chowdhury* (5), where it was held that the Magistrate does not exercise a proper discretion, who on receipt of a police report that the complaint is false forthwith orders the complainant to be prosecuted under S. 211, I. P. C., and rejects the prayer of the complainant for hearing the complaint. But if the Magistrate examines the complainant and his witnesses and comes to the conclusion that the charge is false he can then proceed under S. 476, Criminal P. C. This case and other cases similar to it proceed on the assumption that the complaint of the complainant has not been finally and judicially disposed of. But where the Magistrate has held that the case against the accused is groundless and has before him the report of the police in support of his view it is not necessary that he should again ask the complainant to prove his case which the Magistrate has disbelieved even before he examines the complainant and his witnesses. The procedure recommended in cases ordering prosecution under S. 211 is that the complainant if his complaint is pending should be given an opportunity of proving his case before he is directed to be prosecuted. In the present case the complaint had been finally disposed of by the Magistrate under S. 253 and therefore there was nothing before him into which he should make any further enquiry. This ground also fails, and in this view the rule is discharged.

With regard to the appeal by the complainant Aziz Mia the real ground is that no complaint should have been made under S. 476 before the complainant had been given opportunity of proving his complaint. This point has already been disposed of. The other point raised is that before making a complaint under S. 476 the learned Magistrate had asked the C. I. D. to report on the complaint. This inquiry was a preliminary enquiry as contemplated by S. 476. It is argued on behalf of the appellant that the preliminary enquiry under S. 476 should be conducted by the Court and not by any other agency as is provided for by S. 202, Criminal P. C. The wording of S. 476 is so plain that it can hardly be argued that the words "such preliminary enquiry" in the section should be qualified by reading into it "by the Court itself" words which the legislature has not thought fit to use. The section simply says that if the Court is of opinion that an offence has been committed in respect of a judicial proceeding before it such Court may after such preliminary enquiry, if any, as it thinks necessary record a finding etc. This section gives the discretion to the Court to hold or not to hold a preliminary enquiry. If the Court is of opinion that no preliminary enquiry is necessary it may at once make the complaint. If, on the other hand, it thinks that it is desirable to have a preliminary enquiry, he may adopt any course for the purpose of such an en-

(4) [1916] 34 I. C. 305=7 Cr. L. J. 406.
(5) [1901] 5 C. W. N. 103.

quiry. The words "preliminary enquiry" under S. 476 may be co-extensive with if not wider than the words "enquire into the case" in S. 202, Criminal P. C. There is no direct authority on this point but the question did come up for observations in some cases. In *Chamari Singh* v. *Public Prosecutor of Patna* (6), the Sessions Judge made a complaint under S. 476 and sent the case to the Magistrate to enquire if any offence was committed by the accused and, if so, to prosecute him under certain sections of the Criminal Procedure Code. This procedure the learned Judges condemned and observed:

"It is for the Court acting under S. 476 to make any enquiry that is necessary and then to make a complaint against the person or persons who, he is satisfied, have committed an offence."

They do not mean to lay down that it is the Court acting under S. 476 which must hold the enquiry. What they mean is that the Court acting under that section should make an enquiry and make a complaint as the result of such enquiry and not delegate the function to another Court for they observe that this section does not contemplate that the Court should send the case to a Magistrate for enquiry as to whether an offence has been really committed and for prosecution if the Magistrate is so satisfied. This decision does not help the appellant as it only lays down that an enquiry preliminary to a complaint should be made by the Court which does not necessarily mean by the Court itself examining witnesses. The case of *Emperor* v. *Waman Dinkar* (7), is not also in point. It does not support the appellant but it may be turned against him on some of the observations made in that case. There the Assistant Collector who had sanctioned the prosecution made a complaint by holding a preliminary enquiry in the shape of a part by himself and the rest of it by the C. I. D. It was held that the Assistant Collector was bound to hold the whole enquiry himself as he had started it. In *Raja Rao* v. *Emperor* (8), the point on behalf of the accused was that they were not allowed at the preliminary enquiry to cross-examine the witnesses produced against them. Waller, J., observed:

"What a Court has to decide under S. 476 is: (a) whether an offence of the kind contemplated appears to have been committed, and (b) whether it is expedient in the interest of justice that it should be further enquired into. In order to arrive at a decision, the Court may, if it thinks fit, hold such preliminary enquiry as it considers necessary. The nature, method and extent of the preliminary enquiry are, it seems to me, entirely at its discretion."

This observation of the learned Judge is against the appellant in so far as it holds that "the nature, method and extent" of the enquiry are in the discretion of the Judge. The method adopted in the present case by the learned Magistrate was to have an enquiry made by the C. I. D. The only case which lends some support to the appellant's contention is the case of *Sakhi Rai* v. *Emperor* (9) a decision of a single Judge. The facts shortly stated were that a person lodged a complaint before a Sub-Divisional Officer who without examining him on oath ordered the complaint to be put up with the police report. He subsequently passed an order calling upon the complainant to show cause why he should not be prosecuted under S. 211. In showing cause the complainant produced several witnesses who were examined under the order of the Sub-Divisional Officer by different Subordinate Magistrates. On a perusal of the police report and the evidence recorded by the Magistrates the Sub-Divisional Officer made a complaint against a witness for the complainant under S. 476 on a charge under S. 193, Criminal P. C. The learned Judge held that the complainant could be called upon to show cause why he should not be prosecuted only under S. 476 and that the preliminary enquiry to be held under S. 476 could not be directly held by any other Magistrate except the Sub-Divisional Officer himself who on the police report thought that the complaint was a false one. In that point of view the learned Judge was of opinion that the evidence recorded by the subordinate Magistrates was recorded without jurisdiction and could not form the basis of prosecution. On the facts of that case the decision is right as the Sub-Divisional Officer

(6) A. I. R. 1925 Pat. 330=88 I.C. 780=26 Cr. L. J. 170=4 Pat. 24.

(7) [1919] 43 Bom. 300=20 Cr. L. J. 433=51 I. C. 257.

(8) A. I. R. 1926 Mad. 1003=27 Cr. L. J. 1149 =97 I. C. 669=50 Mad. 660.

(9) [1919] 20 Cr. L. J. 345=49 I. C. 917.

could not without entrusting the holding of the preliminary enquiry to a subordinate Magistrate, merely delegate the work of recording evidence to such Magistrate while himself assuming to hold the preliminary enquiry. But if the learned Judge meant to lay down the law generally that the preliminary enquiry could not be made except by the Court acting under S. 476, I beg to express my respectful dissent. The question now before us was not directly raised in that case and the observation made by the learned Judge must be taken in connexion with the particular facts of that case. On the other hand, a decision of the Allahabad High Court in *Shabbir Hasan* v. *Emperor* (10) supports the view I have expressed. Dalal, J. is reported to have there said :

"If the civil Court so desires an enquiry may be ordered by the police but in that case when the police papers arrive the civil Court has to determine whether it is necessary to take action against particular persons under S. 476."

The result of an examination of these cases and of the consideration of the words of S. 476 itself is that the preliminary enquiry mentioned in that section my be conducted by the Court either by itself or by any other method available. This appeal accordingly fails and is dismissed.

The next appeal (No. 934 of 1929) is by Fazlar Rahaman who was not the complainant nor does it appear from the record that he was in any way connected with the complainant. Afaq Ali's case is that this man was the wire-puller behind the screen. His case is that he had a long standing dispute with the appellant Fazlar Rahaman for possession of a plot of land in their native country and that the complainant Aziz Mia was set up by this appellant to lodge a false complaint against him. The Criminal Investigation Department held an enquiry into this matter and reported against both. On receipt of the report the learned Chief Presidency Magistrate said that it was expedient for the ends of justice that an enquiry should be made into an offence under S. 211, I. P. C., against both. Under that section a person who institutes a criminal proceeding as also a person who causes such proceeding to be instituted may both be guilty of an offence under that section. The question before us is whether this Fazlar Rahaman can be said to have committed an offence in or in relation to a proceeding in the Court of the Chief Presidency Magistrate within the meaning of S. 476, Criminal P. C. That section is not restricted to the party making the complaint or actually before the Court but is wide enough to include any person who appears to have committed an offence mentioned in S. 195 (1) (b) which is not restricted to parties to the proceeding like Cl. (c) of that section. The Court has therefore jurisdiction to prosecute a person who causes a false complaint to be lodged. All that S. 476 requires is that the Court should be satisfied that it is expedient in the interest of justice that an enquiry should be made into an offence which appears to it to have been committed in or in relation to a judicial proceeding. It does not speak of a party to the proceeding. An offence enumerated in S. 195 (1) (b) may be committed by a person who is not a party to the proceeding but if the Court is satisfied that such an offence in relation to a judicial proceeding has been committed, it can lodge a complaint under S. 476 against any person committing the offence : see *Shabbir Hasan's* case (10). We agree with the view taken by the Full Bench of the Rangoon High Court in *Emperor* v. *Syadkhan* (11). We think therefore that the order passed by the Chief Presidency Magistrate sanctioning the prosecution of Fazlar Rahaman is not illegal. This appeal also is accordingly dismissed.

Costello, J.—I agree.

V.B./R.K. *Appeals and revision dismissed.*

(10) A. I. R. 1928 All. 21=105 I. C. 810=28 Cr. L. J. 986.

(11) A. I. R. 1925 Rang. 321=91 I. C. 36=27 Cr. L. J. 4=3 Rang. 303 (F.B.).

A. I. R. 1930 Calcutta 520

C. C. GHOSE, J.

Sachindra Nath Dutt—Plaintiff—Petitioner.

v.

Secy. of State for India and *others*—Opposite Party.

Civil Rule No. 416 of 1929, Decided on 26th July 1929, in matter of order of Dist. Judge, 24 Parganas at Alipore, D/ - 23rd February 1928.

Civil P. C., O. 41, R.. 10—Application for security for costs, must be made promptly.

If a party to a suit or appeal desires to apply for security for costs, he must do it promptly. Otherwise, the order made on such an application may have the effect of stifling the suit or appeal. [P 521 C 1]

Hem Chunder Dhur—for Petitioner.

Judgment. — In my opinion, the order complained of cannot be supported. The appeal was filed on 14th July 1928 and the application on which the order complained of was made was not put in till 6th February 1929. It is elementary that, if a party to a suit or appeal desires to apply for security for costs, he must do it promptly. Otherwise, the order made on such an application may have the effect of stifling the suit or appeal. In that view of the matter, the orders of 12th February and 23rd February 1929 must be set aside. As the opposite party does not appear, there will be no order as to costs.

V.B./R.K. *Order set aside.*

A. I. R. 1930 Calcutta 521

BUCKLAND, J.

In re, *Regent Park Syndicate Ltd.*—Petitioner.

Appln. in Original Civil Suit No. 1476 of 1928, Decided on 23rd April 1929.

Calcutta High Court Rules, Ch. 4, Rr. 10 and 11—Public Officer should be allowed to inspect and take notes, but not copies, of depositions made by person under Companies Act, S. 195.

In the interests of the administration of criminal justice, Courts should allow a public officer charged with the investigation of criminal offences, such as the Deputy Superintendent of Police, to inspect the depositions of a person, who is believed to be involved in a criminal offence, made under S. 195, Companies Act, and to inform himself of anything that may come to light on such inspection. He cannot, however, take copies of the depositions but only notes of them: *Haddock's Case* (1902), 2 *Ch.* 73 and *In re Grey's Brewery Company*, 25 *Ch. D.* 400, *Appl.*; *In re Imperial Continental Water Corporation*, 33 *Ch. D.* 314, *Dist.* [P 524 C 1, 2]

H. R. Panckridge—for Deputy Commissioner.

W. W. K. Page—for Gopalchandra Chakravarti.

J. C. Hazra—for Dwarkanath Chakravarti.

Judgment.—This is an application by Mr. L. N. Bird, Deputy Commissioner of Police, Calcutta, for an order giving him liberty to inspect, through one of his subordinate officers or any other person, the records of an examination under S. 195, Companies Act, of Ray Bahadur Dwarkanath Chakravarti and of Gopalchandra Chakravarti, also for certified copies of their depositions.

In his petition, Mr. Bird says that on an application by one Khirodemohan Goswami, the manager of the estate of the minor sons of the widow of the late Radhikamohan Ray of No. 45, Lansdowne Road, against certain persons to the effect that they entered into a criminal conspiracy to commit a criminal breach of trust in respect of the sum of a lakh of rupees belonging to the estate, he ordered an investigation into the matter to be conducted by Inspector Pulinkumar Chatterji of the Detective Department. He states that the investigation so far has disclosed a prima facie case of an offence of conspiracy to commit criminal breach of trust as an agent punishable under Ss. 120 (b) and 409, I. P. C., against Sureshchandra Sanyal, two other subordinate officers of the minors' estate, and also against Ray Bahadur Dwarkanath Chakravarti and his son Gopalchandra Chakravarti. Mr. Bird then states the result of his investigations in greater detail, which it is not necessary to repeat.

Mr. Bird then continues that he is informed that, on the application of the Imperial Bank of India, Ray Bahadur Dwarkanath Chakravarti and his son Gopalchandra Chakravarti have been examined by the Registrar in Insolvency of this Court under the provisions of S. 195, Companies Act, as to their dealings in respect of property involved in the criminal charge, and that they made statements in their examination with reference to certain matters. He then says that such statements are material evidence in reference to the conspiracy, and finally concludes that, for the purpose of completing the investigation of the case, it is necessary to have inspection of the depositions of the said two persons so examined under the Companies Act. This application has been strenuously opposed on behalf of the deponents, they being persons, among others, who are being prosecuted upon the charge of conspiracy. The point is not covered by authority. I shall have to refer to some

English cases which have been cited in the course of argument, but there is none directly bearing upon the point. On behalf of the deponents the first point taken is that the application is based upon contempt of Court, in that it was a contempt of Court on the part of some person, whose name is not disclosed, to have informed the applicant as to what was said upon the examination, and that the applicant has declined .to state the name of his informant, and that, in the circumstances, the application should be summarily rejected.

As to such information I may refer to what preceded the examination. An application was made to this Court in the matter of the Regent Park Syndicate Limited (in liquidation), and an order was made, among other things, for the examination under S. 195 of Ray Bahadur Dwarkanath Chakravarti and his son Gopalchandra Chakravarti. An appeal was preferred against that order and the order was vacated, except as regards the injunction which had been granted, and so much of it as was directed to the examination of these persons. The learned Chief Justice, in ordering the examination to be held, said:

"When the notes of the examination are transcribed they will be filed on the file of the company in the winding up proceedings. They will be part of the record of the company's winding up. There can be no doubt that Mr. D. N. Chakravarti and the other witness, Gopal will be entitled for the purpose of any further application that may be made against them to take copies of the notes at their own expense, but it does not follow that any other person will be allowed to take copies without permission of the Court."

The examination has since been held by the Registrar in Insolvency.

Strictly, the materials before the appeal Court, when that judgment was delivered, are not before me on this application, but they have been referred to, and it is difficult to suppose that anybody who has perused the proceedings in that case and the judgment delivered by the appeal Court would not realize that the statements of the deponents might assist in investigating the criminal charge preferred. This makes it difficult to treat the suggestion that there has been a contempt of Court on the part of some one in making the very limited statement which is referred to in para 4 of the petition very seriously. But apart from that, the contempt, if contempt there be, is not a contempt by the applicant. It is the contempt of the person who made the statement to the applicant. Who that person is I have not enquired. I am told that the deponents have enquired and that they have not been informed, but that has nothing to do with the Court so long as no application is made to the Court in respect of the alleged contempt. The contempt, therefore, is not contempt by Mr. Bird, but by some person or persons unknown, to ascertain whose name no serious effort has been made through the medium of the Court and against whom no application in contempt is pending. In my opinion, there is no substance in the suggestion that the application is based upon a contempt of Court.

A further objection is based upon paras. 5 and 6 of the petition, which, it is contended, are inconsistent. I may say, with reference to para. 5, that I should not contemplate allowing the applicant to take copies of the depositions of the deponents. The rules of the Court applicable to pending proceedings allow inspection only. Further, even if copies of the depositions were to be allowed to be taken by the applicant it is not and it could not be a matter for this Court to decide whether such depositions would be admissible in evidence in different proceedings before some other Court. For these reasons, I disregard entirely para. 5 of the petition.

Then I come to para. 6. Learned counsel has submitted that even to allow inspection would be to allow the dspositions to be used in evidence against the deponents in the criminal proceedings. That is not what I understand the applicant to mean by this paragraph. What I understand him to mean is that after inspecting the depositions and making notes Mr. Bird, with such information as he may have thus acquired, proposes independently to investigate the facts disclosed, for the purpose, if possible, of producing independent proof of any such matters which may be relevant to the criminal proceedings. That is not using the deposition itself in evidence against the deponents, and it is far from my inten-

tion, by any order that I may make, now to say that that may be done. On the other hand I must at the same time make it clear that I do not exclude the possibility of that, if it may otherwise be accomplished and is permissible, in which connexion I may draw attention to a passage in Palmer's Company Precedents, Edn. 13, Part 2, p. 669, where the learned author in a note says that if the depositions are required to be used at a criminal trial, the proper course is to subpoena the Registrar to produce them and no order under R. 73 of 1909 seems necessary, that being the rule under which an order for inspection, such as is now sought, would be made in England. That this is the correct course to follow for such purpose also appears from the form of the order quoted on p. 723 of the same volume. Whether or not that course should be followed as regards these depositions, and whether or not the depositions would be admissible in evidence, are not matters as to which I am called upon to adjudicate.

On the same point, viz., the use of depositions against the deponents in the criminal proceedings, I have been referred to S. 196 (7), Companies Act. For reasons which I do not wish to elaborate, but of which one is that Ss. 195 and 196 apply to totally different circumstances, I do not think that any argument by analogy can be based upon S. 196. It has been submitted that S. 196 (7) does not allow notes of the examination held under that section to be used in criminal proceedings. This is based upon the words in the subsection which say that notes of the examination may be used in evidence in civil proceedings against the person examined. Criminal proceedings, it is true, are not mentioned, but the fact that they are not mentioned does not, in my opinion, necessarily exclude the possibility of the notes being used in such proceedings. It may be that the point was left open to be dealt with under the general law. I will leave the matter there, because it is not a point upon which I have now to adjudicate, but I wish to guard myself against expressing any opinion as to the precise effect of the subsection, which, in that it contains a special reference to civil proceedings, differs from the corresponding section of the English Companies Act.

The point to be decided has also been discussed by learned counsel on either side from a wider point of view. Mr. Panckridge, on behalf of the Crown, has argued, and in my opinion rightly, that where, for the purpose of the administration of criminal justice, it is necessary that an order such as that which is asked for should be made, the Court will make it. As against that, it has strongly been pressed upon me that the rights of the individual must be protected. Certainly they must be considered, but the circumstances of this case are peculiar in the sense that the witness and the person charged in the criminal prosecution are the same. In such circumstances, an application such as this might be expected to be resisted. I can but consider whether, so far as any assistance is to be derived from the authorities, the rights of the individual should be allowed to outweigh the importance of the investigation and detection of crime and the interests of public justice.

Section 195 is a section providing for the examination of any person or officer of the company known or suspected of having property of the company in his possession or of any person who is capable of giving information concerning the trade dealings or affairs or property of the company. The object of this section has been considered in cases in which the question has arisen as to whether or not inspection should be given of the depositions recorded under S. 174, the corresponding section of the English statute. The strictly private character of the examination has frequently been referred to. But it is important to bear in mind that those have all been cases in which the question had to be considered in relation to claims either by or against the company. In none of them was the question of a criminal prosecution involved. In *Haddock's* case (1), the Master of the Rolls said:

"This proceeding is a private examination which the Court sanctions in order that the liquidator may obtain the necessary information to enable him to proceed in the winding-up, and for many reasons it is most undesirable that the opposing party in the litigation

(1) [1902] 2 Ch. 73=71 L. J. Ch. 511 = 86 L. T. 430=50 W. R. 536=18 T. L.R. 596.

contemplated by the liquidator should be allowed to be present at a proceeding which is a proceeding for the purpose of informing the officer of the Court and the Court what course ought to be pursued."

In *In re, Grey's Brewery Co.* (2) Chitty, J., made similar observations, and continued:

"The result of the examination, that which is written down, is not evidence against anybody else. It is the statement on oath of the person under examination, but the examination is not a proceeding in the nature of a litigious proceeding between parties, the object of the examination being, as I have already stated, to get information in order to see what course ought to be followed with reference to some matter or some claim which the official liquidator, when he applies to the Court is allowed to state privately."

The learned Judge's observations were with reference to what may be called the winding-up aspect of the matter. But if the object of the examination is to get information to see what course should be followed by the official liquidator, if it may be that information has been derived in the course of such examination which will be of service to the State in adminstering criminal justice, is it not right to say that that is also a matter which the Court should consider? From the standpoint of the interests of the State, it seems to me that the Court would only be doing what is right in holding that a public servant who is charged with the investigation of criminal offences should be allowed to inform himself as to anything that may have come to light on such examination. I do not say that I should take the same view where the applicant is a private prosecutor. His motives would require scrutiny and it might not be possible to ensure that the information would be rightly used. In *In re, Imperial Continental Water Corporation* (3) a private individual brought an action against the company and its directors, and, independently of that action, obtained an order under S. 115, Companies Act, for the examination of the directors. The Court postponed the examination until after the trial, the principle being that the plaintiff was not entitled to have an additional advantage in his action by reason of the provisions of the Act. That case is illustrative of the principle that, as regards civil proceedings, the deponent is entitled to protection, but it is a very different matter to apply such a principle to the investigation of criminal proceedings at the instance of the Government. In my opinion an order should be made in favour of the applicant, but the form of the order must be considered with reference to the rules of this Court.

Chapter 4, Rr. 10 and 11, are those which apply to search, inspection and taking copies of documents forming part of the records in suits and proceedings in this Court by a person who is not a party. When the proceedings have terminated there is no difficulty. But during the pendency of the proceedings the order is within the discretion of the Registrar subject to the order of the Judge. It follows, therefore, that there is no right by a person who is not a party to the proceedings to search, inspect or take copies of any records in a pending proceeding, and even when inspection is allowed it may only be taken in the presence or with the consent of the parties appearing or after 24 hours' notice to them. On search or inspection a party is not allowed to take copies, but only notes of such search or inspection.

The order, therefore, that I make is that the applicant, Leslie Newman Bird, is at liberty to inspect the depositions of Ray Bahadur Dwarkanath Chakravarti and Gopalchandra Chakravarti, recorded upon their examination under S. 195, Companies Act, by the Registrar in Insolvency. The order is personal to the Deputy Commissioner of Police making the application. He may not take copies, but he may make notes of his inspection, and in so doing he may not reproduce verbatim any portion of the deposition however brief. For the purposes of obtaining inspection Mr. Bird may be attended by his solicitor, but the actual inspection must be by Mr. Bird alone, and neither the solicitor nor any other person will be entitled to inspect under this order. The Registrar will make the necessary arrangements. Before inspection there must be 24 hours' notice to all the parties to the summons. No order as to costs.

S.N./R.K. *Application allowed.*

(2) [1884] 25 Ch. D. 400=50 L. T. 14 = 32 W. R. 381=53 L. J. Ch. 262.

(3) [1886] 33 Ch. D. 314=55 L. T. 47=56 L. J. Ch. 189.

A. I. R. 1930 Calcutta 525

S. K. GHOSE, J.

(*Rai*) *Satish Chandra Chaudhuri*—Plaintiff—Appellant.

v.

(*Maharaja*) *Sasi Kanta Acharjya Chaudhuri* and *others*—Defendants—Respondents.

Second Appeal No. 439 of 1928, Decided on 13th February 1930.

Civil P. C., S. 2 (12)—Statutory definition of mesne profits includes interest.

P, having obtained a decree for recovery of possession of property, instituted a suit for mesne profits for a period of two years prior to the delivery of possession with interest from the date of the suit. The trial Court awarded a sum as mesne profits and allowed interest only from the date of the decree, giving no reasons for not awarding interest previous to the decree.

Held: that the statutory definition of mesne profits included interest. *P* was entitled to interest prior to the decree as the trial Court assigned no reason for refusing it. But as *P* had asked for interest from date of suit only he could recover that only and no more: *A.I.R.* 1929 *P.C.* 200, *A. I. R.* 1930 *P.C.* 82, 27 *Cal.* 951, *Ref.* [P 526 C 1]

Jotindra Nath Sanyal and *Probodh Nath Sanyal*—for Appellant.

Jogesh Chandra Roy and *Sachindra Kumar Roy*—for Respondents.

Judgment.—This appeal arises out of a suit for mesne profits. The plaintiff brought the original title suit in 1913, obtained a final decree in 1920, and delivery of possession in execution thereof in 1921. The suit for mesne profits was brought in 1922 in respect of the years 1326 and 1327 when the appeal was pending in the High Court. The defence of the landlord-defendants is that mesne profits should be calculated on rent basis and not on profit basis. The defence of the tenant-defendants is that they were bona fide inducted into the land and that the profits claimed were too high. The plaintiff put his claim at Rs. 3,994. The trial Court made a calculation of mesne profits on the produce basis and fixed the amount at Rs. 616-8-0 which was to be realized from defendants 8 to 12, being the tenants and some of the landlords. Both sides appealed. The landlord-defendants 8, 11, and 12 contended that they were not liable to mesne profits on produce basis. The tenant-defendants contended that the amount should be further reduced. The plaintiff on the other hand contended that the assessment made by the trial Court was too low, that the principle of assessment made by the trial Court was wrong and that further he was entitled to interest.

The learned District Judge who heard the appeal dismissed both appeals. The present second appeal is preferred by the plaintiff. The defendants also preferred a second appeal, but were unable to get it admitted under O. 41, R. 11, Civil P. C.

In this appeal it is contended that the lower appellate Court was in error in following the principle upon which mesne profits should be calculated. This principle has been the subject of recent decision by the Judicial Committee in two cases, namely, *Gurudas Kundu* v. *Hemendra Kumar Roy* (1) and *Harry Kempson Gray* v. *Bhagu Mian* (2). It is there laid down that the statutory test of mesne profits is not what the plaintiff has lost by his exclusion, but what the defendant has or might reasonably have made by his wrongful possession. It is pointed out that the learned District Judge in his judgment relies on the fact that the plaintiff himself was only a rent receiver and he, therefore, considered that it was not necessary to calculate the profits to a nicety. It is, therefore, contended that the matter should be remanded to the lower appellate Court, for further consideration. It appears, however, that the trial Court did base its decision upon a calculation of profits made upon evidence. It relied principally upon the evidence of the defendants' witness Nidas Mandal. The learned District Judge refers to this and he says that it is not possible for him, not having seen the witnesses, to say that any other witness was more reliable. It is pointed out that Nidas Mandal, although he was a witness cited by the talukdar defendants, deposes to the profits being at a lower rate than what is deposed to by the other defendant witnesses. But in any case it is a matter of evidence, and upon this point the learned District Judge has concurred with the trial Court. To this extent the findings of the trial Court cannot be assailed in second appeal. It is further pointed out on

(1) A. I. R. 1929 P. C. 200=121 I. C. 525=56 I.A. 290=57 Cal. 1 (P.C.).

(2) A. I. R. 1930 P. C. 82=121 I. C. 540=57 I.A. 105 (P.C.).

the other side, that it has been found that the talukdar defendants actually received only a money rent and the plaintiff himself was only a rent receiver. No doubt it is also found that the talukdars were acting jointly with the tenant-defendants. But nevertheless the fact that the talukdars and the plaintiff were both rent receivers cannot be overlooked. In the case of *Harry Kempson Gray* v. *Bhagu Mian* (2), it is held that when the person in wrongful possession of land merely let it to others the rental value of the land is the proper criterion for ascertaining mesne profits. In any case it seems to me that though the learned Judge makes reference to the fact that plaintiff was a rent receiver he nevertheless affirms the findings of the trial Court which were based upon a calculation of the profits derived from the produce. I think, therefore, no useful purpose will be served by sending back the case for a fresh hearing.

The next point urged in behalf of the appellant is that he is entitled to interest. The trial Court has allowed interest on the total amount at the rate of 6 per cent per annum from the date of the decree till realization. The plaintiff claims interest from the date of the suit. In the case of *Girish Chunder Lahiri* v. *Shashi Shikhareswar Roy* (3) it was held that the Court had jurisdiction to reduce interest as it chose, because mesne profits are in the nature of damages which the Court might award according to the justice of the case. In that case the decree allowed mesne profits, without making mention of interest, and it was held, having regard to the definition of mesne profits that interest should be allowed. In the present case the Court below gave no reasons for refusing to give interest as claimed by the plaintiff, and I consider no reasons exist.

In this view the plaintiff is entitled to interest from the date of the suit. To this extent the decree of the lower appellate Court will be modified. The appeal is allowed in part with costs in proportion to each party's success in all Courts.

R.M./R.K. *Appeal allowed in part.*

(3) [1900] 27 Cal. 951=27 I. A. 110=4 C. W. N. 631=7 Sar. 687 (P.C.).

A. I. R. 1930 Calcutta 526

MUKERJI AND GUHA, JJ.

Barboni Coal Concern Ltd.—Appellants.

v.

Paricharak and *others* — Plaintiffs and Defendants—Respondents.

Appeal No. 290 of 1927, Decided on 18th February 1930, from original decree of Addl. Sub-Judge, Asansole, D/- 12th July 1927.

(a) Hindu law—Religious endowments—Shebaits treating property as secular subject to religious charge—Principles applicable to complete dedication may not apply—Suit by one shebait for his share of rent is maintainable.

In cases in which the shebaits have beneficial interests in the dedicated property, and such interests descend beneficially and the several shebaits are in separate enjoyment of their respective interests in severalty it is difficult to see why the principles applicable to cases of complete dedication should necessarily be applied.

Where a debutter was always treated as one of those less perfect dedications in which the shebaits have treated the property as secular in all respects but subject to a religious charge a suit by one of the shebaits and for his share of the rent only is maintainable: 41 *I. C.* 837, *Dist.*; 32 *Cal.* 129 (*P. C.*), *Ref.* [P 528 C 2]

(b) Hindu law—Religious endowment—Statement that dedication is for benefit of family god and increase of debutter property, does not affect complete dedication.

A statement in the dedication, that the transaction was for the benefit of the family god and with the object of increasing the income of the debutter property, is attributable to the notion which unfortunately prevails amongst shebaits that their own interests and those of the deity are always identical. No legal inference that the dedicaton was completely for religion follows from such a statement. [P 529 C 1]

(c) Stamp Act, S. 26—Objection under, taken for first time in argument in appeal—Even if objection is tenable decree cannot be set aside.

An objection by the defendant-appellant that the lease having been stamped under S. 26, the plaintiff was not entitled to recover anything in excess of the amount for which the stamp was paid, was not taken in the Court below or in the memorandum of appeal.

Held: that it is not an objection, even though tenable, on which the decree should be set aside. [P530 C 1]

S. C. Basak, *Jitendra Nath Roy*, *Hira Lal Ganguly*, *Debendra Nath Bhattacharjee* for *Sudhansu Sehkar Kar*—for Appellants.

Panchanan Ghose and *Durga Das Roy*—for Respondents.

Judgment.—The suit out of which this appeal has arisen was instituted by the plaintiff for recovery of royalty, interest and cesses from the defendant from 14th April 1918 to 13th April 1924 under a mining lease executed in favour of the predecessor of the latter on the 24th May 1901. The lease was granted by four persons as shebaits and servitors of a deity Gopinath Jiu Thakur. The plaintiff is one of them and claimed a fourth share of the dues making the other three cosharers pro-forma defendants in the suit. The suit has been decreed for the amount claimed with a very small deduction. The principal defendants are the appellants.

To deal with the contentions that have been urged in this appeal a few facts have to be stated. The deity Gopinath Jiu Thakur is the family deity of the plaintiff and the pro-forma defendants. They jointly gave a lease and in the kabuliyat thereof the following recitals appear : the translation of the recital as it appears in the paper-book is not quite happy, and a more accurate translation of it is to be found in the judgment of the Privy Council in a litigation between the lessors and the original lessee which is reported in *Tricomdas Cooveri* v. *Gopinathji* (1).

"On a proposal being made to take a settlement of the rights of your family deity in this mouzah for the purpose of raising coal from below the surface of the said mouzah by making pits, you for the benefit of your family god and with the object of increasing the income of the debtutter property, are making a settlement with me of the right and interest in the mouzah to the extent by your family deity.

Immediately before this there was another recital and on this a good deal of stress has been laid on behalf of the appellants that the mouzah is the rent free property of the said family god. Two of the paragraphs embodying the conditions of the lease have also to be referred to, namely para. 1 and para 17; in the former certain rates of commission are mentioned as being payable for and to the extent of the interest of the said family god, and in the latter it was declared that the lessees are the sole heirs of three persons their ancestors. In the schedule to the kabuliyat the whole mouza and no particular share or portion of it was described. The lease therefor proceeded upon the assumption that the family god Gopinath Jiu Thakur was the 16 annas owner of the mouza but it is now an admitted fact that the interest of the said family deity does not extend beyond an eight annas share. Prior to the lease there were two litigations, one commenced in 1884 and the other in 1895. The former was a suit for rent instituted by the predecessor of the lessors against certain other persons in respect of some lands of the mauza on the allegation that the latter or their predecessors had been possessing an eight annas share of the lands under a settlement from him. The defendants in that suit denied that the relationship of landlord and tenant ever subsisted between the said plaintiff and themselves, and asserted that they were in possession of eight annas share of the mouzah as shebaits of their own family deity of the same name, viz., Gopinath Jiu Thakur. The suit succeeded in the trial Court but was dismissed on appeal. The other litigation was a suit for declaration of title and for other reliefs instituted by the successful defendants in the rent suit against the said four lessors on the allegation that Gopinath Jiu Thakur the family god of the said successful party was the owner of an eight annas share of the mouza and that they are entitled to the said share as shebaits. The said lessors were worsted in this litigation both in the trial Court and in the appellate Court and their opponents were successful. In one of the paragraphs, viz., para. 5 of the kabuliyat, which forms the subject-matter of the present suit and to some of the terms whereof reference has already been made, it is stated :

"I have looked into the suits No. 21 of 1884 in the Court of the Munsif and No. 123 of 1884 in the Court of the Judge concerning your right to the said mouza Manoherbahai."

These two numbers are those of the suit and the appeal in the former of the two litigations. There is, however, no reference to the other litigation namely to the title suit aforesaid. In 1908 the original lessee Bhoja was sued under the lease for royalty etc. for a certain period by three of the lessors as shebaits and servitors of the god Gopinath Jiu with the fourth lessor as pro forma defendant and this litigation went up

(1) [1917] 44 Cal. 759=39 I. C. 156=44 I. C 65.

to the Judicial Committee whose judgment therein has already been referred to. In 1908 Bhoja's interest under the lease was transferred to Messrs. Laik Banerjee and Co. who took three leases from the successful party in the aforesaid title suit, viz, the eight annas sharers as shebaits of their own family god Gopinath Jiu Thakur. This 8 annas share they obtained under the following three leases of a 2 annas share by a lease dated 24th January 1908, a five annas share by a lease dated 10th August 1908, and a one anna share by a lease dated 5th September 1908. Laik Banerjee and Co. became insolvents and the official assignee in whom their interests vested transferred the leasehold to the defendants in the present suit. In 1914 the defendants further purchased the interest of one Radha Ballav Mukerji who had obtained some interest in the mouza from the superior landlord the Raja of Pachette and later on in 1918 they obtained a further lease from the Raja of Pachete himself.

The appellants' first contention is that the suit instituted as it was by one of the shebaits and for his share of the rent only was not maintainable. They rely in this behalf upon the decision of this Court in the case of *Narendra Nath Kumar* v. *Atul Chandra Banerji* (2) in which it was held on a consideration of various authorities bearing upon the point that where the administration of the trust is vested in several trustees they all form, as it were but one collective trustee and they must exercise all the powers of their office in their joint capacity. The learned Judges appear to have upheld the view of the lower Court in that case that

> "the shebaits are not cosharers but coworshippers and any family arrangement at which they may have arrived amongst themselves cannot entitle them to treat the debutter property as personal property and to sue personally for their share of the rent payable to the idol."

The case itself was one in which the plaint was framed under S. 148-A, Ben. Ten. Act, for recovery of a share of the rent payable to the deity on the allegation that the plaintiffs therein were interested to the extent of that share. The nature of the dedication in that case does not appear but the decision proceeded on the footing that it was :

> "impossible to maintain the position that they (i. e. the plaintiffs) have an interest in the land to the extent of one-fourth share and that on that basis they are entitled to collect one-fourth share of the rent from the tenant defendants."

Now it cannot be disputed that there may be dedication of a partial, incomplete or qualified character. In the case *Maharaja Jagadindra Nath Roy Bahadur* v. *Rani Hemanta Kumari* (3) Arthur Wilson observed :

> "There is no doubt that an idol may be regarded as a juridicial person capable as such of holding property though it is only in an ideal sense that property is so held, And probably this is the true legal view when the dedication is of the completest kind known to law. But there may be religious dedications of a less complete character. The case of *Sonatan Bysack* v. *Sreemutty Juggat Soondree Dossee* (4) and *Ashutosh Dutt* v. *Doorga Charan Chatterjee* (5) are instances of less complete dedications in which notwithstanding a religious dedication property descends (and descends beneficially) to heirs, subject to a trust or charge for the purpose of religion. Their Lordships desire to speak with caution, but it seems possible that there may be other cases of partial or qualified dedication not quite so simple as those to which reference has been made."

In cases in which the shebaits have beneficial interests in the dedicated property and such interests descend beneficially and the several shebaits are in separate enjoyment of their respective interests in severalty it is difficult to see why the principles applicable to cases of complete dedication should necessarily be applied. Not to travel beyond the record of this case, we find that the defendants' predecessors Laik Banerjee and Co., took three separate leases of two annas, five annas and one anna of the eight annas share of the rival deity Gopinath Jiu Thakur. The suit of 1908 which went up to the Judicial Committee and to the judgment, in which case reference has already been made, three of these shebaits were the plaintiffs with the fourth one as the pro forma defendant. The suit was for recovery of the royalty due to the extent of the entire share of the family deity minus Rs. 4,000 which the said fourth brother had realized on account of his share. Along with the

(2) [1918] 41 I. C. 837.

(3) [1905] 32 Cal. 129=31 I. A. 203=8 Sar. 698 (P.C.).

(4) [1859] 8 M. I. A. 66=2 Suther. 37=1 Sar. 721 (P.C.).

(5) [1880] 5 Cal. 488=6 I. A. 182=8 Suther. 694=4 Sar. 58 (P.C.).

present suit was tried another suit which one of the other lessors had instituted against the defendants for his one-fourth share of the rent under the lease and the defendants have now paid him off separately. The collections made by the four lessors have not always been joint ; there is evidence of this fact on the present record and it is also expressly stated to have been so in the judgment of the Judicial Committee already cited. It is true that in the kabuliyat the statement was made that the transaction was :

"for the benefit of the family god and with the object of increasing the income of the debutter property."

But this statement is attributable to the notion which unfortunately prevails amongst shebaits that their own interests and those of the deity are always identical. No legal inference follows from such a statement. Our attention has been drawn to the deposition (Ex. H-1) of Gokula Nanda Thakur in the suit of 1908 in which he stated that the income of the mouzah cannot be spent for the personal purposes of the shebaits and the whole income has to be credited to the debutter fund and further that neither the properties nor the profits of the debutter had been divided amongst the shebaits. The present plaintiff was a co-plaintiff with Gokula Nanda Thakur in the suit of 1908, and the admissions made by the latter in that suit are admissible against the present plaintiff, but they have never been put to him to give an opportunity of explaining them. It has been proved in the case that the present debutter was always treated as one of those less perfect dedications in which the shebaits have treated the property as secular in all respects but subject to a religious charge. We are of opinion therefore that the suit as based on the contract embodied in the lease was maintainable, and as the other lessors have not disputed the plaintiffs' four annas share as shebait, he cannot fail on this first contention of the appellants.

The second ground urged is that the plaintiff cannot recover on the footing that his family god has 16 annas title. This ground has been sought to be supported on two reasons : first, because the defect in the title was not disclosed, and second because, in consequence of dispossession by title paramount the defendants and their predecessors had to attorn to others. As to non-disclosure of title the point urged is that nothing was said at the time of the lease about the title suit of 1885 which had conclusively established that the title of the plaintiffs' family god Gopinath Jiu Thakur did not extend beyond an eight annas share. The evidence and circumstances bearing on this question have been placed before us in great detail.

The suit in 1884 and the appeal which arose out of it were specifically referred to in para. 5 of the kabuliyat. In Ex. F-1, the judgment of the trial Court in that suit, is set out the claim of the other eight annas sharers and in Ex. F-4, the judgment of the appellate Court, the claim is set out in great detail together with the evidence that supported it. The specific mention of this litigation in the kabuliyat coupled with the recital therein to which reference has already been made leaves no doubt in our minds that the defendants' predecessor Bhoja was fully apprised of the fact that the title of the plaintiffs' family god could not with safety be taken as extending beyond eight annas. The mention of litigation in the kabuliyat makes all supposition of concealment impossible. We also think that the papers of the suit of 1895 were made over to Bhoja as the plaintiff alleges. The omission of any reference to the suit of 1895 was, in our opinion, due to the fact that Bhoja was not willing to have documents in which an eight annas title of the lessors would be conclusively shown but rather to leave the extent of their title in a doubtful state so that he might try his luck with the remaining eight annas holders. It is admitted that he obtained possession under the lease and it seems that that was all that he wanted then. The mention of the suit of 1884 was on the other hand necessary and was considered sufficient to protect the lessors from a charge of fraud and concealment that Bhoja might subsequently bring forward. We hold that the lease was taken by Bhoja with knowledge of the real extent of the lessor's title. In this view of the matter the second reason on which the

appellants' contention is based need not be considered.

The third contention urged on behalf of the appellant is that the lease having been stamped under S. 26, Stamp Act, the plaintiff was not entitled to recover anything in excess of the amount for which the stamp was paid. This objection was not taken in the Court below and as pointed out by the Judicial Committee in the case of *Lachmi Narayan Agarwalla* v. *Braja Mohun Singh* (6), is not an objection, even though tenable, on which the decree should be set aside; if there is no proper stamp on the document it may be put on afterwards on payment of a penalty, and the instrument then becomes effective under S. 35 (a). The ground, therefore, should not be upheld. The result is that in our judgment the appeal fails and it is accordingly dismissed with costs.

The objection that the full amount of the plaintiffs' claim is not claimable in view of the stamp which the instrument of lease bears was not taken either in the Court below, or even in the memorandum of appeal to this Court. It was subsequently put forward by way of an additional ground, which, however, was permitted to be urged. Assuming that it would be right for us to move in this matter now, we find from the kabuliyat that the lease does not purport to be a lease in perpetuity, but is a lease for which no term is fixed. The lease therefore is one under Art. 35, Cl. (a), sub-Cl. (iv), Sch. 1, Stamp Act, and inasmuch as it was on a stamp of Rs. 471, a royalty far in excess of what has been claimed could be claimed under the lease. There is no substance in the objection and it is accordingly overruled.

M.N./R.K. *Appeal dismissed.*

(6) A. I. R. 1924 P. C. 221 = 82 I. C. 789 = 51 I. A. 332 = 4 Pat. 34 (P. C.).

A. I. R. 1930 Calcutta 530

SUHRAWARDY AND JACK, JJ.

Sonaulla Karikar—Appellant.

v.

Abu Sayad Mahammad Ismail—Respondent.

Appeal No. 1190 of 1927, Decided on 30th April 1929 against appellate decree of Sub-Judge, Faridpur, D/- 7th March 1927.

(a) Transfer of Property Act, S. 101—"Absolutely"—Meaning explained.

The word "absolutely" is used in S. 101 to indicate that the interest in which the encumbrance should merge must be the absolute interest and not a limited one. And the incumbrancer must become entitled to the absolute interest : 34 *All*, 268 and *A. I. R.* 1922 *Bom.* 211, *Dist.* [P 531 C 1]

(b) Transfer of Property Act, S. 53—Transaction vitiated by fraud—Effect on parties.

Where the transaction is vitiated by fraud, it affects not only the right of the party to the fraud, but even an innocent party who was apparently not a party to the fraud. [P 531 C 2]

(c) Transfer of Property Act, S. 101, Exception—Cases where there will be no extinction of charges explained.

The exception to S. 101 provides two circumstances which make the earlier part of the section inapplicable. The first is that the encumbrancer declares, by express words or necessary implication, that his encumbrance shall continue to subsist; secondly, that such continuance would be for his benefit. In either of these cases, the section says that there will be no extinction of the charge : *Toulmin* v. *Steere* (1817), 3 *M. E. R.* 210, *Diss.* from; 10 *Cal.* 1035 (*P.C.*) and 7 *M. H. C.* 229, *Rel. on.* [P 532 C 1, 2]

Syed Nasim Ali—for Appellant.

Rupendrakumar Mitter—for Respondent.

Suhrawardy, J.—The predecessor of defendants 1 to 4 borrowed a sum of Rs. 55 from the plaintiff in January 1915, and executed the mortgage bond in suit. In November 1916 the mortgagors sold the mortgaged property to defendant 5. In December 1916 they sold the same property to the plaintiff mortgagee for Rs. 300, out of which Rs. 123 was paid in cash to the mortgagor and Rs. 177 was credited towards the mortgage of 1915. The mortgagors put the plaintiff in possession of the property. Thereafter, defendant 5 brought a suit in 1923 against the plaintiff for recovery of possession of the property and succeeded in obtaining a decree, in execution of which the plaintiff lost possession of the property. That litigation ended on 27th June 1925, and, on 29th August 1925, the plaintiff instituted the present suit on the bond of January 1915, for recovery of the amount due under it. Defendant 5 entered appearance and contested the suit and the only defence with which we are now concerned is his contention that the plaintiff's mortgage bond of 1915 is no longer operative and the

mortgage lien has been extinguished by the plaintiff's purchase of the property in December 1916. The trial Court overruled this objection and also other objections taken on behalf of the defendants and allowed the plaintiff a partial decree. The plaintiff and defendant 5 both appealed and the learned Subordinate Judge gave effect to the objection taken by defendant 5 on the ground stated above and as a result allowed the defendant's appeal and dismissed the plaintiff's appeal without discussing the other questions raised in this case which in view of his judgment were not considered necessary. The plaintiff is the appellant in this case and it is argued on his behalf that the view of law taken by the lower appellate Court is erroneous.

The learned Subordinate Judge has relied on S. 101, T. P. Act and held that the plaintiff having purchased the mortgaged property in December 1916, the mortgage charge was extinguished, and hence the plaintiff is not entitled to maintain the suit on the mortgage bond of 1915. In my judgment, this view of the law, in the circumstances of the case, cannot be supported. According to the facts as stated above, in December 1916, when the mortgagors sold the property to the plaintiff, they had no subsisting title to it, and, therefore, they could pass no title to the plaintiff. S. 101, T. P. Act says that, where the owner of an incumbrance on immovable property becomes absolutely entitled to that property, the encumbrance shall be extinguished. The principle underlying this section is an application of the well-known doctrine of merger. Where the full interest and the limited interest coalesce, the limited interest is extinguished. But in the present case there was no combination of the two interests. The word "absolutely" is used in the section to indicate that the interest in which the encumbrance should merge must be the absolute interest and not a limited one. And the incumbrancer must become entitled to the absolute interest. The property in this case had already been purchased by defendant 5 and so the plaintiff did not become entitled to the property. Hence S. 101, T. P. Act, has no application to the present case.

Another point of view is that the sale by the mortgagors to the plaintiff in December 1916, was a fraudulent transaction. The mortgagors had, a few days before the sale, already parted with their interest in the property by sale to defendant 5. Fraud perpetrated by a party to the transaction will not give it validity except in the case of a subsequent holder of the property in good faith and for valuable consideration. Where the transaction is vitiated by fraud, it affects not only the right of the party to the fraud, but even an innocent party who was apparently not a party to the fraud. The law is thus stated in Ghose's Mortgage, 5th Edition Vol. 1, p. 487 :

"Where a release has been obtained by fraud or misrepresentation, it will, of course, be inoperative as between the parties, and the mortgagee would be restored to his original position on discovery of such fraud or misrepresentation. And this right may be exercised even against a person who is innocent of the fraud, provided he has not given any valuable consideration."

that is, subsequent to the fraud and in the honest belief of the genuineness of the transaction. But it is difficult to hold that defendant 5, though not a party to the fraud, was not privy to it or did not help the mortgagor in practising the fraud on the plaintiff. He purchased the property before the plaintiff, but did not take possession of it. His document was registered many months after it was executed. So that, on the date when the plaintiff purchased the property and obtained possession of it, he had no reason to believe that the mortgagors had lost their interest in it and were not, therefore, in a position to pass it. This the mortgagors could only do because of the negligence or intentional omission by defendant 5 to take possession of the property when he purchased it. On this ground also defendant 5 is not entitled to succeed. Then again, when defendant 5 purchased the property, he took it subject to the plaintiff's mortgage. He cannot get rid of it by the fraudulent act of the mortgagors.

The learned Subordinate Judge has relied upon the decision in *Jugal Kishore* v. *Ram Narain* (1) in support of his view. Without admitting the correctness of that decision, in view of the recent decisions in England as well

(1) [1912] 34 All. 268=13 I. C. 619.

as in India, I am of opinion that the facts of that case distinguish it from the present case. In that case the mortgagee had purchased the property and at the date of the purchase had become absolutely entitled to it. His right to retain it was subsequently defeated by the pre-emptor. It does not appear from the report, but it may be presumed that the mortgagee was paid back by the pre-emptor the amount of the consideration paid by him for the purchase of the property. That was a case in which the mortgagee had become absolutely entitled to the property, though for a short time and therefore the principle of S. 101 might be said to apply. Reliance has also been placed on behalf of the respondent on the case of *Bai Rewa* v. *Vali Mahomed Miya Mahomed* (2), which follow the Allahabad decision. In that case, the mortgagee had purchased a wakf property and subsequently lost title to it. Thereafter the mortgagee wanted to enforce his previous mortgage. The learned Judges held that there were circumstances indicating that, at the time of the purchase, the mortgagee had the intention of not enforcing the mortgage and, therefore, lost his right under the mortgage by the sale. The question, as to whether the mortgagee became absolutely entitled by his purchase, was not discussed. I am not quite sure that the decision on the facts of that case can be supported in view of the law which I will presently discuss.

Section 101, T. P. Act, contains a proviso or exception in the light of which cases of this nature have to be considered. It says:

> "Unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit."

As I read the section, it seems to me, having regard to its punctuation, that the exception provides two circumstances which make the earlier part of the section inapplicable. The first is that the encumbrancer declares, by express words or necessary implication, that his encumbrance shall continue to subsist; secondly that such continuance would be for his benefit. In either of these cases, the section says that there will be no extinction of the charge. The cases which have held that the non-application of the section depends upon the presence of the intention at the date of the combination of the two interests, have overlooked the last clause of the section, which is in the disjunctive. Omitting the words with which we are not concerned, the section will stand thus: Where the owner of a charge or other encumbrance on immovable property is or becomes absolutely entitled to that property, the charge or encumbrance shall be extinguished, unless such continuance (continuance to subsist) would be for his benefit. This construction has been accepted by the learned author in Ghose on the Law of Mortgage, at p. 524. This view is in accordance with the present law in England and the law which was laid down in India many years ago. A contrary rule was dogmatically enunciated in the case of *Toulmin* v. *Steere* (3). This case has been severely criticized in England and has been held to be inapplicable in India by the Judicial Committee in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (4) in which their Lordships, though on a different set of facts, say:

> "The ordinary rule is that a man having a right to act in either of two ways should be assumed to have acted according to his interest."

The present enunciation of the law will be found in Fisher on Mortgage, 6th Edition, para. 1528. After discussing the subject, the learned author remarks:

> "It is submitted that in all such cases the prima facie inference now is that the charge is kept alive because it is obviously for the benefit of the purchaser of the equity of redemption that it should be, which is always a strong ground in equity for rebutting the inference of merger."

The law in India was laid down in 1873 by two learned Judges of the Madras High Court in *Ramu Naikan* v. *Subbaraya Mudali* (5), approvingly noticed by the Judicial Committee in *Gakaldas'* case (4). The facts there are not very dissimilar to those of the present case. In that case, the mortgagee had subsequently purchased in execu-

(2) A. I. R. 1922 Bom. 211=70 I. C. 912=46 Bom. 1009.

(3) [1817] 3 M. E. R. 210=36 E. R. 81=17 R. R. 67.

(4) [1884] 10 Cal. 1035=11 I. A. 126=4 Sar. 543 (P.C.).

(5) [1873] 7 M. H. C. 229.

tion under a money claim of his the mortgage property, and it was held that he could still use his mortgage as a shield against the claims of the mortgagees subsequent to his original mortgage. In any view of the case I am of opinion that the decision of the Court below that the plaintiff's right as mortgagee had become extinguished by his purchase of the property in 1916 is erroneous and should be reversed.

The result is that this appeal is allowed, the decrees of the Court below in both the appeals before it are set aside and the case remanded to that Court for consideration of other points which were left undetermined by the learned Judge because of the view of the law he took on the first point urged before him. Costs will abide the result.

Jack, J.—I agree,

V.B./R.K., *Case remanded.*

A. I. R. 1930 Calcutta 533

PAGE, J.

Farey Hossein Mir—Defendant—Appellant.

v.

Nagendra Kishore Roy Choudhury and *others*—Respondents.

Appeal No. 1221 of 1928, Decided on 7th March 1930, against appellate decree of Sub-Judge, 4th Court, Mymensingh, D/- 21st January 1928.

(a) Bengal Tenancy Act (8 of 1885), S. 105—Two plots held under one landlord—Decree with regard to one operates as res-judicata in other if parties to suits under S. 105 same and sued in same capacities.

The decree of the Court under S. 105 with regard to one of the two plots held by tenants under one landlord is binding on the tenants and operates as res judicata with regard to the other plot if the parties to the subsequent suit under S. 105 and the capacity in which they are sued is the same. [P 533 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 105—"Decree" should not direct different cosharer-tenants to hold at different rates.

In a suit under S. 105, a decree which results in different cosharer tenants holding the same at different rates of rent is not a correct decree. [P 533 C 2]

Birendra Kumar De—for Appellant.

Annada Charan Karkoon — for Resdents.

Judgment.—In this suit the plaintiff is the landlord of certain lands in a village in two plots of which the defendants are the tenants. In respect of the plot in suit the plaintiff brings a suit for rent at Rs. 45-1-9 per annum including cesses on the basis of a decree obtained against all the defendants under S. 105, Ben. Ten. Act. The defendants contend that they are not bound by that decree under S. 105, because two of the defendants at the time were minors and were not duly represented in that proceeding. The lower appellate Court has held that at the time of the S. 105 proceedings the two defendants who were alleged to be minors were majors, and gave a decree for the plaintiff at the rate which he claimed against all the defendants. It was contended in the lower Courts and also on this appeal that the question whether at the time of the S. 105 proceedings the two defendants were majors or minors was determined by the previous suit between the same parties in respect of the other plot which they held under the plaintiff.

It appears that after the decree in the S. 105 proceedings a suit was brought for rent settled in those proceedings in respect of the other plot by the plaintiff against the same defendants, and it is contended that inasmuch as in that suit the parties were the same and the capacity in which they were sued was the same, the question whether the 105 proceedings upon the minor defendants by reason of the fact that they were minors and not duly represented in those proceedings was a matter substantially in issue, which in fact was heard and determined in that suit. I think it was, and in my opinion that question becomes res judicata as against the plaintiff. In those circumstances it was not open to the Court to hold that those defendants were majors at the time of the S. 105 proceedings, and, therefore, were not bound by those proceedings. The effect as against them is that the amount of rent must be at the old rate of Rs. 22-5-0. It is further urged that as against the major defendants the suit should be treated as a suit for money due for use and occupation, and that as against them a decree should be passed at the rate of Rs. 45-1-9. In my opinion that would not be a correct decree because it would result in the different cosharer-tenants holding at varying rates of rent the same plots.

For these reasons the appeal must be allowed, the decree of the lower appellate Court set aside, and the decree of the Munsif varied in the sense that there will be a decree against all the defendants for the years 1328 and 1331 B. S. at the rate of Rs. 22-5-0 per year with cesses therein at 6 pies per rupee and damages at 25 per cent. The plaintiffs are entitled to their costs in all Courts.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 534

LORT-WILLIAMS, J.

Chartered Bank of India—Plaintiffs.

v.

Imperial Bank of India—Defendants.

Original Civil Suit No. 1053 of 1928, Decided on 19th April 1929.

Civil P. C., O. 6, R. 17 and O. 4, R. 5—Amendment applied for after close of case setting up new case, entailing great examinations and probably amendment of statements prejudicing certain chances of defendant regarding judgment in their favour—Order was passed in the alternative either allowing amendment on payment of costs or giving judgment without prejudice to plaintiff's right of fresh suit.

Where at a very late stage of the suit that is on examination of a number of witnesses for both the parties, after several hearings and adjustments and on the case being fixed for the final speeches of the counsel, the plaintiff applied for an amendment which raised an entirely new case, entailing the recall of the plaintiffs' witnesses for cross-examination and probably the amendment of defendant's written statement, further discovery and further evidence on both sides, and on the case as it then stood, the Court was of opinion that subject to any argument that may be addressed, the defendant was entitled to judgment and there was no knowing what the position and the result might be after the amendment had been allowed, and there was no accrual of any rights which might be prejudiced by allowing the amendment, the Court passed an order allowing the amendment on payment of costs up to the date of amendment until which payment all proceedings were to be stayed or in the alternative to hear arguments and give judgment on the case as it then stood without prejudice to the plaintiff's right to bring a fresh suit on the subject matter of the proposed amendment: *Blackmore* v. *Edwards*, (1879) *W. N.* 175, *Foll.*; *Clarapede* v. *Commercial Union Association*, (1883) *W.R.* 263; *Edevain* v. *Cohen*, (1889); 41 *Ch. D.* 563; *Budding* v. *Murdoch*, (1875); 1 *Ch. D.* 42; *Raleigh* v. *Goschen*, (1898) and 1 *Ch.* 73, *Ref.* [P 536 C 1]

N. N. Sircar and *Amir Ali*—for Plaintiffs.

Langford James and *S. K. Gupta*—for Defendants.

Judgment.—On 14th October 1927 the plaintiffs wrote to the defendants, claiming certain goods lying in Messrs. Kerr Tarruck's godown in the Bengal Bonded Warehouse, on which the defendants had placed their name. The defendants replied on the following day saying that all the goods in the said godown had been pledged to them by Messrs. Kerr Tarruck in accordance with an arrangement for advances against goods pledged, which had been in existence between them and the said firm for some 15 years, and they gave to the plaintiffs full particulars about the character of the pledge and of their possession and control of the said goods, showing that they had been validly pledged to them by the said firm.

Seven months after, viz., on 11th May 1928, the plaintiffs issued their plaint. Therein they stated that they were holders for value of certain bills of exchange drawn by British shippers on Messrs. Kerr Tarruck & Co., for the price of goods sold to the said firm, and that they received from the shipper's bills of lading, etc., as security for the due payment of the bills, and that the said firm had accepted the bills, and that the plaintiffs had made over to the said firm the bills of lading, etc., to enable them to take delivery of the goods before payment, in exchange for certain documents called trust receipts. By these receipts the said firm undertook to hold the goods or the proceeds thereof when sold in trust for the plaintiffs.

In the said plaint they further stated that the said firm had stored the goods in their godown, and that the defendants had wrongfully taken possession of them under an alleged pledge. Further that any alleged disposition of the goods by the said firm was of no effect, the said documents or goods having been dealt with by the said firm fraudulently by concealing the terms and conditions on which the goods were held, that is to say, that the said firm had defrauded the defendants. The written statement is dated 27th June 1928. Therein the defendants say that for many years the said firm had had an overdraft account with the defendants on the basis of a cash credit agreement on the security of the pledge of goods which were deposited in a godown over which the defendants exercised effective

and indisputable control, that the goods in dispute were pledged to the defendants in pursuance of the said agreement, that they received them in good faith, that there were no circumstances to raise a reasonable presumption of fraudulent dealing by the said firm, and that defendants had no knowledge thereof. Further that plaintiffs by their action permitted the defendants to believe that the said firm were owners of the goods or entitled to deal therewith.

Upon those pleadings, certain issues were raised which were settled by me on 17th January 1929. A number of witnesses were called on behalf of both plaintiffs and defendants, and after several days' hearing, and several adjournments their cases were both closed, save and except for counsels' final speech. In the meantime, viz. on 10th August 1928, I gave judgment in the case of *Rahimbux Ashan Karim* v. *Central Bank of India, Ltd.* (1), and, on 28th January 1929, my decision was upheld upon appeal. The issues raised in that case substantially were the same as the issues raised in this. And, having regard to the evidence given in this case, I have no doubt in my mind, subject to any arguments which may be addressed to me by learned counsel on both sides, that, in consequence of and in consonance with that decision, the defendants must succeed in the present case as matters now stand.

That being the position, the learned Advocate-General, on behalf of the plaintiffs, has applied to me for leave to amend his plaint and to raise a new issue thereon by alleging that the said goods were obtained from the plaintiffs by the said firm by fraud and the offence of cheating, and to rely upon the proviso to S. 178, Contract Act. That is to say to allege that the said firm had defrauded the plaintiffs.

The applications are made under O. 6, R. 17, and O. 14, R. 5, Sch. 1, Civil P. C. O. 6. R. 17, practically is a replica of O. 28, R. 1, of the Rules of the Supreme Court in England. In my opinion, it is clear that plaintiffs are seeking, at this late stage of the proceedings, to introduce an entirely new case. Neither the pleadings, nor the issues raised, nor the evidence, nor the arguments throughout have been addressed to this issue which plaintiffs now seek to raise for the first time. Their contention advanced in their petition that this aspect of the case has now for the first time become apparent is disingenuous to a degree, because it was apparent, if at all, as far back as the month of October 1927, when defendants first wrote to plaintiffs setting out particulars of their pledge and their possession.

If the amendment is allowed, it will entail, as counsel for plaintiffs frankly admits, in any case, the recall of plaintiffs' witnesses for further cross-examination, and probably the amendment of defendants' written statement, further discovery, and further evidence on both sides. I have little doubt that in the English Court, such an application would be refused if made at this stage of the proceedings: see the remarks of North J., in *Edevain* v. *Cohen* (2). Though the Courts will not refuse to allow an amendment simply because it introduces a new case, *Budding* v. *Murdoch* (3), it will do so where the amendment would change the action into one of a substantially different character which would more conveniently be the subject of a fresh action: *Raleigh* v. *Goschen* (4). Leave is generally refused also, where there has been substantial delay in making the application, as in the present case. And it is refused, almost invariably, where the purpose of the amendment is to add a plea of fraud, where fraud has not been pleaded in the first instance.

However, the general tendency for many years past has been to allow an amendment at any stage of the proceedings, if it can be made without injustice to the other side—there being no injustice if the other side can be compensated by costs: Per Brett M. R. in *Clarapede* v. *Commercial Union Association* (5)—the object being to avoid, if possible, multiplicity of legal proceedings. This is not a case where rights have accrued to the defendants which might be prejudiced by allowing the

(1) A. I. R. 1929 Cal. 497=119 I. C. 23=56 Cal. 367.

(2) [1889] 41 Ch. D. 563.

(3) [1875] 1 Ch. D. 42=45 L. J. Ch. 213 = 24 W. R. 23.

(4) [1898] 1 Ch. 73=67 L. J. Ch 59=77 L. T. 429=46 W. R. 90.

(5) [1883] 32 W. R. 269.

amendment, such for example as might have arisen under the law of limitation.

On the other hand, I am clearly of opinion, after hearing the evidence, subject to any arguments which may be addressed to me, that, as the case stands now, the defendants are entitled to judgment with costs. Whereas, there is no telling what their position and the result may be, after the amendment has been allowed.

In *Blackmore* v. *Edwards* (6), where the plaintiff amended by adding an entirely new claim, and at the same time abandoned his original claim, the amendment was allowed only upon condition that the plaintiff paid to the defendant all the costs of the action up to the date of the amendment, and all proceedings were stayed until payment of those costs.

Substantially the position in this case is very similar to the position in that, and I propose to deal with this matter in the same way, or, if the plaintiffs prefer, I will hear arguments and give judgment in this case as it stands at present, without amendment of the pleadings, and if I decide that judgment must be for the defendants, it shall be without prejudice to plaintiff's right to bring a fresh suit dealing with the subject-matter of the proposed amendment —whichever counsel think will be the cheaper and more convenient course to pursue.

V.B./R.K. *Order accordingly.*

(6) [1879] W. N. 175.

A. I. R. 1930 Calcutta 536

COSTELLO, J.

Imperial Bank of India, Ltd.—Plaintiff.

v.

Bengal National Bank, Ltd.—Defendant.

Original Civil suit No. 1215 of 1927, Decided on 26th March 1929.

(a) Company — Debentures— Issue of debentures relating to immovable property —Registration followed by proper certificate of registration—Subsequent alteration by Registrar of his own accord does not affect validity of .debentures between parties to it.

If after the issue of debentures relating to immovable property by a company, the debenture-holder gets them registered under the Companies Act and obtains a proper certificate for the same, nothing done subsequently by way of alteration by the Registrar of his own accord affects the validity of the documents as between the company and the debenture-holder. [P 537 C 1,2]

(b) Words and Phrases—Term "collateral" as applied to security—Test for determination stated.

Whether a security is collateral or not depends upon the time of its operation and not necessarily on the precise moment at which it is given. Security may equally be collateral, whether it is given at the same time as what may be called the principal security or whether it is given subsequently, provided only that it is intended to take effect and to operate and to enure for the benefit of the person to whom it is given, alongside and parallel with the other security that has been given: *Athill* v. *Athill*(1880) 16 *Ch,D.* 211, and *Leonino* v. *Leonino* (1879), 10 *Ch. D.* 460, *Foll. Azeem* v. *Cruickshank* (1871), 16 *W. R.* 203; *National Bank of Australasia* v. *Cherry* (1870), 3 *P. C.* 299 *Dist.* [P 538 C 2]

(c) Deed—Construction—Memorandum of company and the powers thereunder to raise money on seeurity of debenture relating to immovable property from Imperial Bank of India examined—Imperial Bank of India Act (47 of 1920), Sch. 1, Part 1, Sub-Cls. (5) and (6).

Among the objects for which a company was "to raise money by the issue of shares preference, ordinary or deferred, debentures, debenture stock, bonds and other securities, and to invest the moneys so raised or any part thereof, upon any of the investments specified in this Memorandum." Upon the securities, of the promissory notes executed by the company in favour of its directors who in their turn endorsed them in favour of the Imperial Bank of India, and also upon the securities of debentures issued by it in favour of the Imperial Bank creating charges upon all the company's undertakings, properties and assets including its uncalled capital, the company borrowed money from the Imperial Bank of India. The position as stated in one of the debentures was this: "The company in consideration of . . . now paid on loan to them by the Imperial Bank of India against certain securities authorised by Act 47 of 1920, do hereby as an integral part and collateral security for the said loan undertake to pay . . . "

Held: (1) on construction of the clause in "Memorandum" that the company was empowered to raise money by the issue of debentures and invest the same or any part of it. [P 537 C 2]

(2) that the promissory notes were the original security and the other forms of security were when the loans were given collateral to that security so as to fall within the terms of Sch. 1, Part 1, Cls. 5 and 6, of the Imperial Bank of India Act. [P 539 C 1]

(d) Imperial Bank (of India Act) 47 of 1920 Sch. 1, Part 1 and Part 2—Scope.

The specific prohibition as to power to transact banking business contained in part 2 of the schedule is subject to the provisions contained in part 1, Sch. 1 and in sub-Cl. (a) read with the operative part of the clause

W. W. K. Page, N. N. Sircar and *J. Langford James*—for Plaintiff.

Sudhir Roy and *J. C. Sett*— for Defendant.

Judgment.—In this suit the Imperial Bank of India is claiming against the Bengal National Bank Ltd., which is now in liquidation, a declaration that two debentures dated, respectively, 4th May 1923, and 1st August, 1923, constitute charges upon all the undertakings, property and assets including the uncalled capital of the defendant bank. The plaintiffs are also claiming an account of what is due to them as the holders of those debentures for principal, interest and costs, and further that the debentures may be enforced by the sale of the property and the assets of the defendant bank.

The claim has been resisted by the defendants upon the ground that the issue and the acceptance of the debentures in question were ultra vires the memorandum of the defendant bank, and were illegal and unauthorized or at any rate ultra vires so far as the Imperial Bank of India is concerned by reason of certain provisions in the Imperial Bank of India Act, which is Act 47 of 1920.

Two further points were also taken on behalf of the defendants, viz., that the debentures had not been properly registered as required by the provisions of the Companies Act of 1913, and also that, as the debentures were not registered in accordance with the requirements of the Registration Act, S. 17, in so far as they related to immovable property, they are unenforcible. This latter point was readily conceded by Mr. Page on behalf of the plaintiffs, and Mr. Page admitted that, in so far as any of the properties of the defendant bank consists of immovable property, that will not have been affected by operation of the two debentures.

So far as the other point in connexion with the registration is concerned, that is, registration under the Companies Act 1913, that has no substance at all, in my opinion, as it is clear that the plaintiffs did in fact register the debentures at the proper time with the Registrar of Companies, and they received from him the proper certificate showing that such registration had taken place, and, by the terms of S. 114, Companies Act, that certificate is conclusive. Therefore, it must be taken that all necessary formalities in regard to the registration of the documents were complied with. It is quite true that subsequently the Registrar of Companies, owing to a misunderstanding, did make an alteration or even made a cancellation in the register with regard to these particular documents. I am, however, of opinion that nothing done by the Registrar of his own accord, after the plaintiffs had properly registered the documents, affected their validity as between the plaintiffs and the defendants.

The real points of substance in the defence, which was ably put forward and argued by Mr. Roy, are those relating to the question of whether or not these debentures were ultra vires either the plaintiff bank or the defendant bank. Now, so far as the latter is concerned, Mr. Roy relied upon Cl. 3 (e) of the Memorandum of Association of the Bengal National Bank Ltd., and that clause sets out that among the objects for which the company was established was:

> To raise money by the issue of shares (preference, ordinary or deferred) debentures, debenture-stock, bonds and other securities, and to invest the moneys so raised, or any part thereof, upon any of she investments specificd in this Memorandum.

Mr. Roy, as Mr. Page contended, sought to put a restrictive meaning upon that clause and to make it read as if the Bengal National Bank were restricted to the raising of debentures for the purpose of obtaining money to invest and not otherwise. I agree with the view put forward by Mr. Page that that is not the right interpretation, and that the clause should be read as an enabling and not a limiting clause, and the real meaning of it is that the Bengal National Bank were empowered to raise money by the issue of debentures and that if they so desired to invest the money they raised or any part of it. That clearly gives them an option as to whether they invest the money raised by debentures either wholly or in part or not at all. Therefore, I think it is clearly within the objects of the Bengal National Bank to raise money by means of debentures.

The other point at first sight seems not altogether free from ambiguity or doubt. That is to say, the question of what are the powers of the Imperial Bank of India in a matter of this kind, because by Part 2 of the schedule to the Imperial Bank Act of 1920 it is laid down that the Bank shall not transact any kind of banking business other than those specified in Part 1 and in particular

". . . . upon mortgage or in any other manner upon the security of any immovable property, or the documents of title relating thereto."

That, on the face of it, is a specific prohibition. It is, however, subject to the provisions contained in Part 1, Sch. 1, and in sub-Cl. (a) read with the operative part of the clause it is provided that the Bank is authorized to carry on and transact the several kinds of business thereinafter specified, viz.,

"the advancing and lending money, and opening cash credits upon the security of :

(vi) fully paid shares and debentures of companies with limited liability, or immovable property or documents of title relating thereto as collateral security only where the original security is one of those specified in sub-Cls. (i) to (iv), and if so authorized by any general or special directions of the Central Board, where the original security is of the kind specified in sub-Cl. (v)."

Sub-Cl. (v) refers to this kind of business:

"(v) accepted bills of exchange and promissory notes endorsed by the payees and joint and several promissory notes of two or more persons or firms unconnected with each other in general partnership."

In the present case, the debentures which were issued by the defendant bank in favour of the Imperial Bank of India were, in my opinion, securities "collateral" to that of the kind mentioned in sub-Cl. (v), viz., promissory notes made by the Bengal National Bank in favour of the directors of the Bank and by them endorsed in favour of the Imperial Bank of India, and indeed, in the first of the two debentures, the position is clearly stated, in that the debenture begins:

"The Bengal National Bank, Ltd., in consideration of ten lakhs now paid on loan to them by the Imperial Bank of India against certain securities authorized by Act 47 of 1920, do hereby as an integral part of and collateral security for the said loan, undertake to pay . . . ."

The second debenture is not worded in exactly the same form, but I have no doubt whatever that both parties realized what their rights were, and that they deliberately put in the forefront of the list of securities which had been given the promissory notes executed by the Bengal National Bank in favour of its directors, who in their turn, endorsed them in favour of the Imperial Bank.

Mr. Roy sought to put upon the word "collateral" in connexion with "security" rather an extended meaning, and he said that as the clause refers to the original "security," collateral security must mean a security which is given after the loan is actually paid, and the primary or original security has been taken. He cited in support of that proposition two cases: *Azeem* v. *Cruickshank* (1) and *The National Bank of Australasia* v. *Cherry* (2). All that those cases decide, in my opinion, comes to this, that if there were an express prohibition against giving a particular kind of security, in the first instance, that would not necessarily preclude that security from being given subsequently for the purpose, not of covering the original debt, but of securing repayment of the debt as and when it became due. Those two cases do not really assist the defendants in the present instance, because they do not say that, in those circumstances, the word "collateral" is to be read as if it meant collateral and subsequent.

There are, on the other hand, two cases: *Athill* v. *Athill* (3) and *Leonino* v. *Leonino* (4), which determine in my opinion that the question of whether a security is collateral or not depends upon the time of its operation, and not necessarily on the precise moment at which it is given. Security may equally be collateral, whether it is given at the same time as what may be called the principal security or whether it is given subsequently, provided only that it is intended to take effect and to operate and to enure for the benefit of the person to whom it is given, alongside and parallel with the other security that has been given. I have no doubt that the intention in the present instance was, as I have said, that the promissory

(1) [1871] 16 W. R. 203.
(2) [1870] 3 P. C. 299.
(3) [1880] 16 Ch. D. 211=50 L.J.Ch. 123=43 L. T. 581=29 W. R. 309.
(4) [1879] 10 Ch. D. 460=48 L.J. Ch. 217=40 L. T. 359=27 W. R. 388.

notes should be the original security, and that the other forms of security should, at the time when the loans were given, be collateral to that security, and, accordingly, they would fall within the terms of Part 1 of the schedule, sub-Cls. (v) and (vi).

I accordingly hold that these debentures did fall within the powers possessed by the Imperial Bank of India under the provisions of the Act of 1920. I am, therefore, bound to say that there is no reason why the plaintiffs are not entitled to the declaration that they ask for, except that from the operation of the debentures there must be excluded immovable properties belonging to the defendant bank by reason of the fact that these debentures were not registered under the terms of the Registration Act.

I make a declaration that the two debentures, dated 4th May and 1st August 1923, constitute charges upon all the undertakings, property and assets including the uncalled capital of the Bengal National Bank, Ltd., other than such part of the bank's property as is "immovable." I make an order at the defendants' request that an account be taken of what is due to the plaintiffs, the holders of those two debentures, on account of the principal and interest and charges.

There will also be an order that the debentures will be enforced by the sale of the property and the assets of the defendant bank. The plaintiff's costs will be added to his claim. The liquidator's costs to be paid by the receivers out of the assets in their hands as between attorney and client.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 539

RANKIN, C. J. AND C. C. GHOSE, J.

Sudhirendra Deb Manna—Appellant.

v.

Ranendra Deb Manna and *others*—Respondents.

Appeal No. 66 of 1928, Decided on 19th February 1930, from original decree of Costello, J., D/- 27th April 1928 in Civil Suit No. 1072 of 1927.

(a) Civil P. C., O. 32, R. 7—Compromise entered into by guardian-ad-litem— Guardian-ad-litem must elucidate all facts either by evidence or affidavit setting forth consideration in favour of compromise.

It is the duty of a guardian-ad-litem who enters into a compromise on behalf of a minor to lay before the Court in one way or another all facts material to the decision of the question whether the proposed terms of a settlement were for the minor's benefit; and although R. 7 does not lay down any special form of procedure in such cases, if the facts are not elucidated by evidence given in the case an affidavit by the guardian-ad-litem setting forth the outline of the facts of the position and the general consideration in favour of the compromise should in general be required. [P 541 C 2]

(b) Transfer of Property Act, S. 52—Basis of doctrine of lis pendens is not notice, but finality of proceedings.

The doctrine of lis pendens has little or nothing to do with the doctrine by which notice is imputed to a purchaser who takes during the pendency of the suit. The basis of the doctrine is that the parties to a suit cannot be allowed to shorten the arm of the Court in dealing with the suit by the transactions which, if they were to be regarded at all, would involve the presence of third parties and might extend the litigation indefinitely and cumber and entangle it without limits: 29 *All.* 339 (*P. C.*), *Foll.*; 6 *Cal.* 687; *Brooke* v. *Lord Mostyn* (1864), 2 *DeG. J.* and *S.* 373, and *Fadelle* v. *Bernard* (1871), 19 *W. R.* 55 *Ref.*: 8 *B. L. R.* 474, *Diss. from.* [P 543 C 2]

(c) Civil P. C., O. 32, R. 7—Compromise decree—Settlement by guardian-ad-litem—Compromise fairly and honestly made and sanction fairly and honestly obtained—Compromise cannot be set aside merely because subsequently it worked out ill towards infant.

The question whether a compromise by a guardian-ad-litem was fairly and honestly made, must depend upon the facts as laid before the Court. If it is fairly and honestly made and sanction is fairly and honestly obtained for it, the compromise cannot be set aside merely because subsequent events have shown that from the infant's point of view it has worked out ill. [P 543 C 2]

B. K. Ghose and *H. N. Sanyal*—for Appellant.

N. N. Sircar, *S. C. Roy*, *A. K. Roy* and *J. C. Sett*—for Respondents.

Rankin, C. J.—The original plaintiff in this suit was one Sudhirendra, the fourth son of Jogendra. Jogendra was the eldest son of Debendra and Debendra was the eldest son of Mohesh. The parties are governed by the Dayabhaga School of Hindu law. Mohesh, the plaintiff's great-grandfather, died in 1874 having left his property to be divided, after the death of his wife and upon the youngest of his grandsons who should be living at the time of his decease attaining full age, among his grandsons in equal shares. Four grandsons were born in the lifetime of

Mohesh of whom the plaintiff's father Jogendra was one. There is a question as to the fifth grandson—whether, allowance being made for the period of gestation, he too is not to be considered as having been born in the lifetime of his grandfather. Debendra was the executor to the Will of Mohesh, probate having been granted to him on 10th July 1874. Debendra died in 1901 having by his will appointed Jogendra to be his executor. He dedicated all his real property, with a certain exception, to a Thakurani called Annapurna Debi providing that, upon the death of his wife, his sons and their heirs should be shebaits alternately and successively for one calendar month each and that the shebaits and their families should get maintenance and residence out of the debutter property. A question has been raised whether this dedication was an absolute dedication to the deity or whether it merely constituted a charge upon the immovable property of the testator subject to which such property descends as upon an intestacy to the heirs of Debendra. Mohesh at his death had left certain properties and Debendra at his death was in possession of a good many other properties. As to these latter it has been contended that they were really acquired out of the estate of Mohesh and are not to be regarded as belonging solely to Debendra's estate. Probate of Debendra's Will was granted to Jogendra in 1902.

In 1915 a suit (No. 372 of 1915) was brought in this Court by Rabindra, Debendra's seventh and youngest son, who was born after the death of Mohesh. In this suit Jogendra and his brothers were impleaded as defendants and the plaintiff claimed that he was equally entitled with his brothers to share in the estate of Mohesh and in the estate of Debendra and asked for administration and partition of both estates upon this basis. A receiver was appointed in this suit which dragged on for a long time, an order of reference to arbitration being made in 1917 and revoked in 1920. In 1919 Kamini died : she was Debendra's widow and shebait under his Will, her sons became shebaits on her death. On 12th March 1921 Jogendra, defendant 1, died pending suit and his four sons, including the present plaintiff Sudhirendra, were substituted in his stead. Sudhirendra being a minor, his elder brother Ranendra was appointed to be his guardian-ad-litem. On 6th June 1922, the suit terminated in a consent decree and it is with the validity of this consent decree and the question whether, in the events which have happened, it is still binding upon the parties that we are concerned in the present suit.

The proceedings which led up to the consent decree are set forth in the judgment of the learned Judge. It seems that on 15th February an order was obtained adjourning the hearing of the case for a month on the ground that there were proposals for settlement. On 17th March another month's adjournment was obtained for the same purpose. On 25th April a week's adjournment was given and the case came into the list and was marked "for settlement." On 5th May the suit was again adjourned for five days and on 11th May for a further four days. The terms of settlement were then reduced to writing and sent to the solicitors acting for the various parties for their approval. The learned Judge has held that the whole of the matter in dispute between the parties were thoroughly canvassed. We have the correspondence in which the solicitors for the plaintiff in that suit addressed the solicitors for Sudhirendra's guardian-ad-litem and obtained approval of the proposed terms subject to a certificate being obtained from the Court that they were for the benefit of the infant. On 6th June 1922 the agreement of the parties was laid before my learned brother sitting at first instance and by his decree it was recited that

"this Court being of opinion that it would be for the benefit of the infant defendant Sudhirendra Deb Manna that the following decree should be made, it is declared with the consent of the adult parties by their respective counsel that the said terms ought to be carried out and the same are ordered and decreed accordingly."

The minute of the proceedings made by the officer of the Court is very short and formal. It shows that counsel expressly asked for a certificate that the terms were for the benefit of the infant; it shows also that Mr. M. N. Basu who appeared for the guardian-ad-litem, was present before the learned Judge and expressed consent of the guardian-ad-litem on behalf of the infant; but to what extent the matter was explained to the

learned Judge and what enquiries were made by him does not appear at all from the minute.

The main outline of the terms of settlement was as follows: That the properties left by Mohesh and the properties left by Debendra were to be treated as one joint estate, Sudhirendra and his three brothers being between them entitled to a 1/7th share thereof; that the parties were all to lease out their interest in the properties set out in the schedule for 99 years, at a monthly rent of Rs. 770 to a joint stock company in process of formation to be called the Jan Bazar Manna Estate Co., Ltd., this company to have a capital of Rs. 1,40,000, divided into 1400 shares of Rs. 100 each, the shares to be allotted to each of the parties in proportion to his interest in the joint estate. The company was to carry on the worship of the Thakurani through the heirs of Debendra, the palas being of two years duration.

The company was also to pay off money which had been raised for the payment of a certain legacy. The company was further to pay certain of the parties sums which were due to them by the joint estate at the date of Jogendra's death. The heirs of Jogendra were to pay to the company a sum of Rs. 17,830 in the manner therein mentioned. The heirs of Jogendra were to pay to Jotindra another sum of Rs. 5,000. The company was to adjust and pay the amounts due to any of the parties in accordance with certain books of accounts. The company was to pay a legacy of Rs. 5,000 to Rajendra. The receiver in the suit was to pay to each of the parties Rs. 5,000 and immediately thereafter was to be discharged and to make over possession of the estates in his hands to the company to be formed as aforesaid.

When this matter came before the learned Judge it was evident that a long, complicated and ruinous litigation had been proceeding since 1915 and that on whatever terms a decree should be passed, the proceedings would necessarily be protracted as the accounts and enquiries necessary to settle the disputes would be of a lengthy and expensive character. The disputes were entirely family disputes. The guardian-ad-litem, Ranendra, was proposing to do nothing on the infant's behalf which he was not prepared to do on his own account. He had exactly the same interest in all respects as his younger brother. As the sons of Jogendra they might no doubt establish that Robindra could take nothing under the Will of Mohesh. But they had to meet a case that Jogendra's intromissions with the estate of his father and grandfather had not been regular. Moreover, on the terms of the Will of Debendra, it was very far from clear that the whole of his immovable properties had not been dedicated absolutely. The learned Judge had before him the fact that protracted negotiations had been conducted between the parties and that the guardian-ad-litem on behalf of the infant, had employed solicitors to advise him. Learned counsel had attended on his behalf to express consent and the learned Judge was little likely to grant a certificate without satisfying himself that the guardian-ad-litem, his attorneys and his counsel had good reason for thinking that the settlement was advantageous to the infant and to his brothers. The terms of R. 7, O. 32, of the Code are as follows:

"No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian."

They lay down no special form of procedure though it is true that where the facts have not been elucidated by evidence given in the case an affidavit by the guardian-ad-litem setting forth the outline facts of the position and the general considerations in favour of the compromise should in general be required. In the present case, however, the nature and extent of the property, the pedigree of the parties, and the nature of the disputes between them may very confidently be taken as having been apparent to the learned Judge from the pleadings and from the exposition thereof by counsel.

There can be no doubt on the other hand that it was the duty of the guardian-ad-litem to lay before the Court in one way or another all the facts material to the decision of the question whether the proposed terms of settlement were for the minor's benefit and in this suit the main contention of the minors is that his brother Ranendra was guilty

of gross negligence in failing to draw the attention of the learned Judge to the fact that certain of the parties had executed mortgages in respect of their shares for substantial amounts. All these mortgages had been granted pending suit. There was a mortgage of 4th September 1917 by Jogendra to Robindra over his one-eighth share in the estate of Debendra; there was another mortgage of 22nd February 1918 by Rajendra and Satindra of their three-eighths share in Debendra's estate. It seems that this mortgage was in 1926 enforced by sale of the mortgagor's share in two properties belonging to Debendra's estate to the defendant S. N. Modak. There was a third mortgage dated 23rd May 1918 by Robindra in favour of Nando Lal Mukherjee over his one-eighth share in Debendra's estate and there was a mortgage dated 22nd August 1918 by Nogendra to Chandi Charan Chowdhury also over a one-eighth share in Debendra's estate.

It is said that a lease for 99 years to the company would not be within the power of a mortgagor, the learned Judge should have been informed of the existence of these mortgages before assenting to a settlement of which an important term was that the parties would grant such a lease. It would then have been for the learned Judge to consider whether the object of the scheme was not likely to be frustrated by the mortgagees enforcing their securities and causing substantial parts of the estate to be sold to third parties free from any claim of the company to be entitled to a lease. This is the only serious attack upon the consent decree which the plaintiff brings forward in this suit. His learned counsel did also found upon a letter written on 4th February 1926 by Messrs. K. K. Dutt and Co. who appear to have been acting as solicitors for the company and also for Robindra to Messrs. Rutter and Co. who were acting for the plaintiff Sudhirendra and his three brothers. The letter says:

"The allegations as to the fact of mortgages not being known to your clients is not correct. Your clients were fully aware of the said fact and in fact it was also arranged between the parties that after the formation of the company and after the adjustment of the mutual account all the parties would consent to the sale of one of the properties which would be sufficient to pay off debts of the parties."

Learned counsel contends that here was an agreement which should have been brought to the notice of the learned Judge. It appears to me, however, that this letter affords no sufficient evidence that in fact there was an agreement, the letter itself disclosing no more than a suggestion might be necessary or advisable in the future and might be done if all parties consented. This point adds nothing to the complaint as to non-disclosure of the existence of the mortgages to the Court.

The defendants contend in answer that as all these mortgages were executed pendente lite S. 52, T. P. Act, renders them completely innocuous, that there is nothing to show that the learned Judge was not informed about them and that the mere fact that the parties themselves, with knowledge of them, entered into this agreement shows that they correctly appreciated the position, hence that there is nothing here to entitle the plaintiff to have the consent decree set aside. They add that between 1922 and the present time, though the company has been in possession of the bulk of the properties, no claim to disturb its possession on the footing of these mortgages has so far been made against it. They further say that the mortgage of 4th September 1917 was a mortgage to one of the parties, namely Robindra, and may be neglected.

Upon this question it appears to me that there is no evidence to show what was and what was not said to the learned Judge at the time of the consent decree. The utmost that can be said on the strength of a minute of the Court officer taken by itself—and it is the only evidence—is that it renders it somewhat improbable that there was any pointed discussion before the learned Judge of the matter of these mortgages. It may be that the parties regarded the contingency of action by mortgagees interfering with the scheme for giving a long lease to the company as a remote contingency, or as one which could be dealt with when it arose by agreement among the parties. They doubtless considered that any mortgage pendente lite would be subordinated to the company in view of the consent decree. Upon the question whether the rights of these mortgagees did in fact and in law, entitle them or pur-

chasers in execution of decrees to enforce the mortgages, to possession of the mortgaged subjects in priority to the company as lessee, learned counsel for the plaintiff says that these mortgages purported to charge the mortgagor's shares in Debendra's estate, that for the purposes of S. 52, T. P. Act, the suit of 1915 was not a contentious suit and was not one in which the right to these immovable properties was directly and specifically in question: *Khan Ali* v. *Pestonji* (1); *Jogendra* v. *Phul Kumari* (2), and *Krishna Kamini* v. *Dina Mony* (3). He further contends that the doctrine of lis pendens applies only to decrees of such a character as a third party could have anticipated having regard to the scope of the suit and does not apply to a case such as the present in which by consent the Court has made a decree altogether outside the scope of the suit: *Kailaschandra* v. *Fulchand Goari* (4) and *Bharat* v. *Srinath* (5).

The mortgagees are not before us and our decision does not bind them, but it is necessary for the present purposes to examine these contentions carefully and in my opinion they are insubstantial. The suit was clearly a contentious suit in its origin and nature: cf. *Faiyaz Husain* v. *Prag Narain* (6). While it is true that there was no room for dispute as to the figure which represented the share of each party in the estate of Debendra, there was controversy as regards all the properties which were to be leased to the company both upon the question whether they could be regarded as belonging solely to the estate of Debendra as distinct from the estate of Mohesh, and also upon the question whether the Will of Debendra had made them absolute debutter. These properties were directly and specifically in question in the suit. It is true that in *Kailas* v. *Fulchand* (4), above cited, Sir Richard Couch in 1871 had suggested that a third party was only bound by the doctrine of lis pendens as regards decrees of such a character as could have been anticipated, but the statute of 1882 is on different lines. The basis of the suggestion made by Sir Richard Couch would seem to be that the doctrine of lis pendens is a doctrine by which notice is imputed to a purchaser who takes during the pendency of the suit. As Lord Macnaughton pointed out in *Faiyaz's* case (6), supra, the doctrine is misconceived if it were so regarded. Notice has little or nothing to do with the matter. The basis of the doctrine is that parties to a suit cannot be allowed to shorten the arm of the Court in dealing with the suit by transactions which if they were to be regarded at all would involve the presence of third parties and might extend the litigation indefinitely and cumber and entangle it without limit. *Brooke* v. *Lord Mostyn* (7) is the leading authority upon such a case as the present, and in *Fadelle* v. *Bernard* (8). Lord Romilly dealt with a similar case. The leading authority in this Court is *Bibee Solomon* v. *Abdool Azeez* (9).

There can be no doubt that the question whether this compromise is to be regarded as fairly and honestly made must depend upon the facts as they were laid before the Court. If fairly and honestly made and sanction fairly and honestly obtained for it, the compromise cannot be set aside merely because subsequent events have shown that from the infant's point of view it has worked out ill. Up to the present time no mortgagee has disturbed the company's possession of any property. Being desirous of setting the compromise aside for other reasons altogether, the plaintiff picks out these mortgages as the best subject-matter for a case of concealment of material facts. He does not really prove that they were concealed at all. The range of the dispute in the suit required the Court to consider a great many circumstances, some of them of greater importance than these mortgages. It is evident to me that the Court proceeded upon a broad view of the case and upon the opinion that as the interests of the infant were being dealt with in the same manner as the interests

(1) [1897] 1 C. W. N. 62.
(2) [1900] 27 Cal. 77=4 C. W. N. 254.
(3) [1904] 31 Cal. 658.
(4) [1872] 8 B. L. R. 474.
(5) A.I.R. 1922 Cal. 353=66 I. C. 273=49 Cal. 220.
(6) [1907] 29 All. 339=34 I. A. 102=4 A.L.J. 344 (P.C.).
(7) [1864] 2 De G. J. & S. 373=33 Beav. 457 =13 W.R. 1115=10 Jur. (N.S.) 1114=34 L.J. Ch. 65=11 L.T. 392.
(8) [1871] 19 W.R. 555.
(9) [1881] 6 Cal. 687=8 C. L. R. 169.

of his relatives, including his brothers, the interests of the infant lay in furthering a scheme to which the whole family were parties. The phrase "equitable fraud" is no longer employed and it is clear enough that if material facts were concealed from the Court, whether by negligence or design, a compromise can be set aside. But the mere production of the minute of the Court officer does not satisfy me that no information was given to the Court as to these mortgages or that any information was withheld which upon a reasonable view of the case taken as a whole might have altered the conclusion arrived at by the learned Judge. I think, therefore, that this part of the plaintiff's case fails.

Now, the consent decree having been made on 6th June 1922 we depend upon the correspondence which has been put in and the evidence of Satindra Deb Manna for the subsequent history of the matter.

On 13th October 1923, the defendant company, the Jan Bazar Manna Estate Limited, was registered with a capital not of Rs. 1,40,000, as required by the decree, but of Rs. 14,000 only in shares of Rs. 100. If the plaintiff, or his brother Ranendra acting for him, either as guardian-ad-litem or a natural guardian, had leased to the company his one-seventh share of the properties, he would have received shares amounting not to Rs. 20,000 but to Rs. 2,000 in nominal value. So long as no shares were issued otherwise than in accordance with the consent decree, it is not certain whether the plaintiff would have been prejudiced by the fact that the nominal capital of the company was ten times smaller than had been agreed upon. But the articles of the company (Art. 51) authorized the directors to increase the capital and authorized them, after offering new shares to the members in proportion to their holdings, to deal with the new shares as they liked. The directors might, therefore, create new shares and allot them for cash in certain events. At an early stage, prior to the registration of the company. Ranendra, on his own behalf and on behalf of the plaintiff, did signify his approval of the draft memorandum and articles, but before the registration of the company took place he withdrew therefrom and refused to sign the memorandum. In like manner Ranendra refused altogether at any time to approve the draft lease which was put forward to him by the company. Notwithstanding the objections of Ranendra and his three brothers, the company was registered and on 15th May 1924 the receiver made over possession of the properties in his hands to the company. Ranendra and his brothers had notice of the receiver's intention but in no way consented to his act. Certain of the plaintiff's uncles who had signed the memorandum proceeded to manage the company, not without a considerable amount of quarrelling amongst themselves. At one time Robindra threatened to be obstructive and Satindra, one of the uncles who had mortgaged his share, began to prefer a scheme for selling the property to the scheme which had been approved by the Court. In the meantime no single party executed the draft lease and to this day the company has obtained no lease from anyone.

In 1926 after the plaintiff had acquired majority in 1925, the company applied to the Court to have the consent decree enforced in execution by directing the parties to execute the lease. The plaintiff and others resisted the application successfully both on the ground that they had never agreed to the company being formed with a capital of Rs. 14,000 only and on the ground of delay and change of circumstances in the meantime. They took exception also to certain of the objects mentioned in the memorandum. The learned Judge refused to make any order on this application both upon the ground that the company had no right to make it and also on the ground that the terms embodied in the consent decree did not authorize him to compel the parties to execute a lease to this company.

Until the plaint in the present suit was filed, in May 1927, matters dragged on without any progress. From 1924 until now the company has been in possession of the property though it has obtained no lease from any of the parties not even from the signatories to the memorandum or its own directors. The plaintiff and his three brothers have not at any time accepted anything by way of rent from the company. The company claims that all the other parties

have accepted rent. There is no evidence that the plaintiff or his brothers have received any money from the company for the worship of the Thakurani and there is no evidence that the plaintiff or his brothers have in any way recognized the company, though it is true that Ranendra did take from the receiver, under Cl. 16 of the consent decree the sum of Rs. 5,000 and it may also be true that they have received the arrears of maintenance therein mentioned from the receiver soon after the consent decree was passed.

I do not consider it material to set out the transactions which have taken place between the company and the plaintiff's uncles. But the evidence of Satindra shows that since the date of the consent decree, several of the uncles have been executing mortgages over their shares. Nogendra, Satindra, Surendra, Robindra and Rajendra all appear to have mortgaged their shares for large amounts.

After this suit had been instituted, namely in July 1927, the company purported to increase its nominal capital up to Rs. 1,40,000. The resolution not only purported to increase the capital but to allot the increase to the parties in the previous suit in proportion to their interest in the joint estate and in terms of the consent decree.

In these circumstances the learned counsel for the plaintiff contends that it is no longer possible to enforce the terms of the consent decree upon him and no longer possible for him to enforce the terms of the consent decree upon anybody else. He claims in this suit to re-open the matter and asks for a partition disregarding the decree. Looking at the present suit as one for partition of joint property he refers us to *Nasratullah* v. *Mujitullah* (10) in which it was said :

"It appears to us that when a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained. In this respect suits for declaration of right to partition differ from most other suits. So long as the property is jointly held so long does a right to partition continue."

In *Mukerji* v. *Afzal Beg* (11) the plaintiff had brought a suit for partition which was compromised, the defendant agreeing to transfer his rights to the plaintiff for a certain sum. This agreement was never carried out. The plaintiff brought a fresh suit for partition and alleged that the predecessor of the defendants refused to carry out the sale. It was held that

"since the defendants or their predecessors-in-title failed to carry out the compromise, the parties were relegated to their rights as they existed prior to the compromise."

There is a decision of this Court to the same effect : *Madon Mohon* v. *Baikanta* (12), approved in *Mansharam* v. *Gonesh* (13). The learned Judge has referred to *Rameswar* v *Ram Bahadur* (14), but the facts of this case are more clearly seen from the report in 31 *Calcutta* 110 and show it to be a case in which the plaintiff, unless he succeeded in setting aside a consent decree, had no interest in the property.

The Advocate-General for the defendant company contends that rights have vested in the company under the consent decree and that it is too late now to go behind that decree. But it is clear enough in my opinion that the company has no agreement with the plaintiff or any of his brothers. The fact that the receiver handed over all the properties to the company in 1924 without the consent of the plaintiff or his guardian and in spite of their refusal to have anything to do with the company or to accept its shares, does not in any way amount to an agreement. The learned Advocate-General contended before us that Art. 3 of the Articles of Association amount, in view of S. 21, Companies Act, to an agreement between the company and the plaintiff. It does not seem to me that even if the plaintiff were a member of the company, an agreement could in this way be made out *Eley* v. *Positive Assurance Co.* (15) and *Hickman* v. *Kent* (16). But the plaintiff is not a member of the company and owed no duty to become one or to

(10) [1891] 13 All. 309=(1891) A. W. N. 117.

(11) [1914] 37 All. 155=27 I. C. 694.
(12) [1906] 10 C. W. N. 839.
(13) [1912] 16 I. C. 383.
(14) [1906] 34 Cal. 70.
(15) [1875] 1 Ex. Div. 20.
(16) [1915] 1 Ch. 881=84 L. J. Ch. 688=59 S. J. 478=113 L. T. 159.

have any dealings with the company whether under the consent decree or otherwise. The company has, from its commencement, had full notice of the terms of the consent decree and no transactions which it has had with the plaintiff's uncles can disentitle the plaintiff to any relief which is otherwise within his rights.

If, however, we regard the matter entirely as one between the parties to the previous suit, it is evident first that that suit was not a mere suit for partition, but was a suit for administration of the estates of Mohesh and Debendra and that there are provisions in the consent decree which are really directed to the winding up of these estates ; secondly that while an owner of joint property may always ask for partition, the claim in the present suit is not for partition on the basis of the consent decree. We have, therefore, to see whether the plaintiff has shown that in the events that have happened the consent decree is no longer binding upon him. On this part of the case, both the plaintiff's pleadings and evidence are extraordinarily scrappy and unsatisfactory. In para. 16 of the plaint he says that none of the parties are even now in a position to transfer their shares and in para. 18 he repeats the statement, the shares of Rajendra and Satindra being specially mentioned. Copies of two mortgages (apparently the mortgages of 22nd February 1918 and 27th September 1925 by Satindra) appear to have been adduced in evidence though they were not ultimately exhibited. A copy of a mortgage by Surendra to Raghunath Das Shewlal dated 28th July 1925, has been put in evidence. Apparently a list of ten mortgages was handed to the learned Judge. This was all the evidence adduced by the plaintiff in addition to the bundle of correspondence which does not seem to throw any light upon these mortgages. The defendant company called Satindra and he was cross-examined about his own mortgages. He said that the defendant Satyendra Nath Modak was a benamidar of Rabindra. Now unless the plaintiff can prove properly and conclusively that by reason of the mortgages executed by his uncles subsequent to the consent decree a company formed in accordance with the decree would obtain an invalid title to a lease for 99 years so far as the shares of the mortgagors are concerned, he fails, as it seems to me, upon this evidence, to make any case for saying that the consent decree, if originally valid, has ceased to be binding upon him. On the evidence as it stands it would appear that the defendant company has now conformed to the terms of the consent decree as regards its capital. The plaintiff and his guardian Rajendra are not shown by the evidence to have objected to this company originally because of the amount of its nominal capital. This point indeed is rendered very doubtful by the letter of 28th June 1924, 21st April 1925, 22nd April 1925, 24th April 1925, 1st May 1925 and 27th July 1925, though their solicitors' letter of 11th January 1926 shows that by this time they were taking this point as an objection. Now that this objection has been removed, it is by no means evident to me, apart from the question as to the mortgages entered into subsequent to the decree by the plaintiff's uncles, that it is impossible to carry out the consent decree.

What then is the position as regards the mortgages upon the evidence in this case ? If all the parties were to execute a lease to the company as they promised to do, would the company's possession of the property under the lease be liable to be disturbed by the mortgagees or purchasers under decrees for the enforcement of their securities? The receiver in the previous suit was in possession until May 1924. Since that date the company has been in possession. Some of the parties have been acting under the decree and an application in execution was made in 1926. It is by no means evident to me, therefore, that if, under the consent decree, a lease was executed by these parties to-morrow, the mortgages would have priority over the lease. As the company has been in possession of the property, good evidence would be required to show that any mortgagee had taken without notice of the rights of the parties under the consent decree. Upon clear proof that the scheme of the consent decree was no longer possible, it may be that the plaintiff could make a case on the lines of *Chaudhri Ahmad Bakhsh* v. *Seth Raghubar* (17) where Lord Davey said:

(17) [1905] 28 All. 1=32 I. A. 229=2 A. L. J. 813=8 Sar. 882 (P. C.).

"Their Lordships are of opinion that a new decree which could only be regularly made in a fresh suit was in the circumstances required in order to give effect to the rights of parties and do justice between them."

But in my opinion this part of the plaintiff's case fails upon the facts proved by the evidence.

In these circumstances, the plaintiff's suit fails. If the plaintiff desires to have any relief upon the footing of the consent decree, this relief must be obtained in a suit properly framed for the purpose. The appeal should be dismissed with costs.

C. C. Ghose, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 547 (1)

RANKIN, C. J.

Mir Belayet Ali — Purchaser—Petitioner.

v.

Radhikalal Das—Landlord—Opposite Party.

Civil Rule No. 1546 of 1929, Decided on 6th March 1930, in the matter of Misc. Case No. 19 of 1929, from order of Munsif, Nawabganj, D/- 5th August 1929.

Bengal Tenancy Act, S. 25 (f) (2) — Transferee paying into Court on footing that he has taken transfer of occupancy holding—Rights of landlord still arise under S. 25 (f) (2) and transferee spends on holding at his risk.

Even where a transferee pays money into Court on the footing that he has taken transfer of an occupancy holding, the rights of the landlord under S. 25 (f) (2) arise and if the transferee in the meantime incurs expenditure by putting masonry buildings on the property, he does so at his own risk. [P 547 C 1]

Radhika Ranjan Guha — for Petitioner.

Gopendra Krishna Banerji — for Opposite Party.

Order.—In my opinion this Rule must be discharged. In appears that the transferee paid money into Court on the footing that he had taken transfer of an occupancy holding. In these circumstances, it appears to me that the landlords' right arose under the new clause in the Bengal Tenancy Act and that, if the transferee has gone to expense in putting masonry buildings in the meantime upon the property he has done that at his own risk. This case cannot be treated as a case of encumbrance nor is it possible for the Court to go outside the language of S. 25 (f) (2). Ben. Ten. Act, and to order compensation which is not authorised thereby. The Rule must, therefore, be discharged with costs. Hearing fee one gold mohur.

V.B./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 547 (2)

RANKIN, C. J., AND C. C. GHOSE, J.

Kanto Mohan Mullick — Insolvent — Appellant.

v.

John Carapiet Galstaun and *another* —Respondents.

Appeal No. 79 of 1927, Decided on 13th January 1928, from original order of Buckland, J., D/- 1st June 1927.

(a) Presidency Towns Insolvency Act (1848), S. 38 — Insolvent will be heard on question of creditor advancing proof which is disputed.

Section 38 contemplates that an insolvent shall have a right to be heard upon any question of a creditor advancing a proof which is disputed. [P 550 C 1]

(b) Practice—Remand — Point of limitation not raised before appellate Court—On remand it cannot be so raised if reference is limited.

Although it is the duty of the Court of appeal to take the point of limitation notwithstanding that it has not been raised by the party, if such point is not taken by the Court, the point cannot be raised on remand on a limited reference unless such decision has been reviewed or the right of appeal, if any there might be, exercised. [P 551 C 2]

(c) Presidency Towns Insolvency Act (1848), S. 77—Official Assignee is not administrator of trust for benefit of creditors.

Under the Indian Insolvency Act of 1848 the Official Assignee in administering the estate of an insolvent is not administering a trust intended for the benefit of any creditor who is willing to come in. [P 552 C 1, 2]

(d) Contract Act, S. 16—Conditions requisite for application of S. 16 stated.

Under S. 16 which deals really with "what is consent" contracts are not avoided merely because they are hard or harsh. They are avoided because there is no such consent on the part of the defendant as in principle can be regarded as a contract by him. Where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other, the contract is said to be induced by "undue influence." There are, therefore, two things to be shown: the person in a position to dominate the other's will and using that position to obtain an unfair advantage. Cl. 3 of the section is to this effect: that where a person is in a position to dominate the will of another and makes a contract which is unconscionable the burden of proving that such contract was not induced by undue influence lies upon the person who is in a position to dominate the will of the other. [P 552 C 2]

(e) Presidency Towns Insolvency Act, S. 46 —Duty of Court as regards debt provable in insolvency as distinguished from dividends to be allowed.

Although no doubt it is the duty of the insolvency Court to go behind any accounts stated or covenant or judgment and in the interest of other creditors get to the real character of the transaction, it does not mean that if a person has lent one lac or a promise to repay two, he is a person who can only prove one lac in insolvency. In such transaction the correct figure at which proof should be admitted as distinct from correct figure upon which dividend should be paid, is the figure which would be due according to the terms of the real bargain between the parties. For the purposes of dividend a different figure has to be computed, viz. the figure of one lac with interest at 6 per cent. per annum to the date of adjudication: *In re Van Laun* (1907), 2 *K. B.* 23, *Ref.* [P 553 C 2; P 554 C 1]

(f) Presidency Towns Insolvency Act, S. 46 —Nominal amount of proof of debt and effect of sums received—Accounting.

The time at which the creditor claims to prove is the time at which he brings his application to have his name inserted in the schedule. That being so, while the sum since received must be taken into account when it comes to paying dividend in order that the creditor may not receive more than 20 shillings in the pound it is not a matter which reduces the nominal amount of his proof of debt. [P 554 C 1]

(g) Presidency Towns Insolvency Act (1909), Ss. 60 and 40—Modern bankruptcy statutes in England can take effect under Act.

The terms of the Presidency Towns Insolvency Act of 1909 are such that they can take no effect upon adjudication under the previous Act, but the modern bankruptcy statutes in England can according to the decisions take effect under that Act by virtue of such sections as S. 40 and S. 60. [P 554 C 2; P 555 C 1]

(h) Presidency Towns Insolvency Act, S. 76 —"Interest."

Where there is a surplus in the estate of the insolvent after paying all the debts in full, Court can give 6 per cent. interest: 13 *Cal.* 66, *Foll.* [P 555 C 1]

Langford James—for Appellant.

N. N. Sircar—for Respondent.

Rankin, C. J.—In this case we are concerned with the ascertainment of the amounts for which Mr. Galstaun is entitled to proof in the insolvency of one Kanto Mohan Mullick. I propose that we should give our decision upon the questions of law which are involved and what is said with reference to the particular figures and amounts will be subjected to correction hereafter on the representation of the parties. The intention is that at the conclusion of this judgment the parties should have an opportunity of checking whether the figures mentioned in it are correct in accordance with the true working out of the principle which is to be applied. Now it appears that the insolvent Kanto Mohan Mullick and four of his brothers entered into a transaction represented by a mortgage deed dated 28th June 1903. It appears that at this time a certain will was being propounded by the persons named as executors therein as the true will of their uncle, one Gopal Lal Seal, and although the contents and effect of that will have not been properly brought before us it is common ground that if that will were established the five brothers would be entitled to the enjoyment of the assets left by their uncle at a period of time long before they would be likely to succeed as mere reversioners expectant upon the determination of the rights of their uncle's two widows. In point of fact at the date of the mortgage transaction the probate suit was being tried. The ultimate result of that suit was that the will was held to be a forgery. The true nature of the transaction represented by the instrument of 28th June 1903 is not in doubt.

It appears that the will case was being conducted, if not nominally, at all events really, on behalf of the five brothers by an Attorney one N. C. Bose and it appears that after certain amounts of money had been spent upon it, it was necessary to obtain more money for the same purpose. Accordingly the attorney, with the assistance, to use a neutral phrase, of a gentleman called Mumford, approached Galstaun and ultimately it was arranged that a loan of one lac should be obtained from him upon the terms that he was to get in six months two lacs for the loan and that the sum of two lacs was to carry interest at the rate of 12 per cent per annum. A loan of half a lac was at the same time being made by one Haridhone Dutt and upon similar terms, namely that at the end of six months double the amount was to be payable. These two transactions are put into the same deed and that deed proceeds upon the basis that the brothers are borrowing from Galstaun sums of money aggregating the sum of three lacs which have been advanced to them by Galstaun out of his own moneys and of moneys contributed by Haridhone Dutt. These advances are said to have been made upon

the security of certain hundis mentioned in the schedule. The actual covenant for repayment is in these words:

"Now this indenture witnesseth that in pursuance of the said agreement and in consideration of the said sum of Rupees three lacs already advanced by the mortgagee to the mortgagors as aforesaid (the receipt whereof the mortgagors do hereby admit and acknowledge) the mortgagors do hereby covenant with the mortgagee that they the mortgagors shall and will on 20th December 1903 pay to the mortgagee at Calcutta the said principal sum of Rupees three lacs without any deduction or abatement whatsoever and will in the meantime and until full payment and satisfaction of the said sum of Rupees three lacs pay interest thereon or on such part thereof as shall for the time being remain owing and unpaid at the rate of 12 per cent. per annum computed from the date of these presents by equal monthly payments."

We are concerned with this transaction in the following circumstances: It appears that the money which was borrowed was expended and that when the time came to repay in December 1903 no part was repaid. Until events long afterwards, which I shall come to in due course, neither principal nor interest nor any part of either was repaid to Galstaun. In 1905 Haridhone Dutt died and on 11th November 1907, Kanto Mohan Mullick was adjudicated an insolvent under the old Act which then obtained in India, namely, the Indian Insolvency Act, 1848, 11 and 12 Vic. Cap. 21. In 1909 a suit was brought by Galstaun against all the five brothers upon the covenant in the mortgage. In March 1915 the Official Assignee was substituted in the place of the insolvent. In 1917 the plaint in this suit was amended, converting it from a mere suit upon a covenant in the mortgage to a suit to enforce a security. In 1920 Galstaun withdrew his suit so far as the Official Assignee was concerned without prejudice to his rights to prove in the insolvency if any. In February 1920 this mortgage suit came on for hearing and the plaintiff proceeded with it on the basis of a suit upon the covenant only. He got a decree against the then defendants, that is to say, the insolvent's four brothers for a sum apparently of Rs. 5,23,500.

Later on, an appeal having been taken from this decree the matter was settled by certain terms of settlement agreed to before the Court of appeal in December 1920. It will be observed that shortly before this date, that is to say, in April 1920, the application with which we are now really concerned had been brought by Galstaun claiming to be entitled to prove in the insolvency of Kanto Mohan Mullick. The terms of settlement arrived at with Kanto's brothers are ten in number. There was to be a decree in favour of Mr. Galstaun for Rs. 2,75,000 with interest on the decree at 6 per cent together with certain costs. The question of the money said to be advanced by Hari dhone Dutt was put upon one side altogether and he was left to proceed with his appeal if he desired to do so. The sixth term is this:

"That Mr. Galstaun will be at liberty to proceed for the balance of his claim in this suit against Kanto Mohan Mullick without recourse to the Mullick parties herein."

I do not think that there is any further term which it is necessary to recite at the moment. In point of fact under that decree certain sums were received by Galstaun in 1925 and 1926. We are told that in May 1925 he received Rs. 1,25,000 and that in July 1926 he received Rs. 1,26,910. It seems that in 1927 there was a mortgage decree for a sum of Rs. 1,11,756, but it is not shown to us nor is it contended by Mr. Langford James that that money has been received so far.

Turning now in the light of these circumstances to the case which is actually before us, I find that on 7th April 1920 Galstaun made an application that the schedule filed by the insolvent should be amended by entering him as a creditor for a sum of money put by him as three lacs with interest at the rate of 12 per cent. per annum with monthly rests. It appears that in the insolvent's schedule he had entered Gulstaun as a creditor in the year 1907. He had put the debt down as disputed and I will assume that he put it down not merely as disputed in point of amount but as disputed altogether. It would appear that under the Insolvency Act a debtor was required to put in his schedule debts claimed which he disputed altogether, and it would appear probable also that there was a chance of certain advantages to a debtor if he did include his creditor's claim in the schedule because in that case he might get protec-

tion against process if the creditor should commence a suit.

Now that application to correct the schedule and admit Galstaun as a creditor was ultimately brought on for hearing before Greaves, J., who delivered judgment in the matter in March 1921. I will not now describe the evidence that was then before the learned Judge, but will notice only that at the hearing before him the insolvent claimed to be represented as well as and independently of the Official Assignee. That claim the learned Judge disallowed. (So far as I can see the section of the Act under which the learned Judge was proceeding, namely S. 38, contemplates that an insolvent shall have a right to be heard upon any question of a creditor advancing a proof which is disputed. The learned Judge, however, came to a contrary conclusion and it may be that there were good reasons for that conclusion. I do not find it necessary to pronounce upon that question. I am, however, proposing to deal with this case upon the basis that the insolvent had a right under S. 38 to be heard upon this matter). The matter was fought out between Galstaun on the one hand and the Official Assignee on the other and the questions that were discussed cover the whole ground. It was disputed whether or not the contract for Galstaun's loan was a good contract or was one made by means of undue influence so as not to leave a free and full consent on the part of the insolvent. The learned Judge rejected that objection to the proof of debt. Another contention seems to have been raised to the effect that because Galstaun had at first proceeded against the insolvent and the Official Assignee by a suit he could not lodge a proof in the insolvency. That contention was very properly rejected. A contention was further based upon Cl. 6 of the terms of settlement and it was also considered whether any question of limitation stood in the creditor's way. On this question of limitation it was held on the authority of *Ex parte Ross* (1) that a proof for a debt which was not barred at the commencement of the bankruptcy did not become barred by lapse of time. From that judgment an appeal was taken and a good deal turned in the Court of appeal upon what the learned Judge had said with reference to the question of Cl. 6 of the terms of settlement. The learned Judge pointed out that nothing had been received, at the time he was dealing with this matter, from the brothers of the insolvent on account of this debt. It was pointed out that if something was received a question of a complicated character might arise as to Galstaun's right to allocate some of that to interest rather than to principal. He was not minded to anticipate and give directions in advance about what would happen if sums of money should be received from the debtor's brothers in future and he said:

> "But in any case I am not finally disposing of any rights and if and when the Rs. 2,75,000 is recovered it may be permissible for the Official Assignee to raise any contention he may be advised to raise. At the moment I am only deciding whether the claim is provable or not. I see nothing in the third contention to prevent the admission of the proof."

On that an order was drawn up whereby the proof was thereby admitted and allowed for the sum of Rs. 2,00,000 with interest thereon at the rate of 12 per cent per annum with monthly rests from 28th June 1903 to 11th November 1907. From this order the insolvent himself as distinct from the Official Assignee preferred an appeal which came on for hearing in January 1922. One would suppose that the insolvent's first point would be that he had not been permitted to take part in the proceedings before Greaves, J., and that, therefore, the whole matter must be sent back so far as he is concerned or indeed altogether. I do not find that any such suggestion was made to the Court or that the Court in any way proposed to act on those lines. The appeal was heard as an appeal preferred by the insolvent himself and certain points were argued for the appellant as appears from the judgment. One point which came to nothing was whether the debt was a joint debt or a joint and several debt on the part of these five brothers. Undoubtedly it was a joint and several debt.

The next question was, it was contended, that because Galstaun had brought a suit and had withdrawn the suit against the insolvent, but did not obtain leave of the Court under O. 23,

(1) [1827] 2 G. & J. 330.

he could not bring another suit and could not consequently lodge a proof. That contention was negatived.

The third point upon which the learned counsel relied was in respect of the amount for which Galstaun's claim had been admitted in the order which had been drawn up on the learned Judge's judgment. The Court of appeal apparently did not understand what the learned Judge intended to do because he did not intend, according to his judgment, to "dispose finally of any rights." It goes on to say that it was not necessary to pursue the consideration of this part of the case any further, for Mr. Sirkar, the learned counsel for Galstaun has not opposed the course which was suggested by the learned counsel for the appellant, namely that this matter should be remanded to the learned Judge taking insolvency matters on the original side in order that he may determine what is the real indebtedness of the insolvent to Galstaun in respect of the claim which he had made. That is the order of remand under which my learned brother Buckland, J., was sitting when he gave the decision which is now under appeal.

The learned Judge in his judgment has again reviewed the case. He has considered in the presence of the insolvent whether or not the contract is one which must be treated as no good contract by reason of undue influence in accordance with S. 16, Contract Act, as expounded in particular by the Privy Council in the case of *Dhanipal Das* v. *Maneshar Bakhsh Singh* (2). He has come to the conclusion that the contract was not brought about by undue influence and that it is a good contract in law. As regards the questions of limitation he has held that those questions were not open upon this reference. He has dealt at length with the fact and figures and has admitted proof for the sum claimed in the end by the creditor as due. That figure is the figure of rupees 2,60,760. As regards the contention that in view of Cl. 6 of the terms of settlement made by Galstaun with the insolvent's brothers, Galstaun's rights of proof in this insolvency are narrowed down by the phrase "without recourse to the Mullick parties herein" the learned Judge has held that this phrase has no reference to any right of contribution which might arise if and when the insolvent has paid more than a proportionate share of the total debt. Accordingly, the question of Galstaun's proof is not in his opinion affected by any such consideration.

Now on this appeal a good many questions have been raised and the argument of Mr. Langford James on the part of the appellant is as follows: He says first of all that by a decision of the Privy Council in an ex parte appeal *Ganesh Lal* v. *Khetramohan Mahapatra* (3), it has now been decided that the period of limitation in a suit upon a covenant to repay contained in a mortgage is three years from the date on which the money became payable. He says, secondly, that it is not the law in India as regards proofs of debt that the terminus ad quem of the period of limitation is the date of adjudication. He says that one must go on until one finds an actual claim made in insolvency and that if by that time the statutory period is run out the claim to prove is barred. Now on this point the learned Judge has in my judgment, correctly held that no such point is open to the appellant after the previous decision of the Court of appeal. In the memorandum of appeal on that occasion the question of limitation was raised though it was not raised in the argument. The appeal was not dealt with on the basis that it was a complaint by a person who had not been allowed to be present and who was entitled to have the case reheard in his presence. Such objections as were raised to there being any debt provable in law were heard and determined and the only question upon which the case was remanded was the question of amount arising in the manner which I have already explained.

It is quite true that notwithstanding that the point of limitation was not taken it was in theory the duty of the Court of appeal at that time to take the point; but if it did not take the point (and it was not altogether an obvious or easy point) it is quite wrong to suppose that without getting the decision reviewed or without exercising any rights of appeal that there might be, it can be questioned when

(2) [1906] 28 All. 570=9 O. C. 188=33 I. A. 118 (P.C.).

(3) A. I. R. 1926. P. C. 56=95 I. C. 899=53 I. A. 134=5 Pat. 585 (P.C.).

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the learned Judge comes to carry out the limited reference which was put upon him by that judgment. It is not necessary for me to do more than to state what the contentions as to limitations are and they are these. It is said that in the ex parte case *Ganesh Lal* v. *Khetramohan Mahapatra* (3) to which I have referred the Privy Council has laid down not merely that there is no 12 years limitation for a suit upon a covenant, but that the limitation is a three year limitation being under Art. 66, Lim. Act, 1908 and not under Art. 116. This contention, it is said, is derived from an observation of what is said by Lord Fitz-Gerald in delivering the judgment of the Judicial Committee in the case of *Ramdin* v. *Kalka Pershad* (4). That case was decided in 1884 under the Act of 1871. As against that it is said that many years have elapsed, since 1884, and since that time questions as to the period of limitation for a suit on a covenant have many times had to be considered by all the Courts in India and that they have all along been unanimous in thinking that the period of such limitation is not three years but six. In these circumstances, it is contended, that a mere dictum in an ex parte case upon questions which it was not necessary to decide would be insufficient to justify the Court in throwing over the considered view upon which all the Courts in India are unanimous.

On the other question as to whether limitation comes to end with an adjudication order, many cases have been cited to us. It is said that the reasons why in England limitation after the date of the bankruptcy does not run are these : first, that it is held that creditors are in effect the beneficiaries of the trust created by law of the debtors' estate ; and, secondly, that during the insolvency creditors are not allowed in the ordinary way to bring suits against the insolvents to enforce their debts. In my judgment it is not necessary to canvass these cases or the arguments that have been advanced. I will content myself by saying that I see no reason whatever under this Indian Insolvency Act of 1848 for thinking that the Official Assignee in administering the estate of an insolvent is not administering a trust intended for the benefit of any creditor who is willing to come in. In my judgment there is nothing in the contention that there is any difference under this Act from the ordinary law as it prevails in England. That question of limitation, therefore, must be put on one side.

The next question of importance is the question whether or not this contract is to be held to be void under S. 16, Contract Act. On this question two Judges have already pronounced, Greaves and Buckland, JJ., but I am only concerned with the judgment of Buckland, J. and, so far as that is concerned, it may be sufficient to say that I entirely agree in his finding of fact that this contract was not brought about or induced by undue influence. Under S. 16 which is a section which deals really with "what is consent?" contracts are not avoided merely because they are hard or harsh. They are avoided because there is no such consent on the part of the defendant as in principle can be regarded as a contract by him. Where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other, the contract is said to be induced by "undue influence." There are, therefore, two things to be shown : the person in a position to dominate the other's will and using that position to obtain an unfair advantage. Cl. 3 of the section is to this effect : that where a person is in a position to dominate the will of another and makes a contract which is unconscionable the burden of proving that such contract was not induced by undue influence lies upon the person in a position to dominate the will of the other. In the present case these brothers were minded to finance a highly speculative litigation. They were not people who were borrowing money to enable themselves to live. They were not people without advice. They were borrowing it on the instructions not merely of their attorney but of several other people assisting him to find finance. It seems reasonably clear from the circumstances that they had little tangible security to offer. They purported to mortgage their

(4) [1884] 7 All. 502=12 I. A. 12=4 Sar. 619 (P.C.).

claims to their uncle's estate. They purported to mortgage some claim also of their grandmother, but it is tolerably reasonable that they were not people who were borrowing upon any good security. The evidence of the insolvent himself contains a great many statements which are difficult to believe, some of which tell against him as well as in his favour. According to him he did not want the money to be borrowed. According to him he told Galstaun that if he lent it the money would be thrown into the sea. According to other passages in his evidence it may be supposed that he had no mind of his own and that the whole of the transaction was entered into because Galstaun wanted it. I take the same view of this matter as the learned Judge of the Court below. In a case of this character it is difficult to say that it was even prudent for the lender to lend money to the amount of one lac on a promise of two. In my judgment the fact that the attorney and certain other agents were employed to negotiate this loan makes it difficult to say that there is any case to the effect that Galstaun dominated the will of the Mullick brothers. This matter has been dealt with fully by the learned Judge and I do not propose to enter into the matter any further than in saying that I agree with his judgment.

In these circumstances the question arises next as to whether or not Cl. 6 of the terms of settlement between Galstaun and the insolvent's brothers meant what it is alleged it means. There, again, I venture to say that I agree with the view taken by the learned Judge. If the intention was to stipulate that Galstaun should be at liberty to go on against the insolvent but that he should take nothing in the insolvency or otherwise which could produce a claim on the part of the insolvent for contribution against his brothers, in my judgment very different words would have been chosen to incorporate that agreement. What is said is that he

"would be at liberty to proceed for the balance of his claim in this suit against Kanto Mohan Mullick without recourse to the Mullick properties herein."

It has been strenuously contended by Mr. Langford James that these terms of settlement were entered into for the benefit of the insolvent, and that there was to be a restriction for his benefit that Galstaun could only proceed against him for the balance of Galstaun's claim in that suit, meaning thereby the figure which he had claimed when he brought the suit. It has been contended that in other ways these terms were made by the Mullick brothers for the benefit or protection of the insolvent. In my judgment that is a complete misconstruction of it. Anything that is contained in these terms is amply accounted for by the interest of the four brothers or of Galstaun.

I come now to the ascertainment of the correct method in which the present proof should be dealt with as a proof in insolvency. The first principle that is appealed to by the insolvent is that the Court has a right and duty to go behind any accounts stated, or covenant or judgment and in the interest of other creditors get to the real character of the transaction. There have been many cases laying down that principle. The main one is the case of *In re Van Laun* (5) which has been cited and commented upon. That principle does not mean that if a person has lent one lac upon a promise to repay two he is a person who can only prove for one lac in insolvency. It is a principle, however, which it is necessary to apply in the present case because the form of the covenant would lead one to suppose that the creditor had lent two lacs at 12 per cent per annum when, in point of fact, he has lent one lac only and he is to get by way of interest a further lac together with what he is to get as interest eo nominoe. If therefore the ordinary principles of modern English bankruptcy law are to be applied the principle will be found expressed in S. 66, Bankruptcy Act of 1914. This is a case where a debt has been proved and the debt includes interest or any pecuniary consideration in lieu of interest and this is a case where the interest or consideration should for the purposes of dividend be calculated at a rate not exceeding (in England) five per cent per annum without prejudice to the right of the creditor to receive out of the estate any higher rate of interest to which he may

(5) [1907] 2 K. B. 23.

be entitled after all the debts proved in the estate have been paid in full. If I am asked, therefore, what is the correct figure at which the proof should be admitted as distinct from the correct figure upon which the dividend should be paid, it appears to me that the correct figure at which the proof should be admitted is the figure which would be due according to the term of the real bargain between the parties, that is to say, the term that although one lac only was advanced the insolvent was to be liable to repay a sum of two lacs with interest. It appears to be common ground that on that footing the total claim up to the time of insolvency including interest at the contractual rate would be Rs. 3,04,861. For purposes of dividend, however, a different figure has to be computed, namely, the figure of one lac with interest at six per cent per annum to the date of the adjudication. That figure has yet to be ascertained but it is a figure which would be under one lac and a half.

The next thing to be considered is this : certain sums of money have been received in 1925 and 1926. They amount in all to some two and a half lacs, a figure which is greater than the figure which is last mentioned. It is quite obvious, therefore, that if this is an ordinary insolvency in which there is no surplus but a deficient fund the creditor would get no advantage in these circumstances by trying to prove. It has been suggested on behalf of the insolvent that before arriving at the amount which is the total amount to be proved, namely, Rs. 3,04,861, credit for the sums received ought to be given so as to reduce the actual amount at which proof is to be admitted for any purpose to a much smaller sum. In my judgment that argument is wrong. To apply the English rule : cf. *Re. London etc., Bank* (6) : the time at which the creditor claimed to prove is the time at which he brought this application in 1920 to have his name inserted in the schedule. That being so, while the sum since received must be taken into account when it comes to paying dividend in order that the creditor may not receive more than 20 shillings in the pound it is not a matter which reduces the nominal amount of his proof of debt. In this connexion it may be mentioned that on the strength of an old case it has been contended that since a judgment was taken against the insolvent's brothers, that judgment from the time it was pronounced must be taken to be a receipt and the equivalent of a payment. In my opinion, there is no foundation for that contention for the present purpose. If it should turn out that after all the other creditors are paid in full the amount of their respective proofs there is a surplus sufficient left from which the full amount of Galstaun's proof of debt, namely, Rs. 3,04,861 can be paid, credit being given for the sums already received from the brothers, then in my judgment that sum will be payable to him in due course of administration. Not only so, but if after that there should be still a further surplus, this Court should, in my opinion, now direct that a payment should be made to him so as to give him the benefit of the principle which will be found in S. 33, Sch. 2, Bankruptcy Act, 1914 which is in these terms :

> "If there is any surplus after payment of the foregoing debts, it shall be applied in payment of interest from the date of the receiving order at the rate of four pounds per centum per annum on all debts proved in the bankruptcy."

It is to be carefully borne in mind that no interest will be payable upon the sums received from the Mullick brothers after the date of their receipt, that is to say, in the event of there being sufficient funds we direct that interest in this country at six per cent per annum be paid upon the total amount of the proof until such time as the first payment was received in discharge of the total liability. Thereafter the sum upon which six per cent will be payable will be reduced by the amount of the capital repaid ; in like manner the sum received in 1926, and any other sums as and when received. It may be as well here to point out that by the terms of S. 40, Insolvent Act, and the decisions thereunder questions such as we have had to deal with have to be decided by the English bankruptcy law as it may be from time to time. The terms of the Presidency Towns Insolvency Act, 1909 are such that they can take no effect upon adjudication under the previous Act, but the modern

(6) [1874] 9 Ch. 687.

bankruptcy statutes in England can according to the decisions take effect under that Act by virtue of such sections as S. 40 and S. 60. This was long ago held by Sir L. Peel in the case of *Grey* v. *Chick* in Coryton's Reports, p., 136 and also by Innes, J., in *In the matter of Vardalac Charri* (7). As I understand, until 1909 the practice of this Court in administering the old Act was to do so upon the modern English principles laid down by the old Act itself and there is nothing in existence of any rule applicable to this case. This explains what otherwise might seem erroneous with reference to the English statutes.

On the question of interest it is only right to say that there is a specific authority in this Court for giving six per cent interest in the case of an insolvent's estate where there is a surplus in the estate after paying all the debts in full; and on this ground the particular figure of six per cent is justified by authorities. The case to which I will refer is the case of *In re, Mahomed Mahmud Shah* (8) which appears to have been followed in certain unreported cases.

The order of the learned Judge will be varied in accordance with our judgment and the creditor will be entitled to take his costs of this appeal out of the estate.

C. C. Ghose, J.—I agree.

V.B./R.K. *Order accordingly.*

(7) [1877] 2 Mad. 15.
(8) [1886] 13 Cal. 66.

A. I. R. 1930 Calcutta 555

RANKIN, C, J., AND BUCKLAND, J.

(Maharaj) Kishore Khanna—Appellant.

v.

The Netherlands Trading Society and *another*—Respondents.

Appeal No. 97 of 1929, Decided on 29th November 1929, against judgment of Mitter, J., D/- 25th September 1929.

Presidency Towns Insolvency Act, S. 9—Judgment-debtor brought before Court under S. 55, Civil P.C., if intimates to Court that he intends to apply for adjudication as insolvent within one month and asking for order of release, he, thereby gives notice that he is about to suspend payment of debts and thus commits act of insolvency within meaning of S. 9.

The statement under S. 55, Civil P. C., that the man intends to file his petition is a statement to the effect that he has decided that his affairs must be settled by dealing with his creditors generally and that he must abandon the ordinary position of a solvent person who deals with each creditor as he pleases and is not concerned to ensure that all his creditors get exactly the same treatment. [P557 C 2]

Where a judgment-debtor brought before the Court at the instance of the judgment-creditors under S. 55 intimates to the Court through his counsel that he intends to apply for an adjudication as an insolvent within one month and asks for an order of release under S. 55 (4) he thereby gives notice to that creditor, although he may not be present in person and be represented by his counsel, that he is about to suspend payment of debts. He commits, as such, an act of insolvency within the meaning of S. 9, Presidency Towns Insolvency Act, and petition in insolvency can be filed against him by another creditor: *In re Scott* (1896), 1 Q. B. D. 619, *Ref.* [P 557 C 1]

S. M. Bose, *N. C. Chatterjee* and *U. C. Laha*—for Appellant.

W. Gregory—for Respondent.

Advocate-General — for Official Assignee.

Rankin, C. J.—In my opinion, this appeal fails except that it gives this Court an opportunity to amend a very badly drawn order of adjudication which I must regret to see under the seal of this Court. It appears that the debtor had been arrested at the suit of a particular creditor and he was brought before the Court under S. 55, Civil P. C., by way of execution for the enforcement of a money decree. On the day in question the facts are that he appeared by learned counsel Mr. Moore. The other learned counsel was Mr. Surita appearing for the decree-holder, one Annada Prasad Chatterjee. When the case was called on, it seems that the defendant being produced in the custody of the Sheriff's Officer, Mr. Moore, counsel, said that his client wished to apply for adjudication as an insolvent and asked for an order under S. 55, sub-S. (4), Civil P. C. The Court made an order that on his giving security in Rs. 500 to the satisfaction of the Registrar for filing within one month his petition for adjudication and for his appearance when called on so to do, he would be released and, in default he would be committed to prison. It would appear that he furnished security and was released. This having happened on 19th July 1929, on 14th September within three months of the date of the order, the present petition in insolvency was filed against him by

another creditor. That petition was founded on several acts of insolvency ; but only one act of insolvency is now relied upon. The petition set forth that the debtor declared in Court that he would file his petition within one month from 19th July and the petition stated that this amounted to giving to all his creditors notice that he had suspended payment. That certainly was not notice to the creditors who were not there and who were not interested or concerned in the matter. The affidavit of the debtor in reply appears to contain nothing except irrelevant matters. The learned Judge has carefully considered this question from the point of view of principle and has dealt only in his judgment with the act of bankruptcy just referred to.

The act of insolvency which concerns us is this :

"That on the said 19th July 1929, the said debtor declared in Court that he would file his petition of insolvency within one month from the date which amounted to giving notice to all his creditors that he had suspended payment."

Now, the first question is whether it has been shown that, on 19th July the debtor committed an act of insolvency as defined in S. 9, Presidency Towns Insolvency Act in this way :

" He gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts."

In this case, the act of insolvency alleged is that on 19th July 1929 the debtor gave notice to Annada Prasad Chatterjee, a creditor that he was about to suspend payment, of his debts. If this petition is upheld, a proper finding to that effect as being the sole act of insolvency on which the petition is based will have to be substituted for the rigmarole which at present is contained in the order. On this question, Mr. S. M. Bose has contended before us that in the circumstances of this case the facts found and admitted do not amount to a notice of intention to suspend payment of debts. He has referred us not only to the general trend of decisions before and after the decision of the House of Lords in *Crook* v *Morley* (1), but in particular, to three cases—*Ex parte Oastler* (2), *Trustee of the Property of Lord Hill* v. *Rowlands* (3) and *In re Scott* (4). He contends, first, that the statement made on the debtor's behalf in his presence before the Court dealing with the debtor under S. 55, Civil P. C., is not to be regarded within the intention of the Insolvency Act as a statement made to the creditor Chatterjee at all, but is a statement made to the Court ; and although Chatterjee may or may not have been present by himself and was represented by counsel, a statement made to the Court is a different thing for the present purpose from a statement made to the creditor. He further contends that, assuming that the statement was made to the creditor, it was not a statement which implied that the debtor was minded thereupon to suspend payment of his debts. We have to consider whether the learned Judge was right in rejecting these contentions.

Upon the first question, I think the learned Judge was right in holding this to be a statement made to the creditor. It is quite true that if one reads S. 55, sub-Ss. (3) and (4), Civil P. C., the statute puts a duty upon the Court to inform the debtor that he may apply to be declared an insolvent and that, if he does, he may get his discharge. It goes on to provide that where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security to the satisfaction of the Court that he will within one month so apply and certain other matters, the Court may release him from arrest. Now, in this case, the debtor was assisted by legal advice. It was not necessary for the Judge to inform him of what his learned counsel was well able to advise ; and, when his learned counsel made the statement which he did, it must be understood as a statement of intention such as is a compliance with the conditions prescribed by sub-S. (4) S. 55. I have pointed out that the intention required is an intention to apply to be declared an insolvent. It is not an intention to be declared at the end of the month provided nothing does turn up. The month is introduced into the section by way of defining the obligations of the surety. What the judgment-debtor has to express is his inten-

(1) [1891] A. C. 316.
(2) 13 Q. B. D. 471 (1884).
(3) [1896] 2 Q. B. D. 124.
(4) [1896] 1 Q. B. D. 619.

tion to apply to be declared an insolvent. He is asking for release from arrest. He is giving security in support of the bona fides of his intention and on the footing that he is a person who is expressing a definite intention to apply to be declared an insolvent.

Is that as an expression of intention upon which a judgment-creditor's execution against him personally is going to be brought to nothing, is that something which the Code contemplates as said to the decree-holder ? In my opinion it is. In the ordinary course of judicial proceedings, such an allegation made in that way is made in the presence of the parties. The decree-holder is a person who would be entitled to represent to the Court that, notwithstanding this expression of intention, the Court nevertheless should not release him from arrest. It is something which the creditor is entitled to be made aware of by a declaration which is made in trust. Not only the Court but the creditor has to act in some sense upon this intimation and, in my judgment, while it cannot be said that the intimation is to all creditors, the intimation is one made to the judgment-creditor in the case and it is in no way necessary that the judgment-creditor should be present in person. If a person is there to act for him, he is to act for him for all purposes of the section. I am not, therefore, prepared to hold that the act relied upon is not an act of insolvency because the notice is not a notice to the creditor.

Then we come to the question whether the notice is a notice which involves that in the meantime the debtor is not going on paying his creditors as he chooses but is assuming an obligation to maintain the status quo and preserve his assets for the benefit of the creditors generally so that they may be applied in due course of administration and not otherwise than the law provides to the payment of his debts. I am of opinion that it is a necessary part of the import of this declaration that he will not in the meantime continue staggering or paying one person and not paying another, giving some money on account, others in full, and so on, as a man who is the master of his own assets would be able to do. In my judgment the position of the debtor when he has to declare his intention to file his petition in order to get release from arrest is the position of a man who has finished with staggering on. He is a man who has to confess that he has been pulled up. He is not able to profess on the one hand, in order that he may be released, that he intends to file his petition and intends to give security in that behalf, and on the other hand to say at the same time that he will pay such creditors as he chooses and that other creditors will be allowed to go without payment in his own discretion.

The case of *In re Scott* (4), which Mr. S. M. Bose has cited to us is a somewhat strong authority against the contention which he has advanced. That was a case of a lady who had, it appears, several creditors. One creditor was making repeated requests for money. At the moment she had not the money to pay him and if she had merely said :

"Now I cannot pay you because I have not got the money,"

that would have been no statement to the effect that she was about to suspend the payment of her debts generally. But in that case,it was pointed out that what she said to the creditor in effect was :

"I cannot pay you or anyone else. I have taken advice and I am advised that I must deal with my creditors collectively."

In my judgment, the statement under S. 55, Civil P. C., that the man intends to file his petition is a statement to the effect that he has decided that his affairs must be settled by dealing with his creditors generally and that he must abandon the ordinary position of a solvent person who deals with each creditor as he pleases and is not concerned to ensure that all his creditors get exactly the same treatment.

In these reasons, I am of opinion that a good act of bankruptcy has been made out in this case. The whole of the acts of bankruptcy recited will be struck out of the order of adjudication and in place thereof will be the following :

"It appearing to the Court that the following act of insolvency has been committed by the debtor, namely, on 19th July 1929, the said debtor gave notice to one Annada Prasad Chatterjee, a creditor, of his intention to suspend payment of his debts."

The order as to costs will be that the Official Assignee will take his costs of this appeal in the ordinary course of administration and the creditor will add

his costs of this appeal to the costs of the petition which will be paid to him under the rules in the proper order of administration. These costs will be paid in the same order of priority as the costs of the petition.

Buckland, J.—I agree.

R.M./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 558

PANCKRIDGE, J.

R. K. Samuel—Plaintiff.

v.

F. H. T. Samuel—Defendant.

Civil Suit No. 922 of 1929, Decided on 5th September 1929.

Civil P. C., S. 35—Suit for judicial separation—Parties professing Jewish religion—Wife praying for order on her husband to pay her costs — Costs cannot be paid—Case held governed not by Letters Patent (Calcutta) Cl. 35, but by Cl. 12.

A suit for judicial separation was brought by the wife against her husband. The parties were members of the Jewish community and professed the Jewish religion. The wife took out summons for an order on the husband to pay to the wife a certain sum on account of and towards the costs of the suit.

Held: that neither Cl. 35, Letters Patent (Calcutta) nor the Divorce Act applied to the case, but the suit came within the ordinary original civil jurisdiction of the High Court under Cl. 12, Letters Patent, and the procedure as regards payment of costs was that laid down by Civil P. C., of which S. 35, did not give the Court power to direct the order prayed for. [P 558 C 2 P 559 C 1]

J. C. Hazra and *Ispahani*—for Plaintiff.

S. C. Bose—for Defendant.

Judgment. — This is a summons taken out by the plaintiff asking that the defendant be ordered to pay to the plaintiff a sum of Rs. 1,500 or such other sum as the Court may direct on account of and towards the costs of the suit.

The parties are wife and husband, are members of the Jewish community, and profess the Jewish religion. The plaintiff wife seeks in this suit to obtain a judicial separation from the husband. The suit was instituted on 13th May 1929, and on 21st May, Costello, J., made an order for alimony and the payment of Rs. 300 on account of the plaintiff's costs of the suit.

It is conceded that the question of the power of the Court to make such an order was not raised on that occasion. There is a recent decision of the Bombay High Court, *Benjamin* v. *Benjamin* (1), to the effect that the High Court has power to grant a decree nisi for the dissolution of a marriage between Jews. The Court, however, in that case made it clear that the decree asked for and made was made in the exercise of the ordinary original civil jurisdiction conferred by Cl. 12, Letters Patent, and not by virtue of the jurisdiction conferred by Cl. 35, which is limited to "matters matrimonial between our subjects professing the Christian religion."

It is further clear that the Divorce Act, 1869, has no application to a case like the present, for relief under that Act can, under the provisions of S. 2, only be granted in cases where the petitioner professes the Christian religion and resides in India at the time of presenting the petition.

It is said on behalf of the defendant that the present case is distinguishable from *Benjamin* v. *Benjamin* (1) inasmuch as here the plaintiff is not asking for dissolution, but for judicial separation, a relief which, it is argued, is unknown to Jewish law, and that the suit is, therefore, not maintainable.

I do not think it necessary to decide this question because even on the assumption that the suit is maintainable I have come to the conclusion that I ought not to make the order asked for. It seems that it is customary for the Divorce Division of the High Court of Justice to direct a respondent husband to secure the costs of a petitioner wife. In making such an order the Court is following the practice of the old ecclesiastical Courts: whether that practice was based on the fact that at common law a wife's property passed to her husband on marriage need not be considered, for the Court has continued to make the order in spite of the change in the law made by the Married Women's Property Act, 1882.

Similarly this Court has to my knowledge frequently made such an order in proceedings under the Divorce Act, and in so doing it has followed the English principle as it is required to do under S. 9 of the Act. But neither the practice of the English Court nor the practice of this Court in proceedings under the Divorce Act can apply to

(1) 50 Bom. 369 (1925).

suits under Cl. 12, Letters Patent, the procedure in which is laid down by the Civil Procedure Code. The power of the Court to order the payment of costs as the Court in its discretion thinks proper is conferred on it by S. 35 of the Code. The language is wide, but in my opinion it does not give the Court power to direct the defendant to put the plaintiff in funds for the purposes of the litigation or even to secure the plaintiff's costs.

Of course it is not uncommon for the Court, in cases where it is exercising its discretion in favour of a litigant to make the payment of his opponent's costs a condition of such exercise. Such a condition is frequently imposed when adjournments are granted or orders made for the examination of witnesses on commission.

Again, the Court has a discretion specifically given by O. 25 to direct a plaintiff to secure a defendant's costs in cases where the conditions prescribed by the order are satisfied. Such cases, however, are not analogous to the case now before me. With regard to the costs already incurred some of them have been dealt with on the applications that have been made.

With regard to those in respect of which no order has been made and future costs I do not think I have the power in a civil suit to order the payment of them or direct the defendant to provide for their payment in the manner prayed.

It has been suggested that a wife's costs in proceedings bona fide instituted against her husband are "necessaries" for which she is entitled to pledge his credit. Even if this view is correct it only means that the wife's attorney has a cause of action against her husband for his charges and does not justify the order asked for in the summons. The application is dismissed. In the circumstances I make no order as to costs beyond granting a certificate for counsel.

V.S./R.K. *Application dismissed.*

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* A. I. R. 1930 Calcutta 559

MITTER, J.

Sailesh Chandra Sarkar— Plaintiff—Appellant.

v.

Bireswar Chatterjee — Defendant—Respondent.

Appeal No. 433 of 1928, Decided on 28th March 1930, against appeliate decree of Sub-Judge, Zillah Burdwan, D/- 20th September 1927.

*** (a) Registration Act, Ss. 17 and 49—Registration is necessary for compromise operating as lease even though compromise embodied in decree—Statement in such unregistered compromise is however admissible as admission—Evidence Act, S. 21.**

A compromise agreement operating as a lease requires registration notwithstanding the fact that it has been embodied in a decree, and such an agreement if unregistered will not be admissible as a lease, although a statement in it may be admitted as an admission. When such a statement is admitted as an admission it is only a piece of evidence and it is open to the party who has made the admission to show that it was made in circumstances which did not make the admission binding on him or her as the case may be: *A. I. R.* 1919 *P. C.* 79 *Rel. on.* [P 560 C 1]

(b) Practice—Appeal—Final Court of fact should always ascertain from evidence if case made out is sustainable on evidence and should not depend upon admission of counsels.

A final Court of fact must always ascertain on evidence as to whether a case made out before is is one which can be sustained on the evidence and not depend merely on the admissions and statements of the counsels. [P 561 C 1]

Amarendra Nath Bose and *Gopendra Nath Das*—for Appellant.

Bijan Kumar Mukerji—for Respondent.

Judgment.—This is an appeal on behalf of the plaintiff and it arises out of a suit for recovery of arrears of rent and cesses for the Bengali years 1327 to 1330 in respect of about 16 bighas of land mentioned in the plaint which the plaintiff alleged the defendant held under him at an annual rent of Rs. 35. The case of the plaintiff was that the defendant held this plaint land under a compromise arrived at between the parties in a previous rent suit No. 851 of 1918 and the case of the plaintiff was that the defendant had paid rent in respect of this tenancy for the years 1325 and 1326. The substantial defence raised by the defendant was that there was no separate tenancy of 16 bighas as alleged by the plaintiff at a

jama of Rs. 35 but that the plaint land really appertained to the jama of Rs. 91 held by him under the plaintiff. With regard to the petition of compromise in the previous rent suit the case of the defendant was that it was an invalid, illegal and fraudulent compromise and as it was in contravention of the provisions of Ss. 29 and 147-A, Ben. Ten. Act, it could not be given effect to. The Court of first instance held that the compromise was accepted by the Court and a decree was passed on the basis of the compromise. In those circumstances the Court was of opinion that although the compromise agreement operated as a lease and should have been registered as such, it was admissible in evidence inasmuch as the agreement was embodied in the decree. It was also held that the compromise agreement was for good consideration and was executed without any undue influence having been exercised by the plaintiff on the defendant or any fraud on his part. The Munsif accordingly decreed the plaintiff's suit.

Against this decision an appeal was taken to the Court of the Subordinate Judge of Burdwan. The learned subordinate Judge reversed the decision of the Munsif and dismissed the the plaintiff's suit. The lower appellate Court came to the conclusion that the solehnama was inadmissible in evidence for want of registration, because the Solehnama really operated as a lease and it had to be registered notwithstanding the fact that it was embodied in a decree. It further came to the conclusion that it had been established that the lands were included in Ex. B, the lease under which the defendant originally held the land under the plaintiff at a rent of Rs. 91.

A second appeal has been preferred to this Court by the plaintiff and the main contentions before me by Mr. Bose who appears for the appellant have been: (1) that even if the solehnama be regarded as inadmissible in evidence the statement in the solehnama that the 16 bighas of land for which the rent suit was brought did not appertain to the jama of Rs. 91 should have been treated as an admission and solehnama should have been accepted in evidence at least for this limited purpose (2) that the finding that the lands in suit are included in the lease Ex. B, is not a proper finding as it is not based on evidence but on a reasoning which is open to considerable criticism.

With regard to the first point it cannot now be disputed in view of the decision of the Judicial Committee of the Privy Council in the case of *Rani Hemanta Kumari Debi* v. *Midnapur Zamindary Co.* (1) that the solehnama should have been registered in order to be effective as a lease. It is pointed out by their Lordships of the Judicial Committee in that case that a lease comes within Cl. (d), S. 17, Registration Act. S. 17, sub- S. (2), exempts only those instruments which come under Cls. (b) and (c) from registration provided they are incorporated in a decree. The Subordinate Judge was therefore right in excluding the solehnama from evidence and in not giving effect to it as a lease because it was not registered. At the same time the statement in the solenama, namely, that the lands did not appertain to the jama of Rs. 91, might be admitted in evidence as an admission made by the parties to the same. As such admission it would only be a piece of evidence and it would be open to the party who made the admission to show that it was made in circumstances which did not make the admission binding on him or her as the case may be. In other words it is open to the party making the admission to show that it was untrue in fact. Be that as it may the learned Subordinate Judge should have admitted the statement as an admission and considered the effect of that admission in relation to the matter in controversy in this case.

With regard to the second point taken, it appears to me clear that there has not been a proper finding in connexion with the point as to whether the evidence established that the suit lands were included in the lease, Ex. B, which related to the jama of Rs. 91. The finding of the Subordinate Judge is that :

"the appellant's pleader says that he has established by evidence that the lands of this suit are included in Ex. B, the lease at the rent of Rs. 101 from which a remission of Rs. 10 was obtained making the rent Rs. 91. The respondent's pleader says that he has not ascertained whether this has been proved or not. I therefore take it that he is not able to controvert that fact."

(1) A. I. R. 1919 P. C. 79=53 I. C. 534=46 I. A. 240=47 Cal, 485.

This finding has been rightly criticised by the learned advocate for the appellant. The mere fact that the appellant's pleader said that he had established by evidence that the lands in suit were included in Ex. B and the mere fact that the respondent's pleader said that he had not ascertained whether it was included or not were not sufficient to justify the lower appellate Court in coming to the conclusion that the appellant's pleader's statement was justified on evidence. It was the duty of the lower appellate Court which was a final Court of fact to ascertain on the evidence as to whether the case of the appellant made before him was one which could be sustained on the evidence. He should have come to a conclusion on the evidence as to whether the disputed lands were included in Ex. B and in this connexion should have considered the effect of the admission made in the solenama. I think therefore that there has not been a proper trial of the appeal and that this defect in the procedure has affected the merits of the case so as to call for an interference of this Court under S. 100, Civil P. C.

The result is that the judgment and decree of the lower appellate Court must be set aside and the case must be sent back to that Court in order that it may rehear the appeal in the light of the observations which I have just made. If on an examination of the evidence the Subordinate Judge comes to the conclusion that the lands in suit were included in Ex. B he must dismiss the plaintiff's suit. If on the other hand he comes to the conclusion that they are not included in Ex. B then he will proceed to determine whether the plaintiff is not entitled to damages for use and occupation of the disputed lands and for this purpose he will give an opportunity to the plaintiff to amend his plaint so as to include a relief in the plaint claiming damages for use and occupation. The leave to amend will be given subject to this that the plaintiff pays to the defendant all costs which he has incurred in the Court of first instance and in the lower appellate Court. If circumstances arise which would necessitate an investigation into the question of damages for use and occupation the Subordinate Judge will proceed to give the leave on the condition I have mentioned.

There will be no order as to costs of this Court.

V. B./R.K. *Case remanded.*

A. I. R. 1930 Calcutta 561

RANKIN, C. J., AND BUCKLAND, J.

Jyoti Prosad Singh Deo—Appellant.

v.

H. V. Low & Co. Ltd.—Respondent.

Appeal No. 35 of 1929, Decided on 13th December 1929, against the original order of Page, J., D/- 6th April 1929.

(a) Lessor and Lessee—No duty is cast upon lessee to produce evidence of title to under-ground—Onus is on lessors to show that lease offered to them is not secure lease—T. P. Act, S. 108 (a).

A contract for grant of mining lease in certain mouzas provided that if the lessees did not take the lease within a certain period "except for want of the lessor's title in the said mouzas" the deposit would be forfeited to the lessor. The settlement record showed the lessor as zamindar of the mouzas and also that one of them was settled as a brahmottar and the other as a debuttar with tenure holders. Further demand was made by the lessees for production of the deeds of brahmottar and debuttar grants for the purpose of satisfying themselves that underground rights had been reserved to the zamindar and also for execution of an indemnity bond. The lessor replied that no deeds could be traced and that he was not prepared to execute an indemnity bond. The lessees thereupon refused to complete the lease and sued for their deposit.

Held: that the exception clause in the contract referred to title to the underground and not title to the mouzas but it did not increase the obligation as to the title lying on the lessor under general law which included not duty to produce satisfactory evidence of title to the underground before the completion of the lease. [P 565 C 1]

That the onus was on the lessees to show that the lease offered to them was not a secure lease. Moreover the title of the zamindar had not been shown to be such as prevented him from giving the lessees a secure and valid lease. [P 5 7 C 1]

(b) Transfer of Property Act, S. 108—Obligation of sellers and lessors are same as regards duty to give good title but different as to furnishing proof of title.

While the statute law in India makes no distinction in principle between the obligation of a lessor and of a vendor as far as regards duty to give good title, the incidents of these different types of contract are different as regards the obligation to give disclosure or furnish proof of title: *Souter* v. *Drake*, (1834) 5 *B. & Ad.* 992; *Scott* v. *Alvares Contract* (1895) 1 *Ch.* 596, *Ref.* [P 567 C 1]

(c) Transfer of Property Act, Ss. 55 and 108—S. 108 contains no provisions as to title

—Lessee can repudiate lease on showing that interest conveyed to him would be nugatory—Lessee cannot call for proof of title in general manner.

Unlike S. 55 which deals with sales, S. 108 dealing with leases contains no provision as to title and the only covenant which it provides for is one for quiet enjoyment but none of title. The lessee may repudiate a lease by proving that the title is bad which he is not to do by establishing that the lessor has no good right but that the interest that would be conveyed to him would be nugatory or incomplete. He can by alleging a specific case of restriction upon title that would interfere with the enjoyment of the property put the lessor on proof on that point but he cannot call for proof in general manner and repudiate on the ground that the lessor has not complied : *Jones* v. *Watts*, (1890) 43 *Ch. D.* 574, *Rel. on.* [P 564 C 1, 566 C 1]

(d) Lessor and Lessee—Title—Lessor is not entitled to show good title unless suspicion of title arises or burden of such proof is on him.

It cannot be said that a zamindar does not show a good title to the underground unless he can disprove that tenure-holders of long standing had been given the underground rights, in absence of anything in the history of the land or in the circumstances of the case to raise a reasonable suspicion and in absence of a stipulation imposing such a burden upon him : 45 *Cal.* 47; *In re, Foot & Hull*, (1879) 10 *Ch. D.* 365, *Ref.* [P 568 C 1]

(e) Transfer of Property Act, S. 55—S. 55 though implying some warranty as to title does not require abstract title—It does not require seller to show good title by production of documents.

Although S. 55 implies some warranty as to title which would take effect on proof of breach it says nothing as to delivery of an abstract title such as obtains in English practice or as to the seller undertaking to show a good title by production of documents and verification of facts the only provision being as to producing document on request and answering questions. [P 563 C 2]

S. N. Banerjee, S. C. Bose and *S. C. Mitter*—for Appellant.

Advocate General and *A. K. Roy*—for Respondent.

Rankin, C. J.—The plaintiffs are a limited company called H. V. Low & Co., Ltd., and they sue the defendant for the return of the deposit paid by them upon an agreement between the parties that the defendant would grant to the plaintiffs a mining lease for a term of 999 years of the underground coal rights in two mouzahs belonging to the defendant and called Raidi and Methadi. It appears from certain correspondence between the parties that an agreement for a mining lease of these two mouzahs had been made in 1923 and the deposit of Rs. 34,440 was paid at that time. On 2nd January 1924, the plaintiffs asked for one month's further time in which to complete the lease but in March, April and May of 1924 they were pressing for completion and intimating a claim for damages on account of the defendant's failure to execute the lease. Ultimately, on 22nd January 1925 the parties with the advice of their solicitors, entered into a formal agreement which provided that the plaintiffs would within two months from the date of the submission of a draft lease by the defendant take a mining lease from him or his lessees upon certain terms therein mentioned which are, in substance, the terms previously arranged. The agreement provided that the plaintiffs would not claim any damages from the respondent for the delay already incurred in obtaining the lease. It further provided, and this is for our present purpose, the important clause :

"If they neglect or fail to take such lease within the aforesaid time except for the reason of the want of the lessor's title to the said mouzahs, the sum of Rs. 34,440 deposited as aforesaid will be forfeited unto the Raja Bahadur."

Now the plaintiffs have refused to accept the lease and they are suing for the return of the deposit upon the ground that they were justified in so doing by reason of the want of the defendant's title to the said mouzahs within the meaning of this exception.

The facts are that the draft lease was sent to the plaintiff's on 29th May 1925. Nothing in this case turns upon the terms of the draft which has not been laid before us. The plaintiff's attorneys, finding that in the draft the defendant's two sons were the proposed lessors, asked for and obtained copies of the patta granted by the defendant to them. They also made enquiry as to their ages and were informed upon this point. On 30th June 1925, they returned the draft approved with certain alterations but stated :

"our approval is subject to the title of the Maharaja 'being satisfactory.' Before the lease is finally completed we must be satisfied that the Maharaja has the right to deal "with the underground."

On 11th July 1925 the defendant's manager returned the draft, with a copy of the settlement records, and explained that under the defendant Raidi was held as a rent-free debuttar tenure and Methadi as a rent-paying

brahmottar tenure ; that in the circumstances it was quite clear that the defendant was the landlord "and as such the right in the underground minerals is vested in him." On 17th July the plaintiffs' solicitors say that it is not clear whether the mineral rights have not been parted with by the ancestors of the defendant to the debuttardars and brahmottardars and ask for copies of debuttar and brahmottar grants, failing which they say an indemnity by the defendant will be necessary. On 23rd July 1925, they pressed for a reply saying that they cannot possibly complete unless satisfied that the Raja has a good title to the underground rights. On 24th the defendant's manager writes to say that he is looking up the whole records to find out copies of the debuttar and brahmottar grants. On 5th August he writes that the brahmottar and debuttar grants were made by the ancestors of the defendant in days long gone by and no trace of the origin of the grants can be found out :

"Prima facie the mining rights in the villages belong to the Raja Bahadur who is admittedly the proprietor thereof and, if anybody questions his rights, it will evidently be for him to show the same. Under the circumstances the Raja Bahadur is not in a position to execute any indemnity bond."

Thereupon, the plaintiffs, by their solicitors, write on 18th August 1925 refusing to complete on the ground that the defendant "has failed to produce any title to the undergrcund rights."

The defendant has not sued for specific performance. Had he done so, it is clear that under S. 25, Sp. Rel. Act, he could only have succeeded upon showing that the title offered to the lessees was a title free from reasonable doubt. And it is also clear under S. 18 (d) that if he had failed in such a suit, the plaintiffs would have been entitled to a return of the deposit with interest thereon. No such suit having been brought, however, it would seem that under our Indian Statute Law, the respective rights of the parties to a contract for the grant of a lease have to be determined with reference to S. 108, T. P. Act, the terms of which are in some respects in contrast with the definition given in S. 55 of the Act of the rights and liabilities of the parties to a contract for the sale of immovable property.

In the case of a contract for sale it is provided by S. 55 that the seller is bound, in the absence of a contract to the contrary :

"(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power and (c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto."

There is a further provision in sub-S. (2) that the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. From other provisions of this subsection it seems to me [though this has been disputed: cf. *Adkesadam* v. *M. V. Guruatha* (1)] that this clause contemplates a completed sale and corresponds to the covenant for title in an English conveyance. There can, however, be no doubt that in India a contract for sale of immovable property implies some warranty as to title by the seller. It has been held in India that defects of title are within the scope of the clause which requires the seller to disclose to the buyer any material defect in the property of which the seller is and the buyer is not aware, and which the buyer could not with ordinary care discover:.*Haji Essa* v. *Dayabhai* (2). Sub-S. (6), S. 55, refers to the buyer having "improperly" or "properly" declined to accept delivery of the property. Upon this section I will make two observations only. It is noticeable that the section says nothing about the seller delivering an abstract of title and in India as a whole this practice does not obtain ; the obligation of the seller is to produce his documents of title for examination by the buyer if the buyer so requests. Secondly, [at least if my view of sub-S. (2) is correct] there is a remarkable absence, in a section which appears to be designed as a statement of the rights of the parties upon a contract for sale, of any statement .of the cardinal obligation of the seller—certainly of any statement to the effect that the seller undertakes to show a good title (by his documents and his verification of facts) which is a very different thing

(1) [1914] 40 Mad. 338=39 I.C. 358 (F.B.).
(2) [1895] 20 Bom. 522.

from a mere warranty that the seller has in fact and in law the estate which he professes to have—a warranty which would take effect upon proof of breach.

The present case, however, though the contract is for a mining lease for 999 years, is governed by the provisions of S. 108, T. P. Act, which deals with the rights and liabilities of lessor and lessee. No special provisions affecting the question before us exist to discriminate long leases from short leases at a rack-rent from other leases, or mining leases from leases of the surface. Such considerations :

"are more proper for the discretion of the purchaser and his advisers before he makes his bargain and incurs expense : Per Kelly, C. B., in *Frend* v. *Buckley* (3)."

Under S. 108 the lessor's obligation to disclose defects is limited to :

"any material defect in the property with reference to its intended use."

It seems reasonably clear [*Syed Mukhtar* v. *Rani Sundar* (4)] that these words have reference to the nature and condition of the property to be demised. No obligation as to production of documents or giving answers to questions (that is, requisitions) is mentioned in this section. Cl. (c) is a provision importing a covenant for quiet enjoyment, but there is no reference in the section to an implied warranty of title.

Upon these provisions of the statute law, learned counsel for the defendant contends that as the defendant is admittedly the zamindar and as the two mouzahs Raidi and Methadi are admittedly within his zamindari, the defendant is prima facie entitled to the mineral rights and there is no indication, proof or presumption to the contrary. He relies upon a series of decisions which establish that when a grant is made by a zamindar of a tenure (even if such tenure be at a fixed rent, permanent, heritable and transferable, minerals will not be held to form part of the grant in the absence of express evidence to that effect : *Sashi Bhusan* v. *Jyotiprosad* (5), *Giridhari Singh* v. *Megh Lal* (6) *Tituram* v. *Cohen* (7), *Kumar Harinarain* v. *Sriram* (8), *Raja Durga Prosad* v. *Brajanath* (9), *Raghunath* v. *Raja of Jharia* (10) and *Raja Bejoy* v. *Surendra* (11)]. These decisions clearly apply to brahmottar and debuttar tenures and we need not consider cases of putnis. It is only within recent times that grants of such tenures were required to be made in writing. It is difficult in India to preserve ancient documents at any time and there must exist numberless brahmottar and debuttar tenures the origin of which is now unknown and for which no written instrument can be produced. What then, he asks, in a contract for the grant of a lease has this defendant promised, and what is the breach of that promise which entitled the plaintiffs to repudiate or rescind the agreement ? If the plaintiffs do not show that they were entitled to rescind the agreement, on what principle can they recover their deposit ?

For the plaintiffs it is contended that whatever be the obligation of an intending lessor under the general law, the defendant by the agreement of 22nd January 1925 undertook not merely that he was entitled to dispose of the mineral rights but in the English sense to show a good title thereto, and that a breach of that obligation can be made out, unless he removes a reasonable doubt whether there is outstanding in the debuttardars or brahmottardars some claim to the underground. It is further contended that the correspondence contains an admission that the grant of these tenures was made by written instruments ; and that in not producing these written instruments, the defendant failed to comply with his obligation under the contract. It is said that the evidence produced at the trial by the defendant to the effect that these grants have been searched for and no trace of them discovered, is insufficient and inconclusive, as it shows that the defendant might have made greater efforts to obtain them. It is complained that the witness Rajendra Lal Mitter

(3) [1870] 5 Q.B. 213=10 B. & S. 973=39 L.J. Q.B. 90=22 L.T. 170=18 W.R. 680.
(4) [1918] 19 I.C. 815.
(5) A I.R. 1916 P.C. 191=40 I.C. 139=44 I.A. 46=44 Cal. 585 (P.C.).
(6) A I.R. 1917 P.C. 163=42 I.C. 651=44 I.A. 246=45 Cal. 87 (P.C.).
(7) [1906] 33 Cal. 203=32 I.A. 185=8 Sar. 908=2 C.L.J. 709=9 C.W.N. 1073 (P.C.).
(8) [1910] 37 Cal. 723=5 I.C. 785=37 I.A. 136 (P.C.).
(9) [1912] 39 Cal. 696=15 I.C. 219=39 I.A. 133 (P.C.).
(10) A.I.R. 1919 P.C. 17=50 I.C. 849=46 I.A. 158=47 Cal. 95 (P.C.).
(11) A I.R. 1928 P.C. 234=111 I.C. 345=55 I. A. 320=56 Cal. 1 (P.C.).

called by the defendant was not himself the defendant's record-keeper and that subpoenas to produce the grants or copies thereof were not issued upon all persons interested in the tenures. If, they say, the plaintiff had accepted the lease and gone to expense in setting up this colliery, it is quite possible that one or other of such persons would thereafter have produced his grant and shown some title to the mineral rights.

Now the first question in this case is as to the meaning of the agreement of 22nd January 1925. The agreement can be read as an independent agreement complete in itself. The object of the last clause is to exclude all rights in the plaintiffs to a return of their deposit should they fail to complete within the stipulated time save for the exception therein mentioned:

"except for the reason of the want of lessor's title to the said mouzahs."

Unless it can be said that under the general law upon a contract for the grant of a lease, the proposed lessee has no right to repudiate the agreement on the ground of want of title in the lessor, I see no reason for holding that this clause increases the obligation of the defendant in the matter of title. The exception is not introduced in such a way as to suggest an intention to make any special stipulation either as to title or evidence of title. It was contended for the defendant that the phrase "title to the said mouzah" contrasts with the earlier phrase "a mining lease of the underground coal" and that the want of title referred to is limited to the question whether the defendant is the zemindar of those mouzahs. This, it is said, may well have been intended, since his position as zemindar carries with it a good prima facie title to the mineral rights. On the other hand, the view taken by the learned Judge is that

"under this agreement we are not concerned with what the position might be if the agreement contained no provision relating to the title of the lessor, for the all-important provision of the agreement in this case is that if there is a want of title in the lessor, the lessee is not bound to take the lease."

In my judgment, the phrase "want of the lessor's title to the said mouzahs" cannot in this agreement be held to have no reference to the mineral rights, but must, on the contrary, be read with particular reference thereto. On the other hand the plaintiffs' right to repudiate the agreement for want of title in the lessor is not a new right specially stipulated for, and for the first time, by this agreement, but is a reference to what the parties assumed, and I think rightly, to be an obligation arising out of the general law. If the decision of this case depends upon the defendant saying that under this clause he has specially stipulated that he would produce to the lessee documents and other evidence deducing a good title to the mouzahs, then it seems to me that the defendant could not succeed. The object of the clause is not to give the defendant two months in which to show a clear title but to entitle him to forfeit the deposit unless the plaintiffs complete within two months. The exception covers the case of the plaintiffs rightly refusing to complete for want of title in the defendant.

"A person who agrees to let land agrees to grant a valid lease:" per Wallis, J., in *Stranks* v. *St. John* (12)."

If it had turned out, for example, that the defendant as an adopted son had succeeded to this zemindari from his father, but that the adoption for one reason or another was invalid, the plaintiffs' right to repudiate the contract would in my judgment have been clear. But it is not so clear that under the Transfer of Property Act, it would be true to say, as Lord Russell, C. J., said in *Baynes & Co.* v. *Lloyd & Sons* (13),

"the intending lessee was entitled before he accepted a lease tendered under the agreement to be satisfied that the intending lessor had a good title to grant it, and for the purpose had a right if he chose to insist upon it, to require full disclosure."

In spite of the doubt expressed in old cases [e. g., *Guillim* v. *Stone* (14), where an implied agreement to deliver an abstract, etc., was described by Lawrence, J., as "all poetry, the mere fancy of the special pleader,"] it was established in England by *Souter* v. *Drake* (15) and subsequent cases, that a lessor has to show a good title in the same way as a vendor, notwithstanding that the intended lease might be for a short term and on a rack-rent. In 1874, by S. 2, Vendor and Purchaser Act, it

(12) [1867] 2 C.P. 376=36 L.J.C.P. 118=16 L.T. 283=15 W.R. 678.
(13) [1895] 1 Q.B.D. 820.
(14) [1811] 3 Taun. 482.
(15) [1834] 5 B. & Ad. 992.

was provided that the intended lessee should not be entitled "to call for the title to the freehold"; and further provision in relief of persons who have contracted to grant or assign leases or under-leases was made by the Conveyancing Act of 1881. In *Jones* v. *Watts* (16), the effect of the Act of 1874 was considered and Cotton, L. J., said:

"In my opinion a lessor under the Act makes out a good title without showing a title to the freehold. The question to be decided is whether assuming a free-hold title to be good, a good title is shown to the lease-hold interest and the lessee cannot by a simple denial of the lessor's title acquire a right to the discovery of documents which relate only to the title of the free-hold. But does that prevent a purchaser raising later an objection that the title to the free-hold is bad? I think not; and if he raises by way of objection to the title any distinct and tangible issue as to the goodness of the title, I think that he can call on the vendor for production of such documents in the vendor's possession as are relevant to that issue."

The case shows that if the defendant had alleged a specific case to the effect that there were restrictive covenants interfering with the enjoyment of the property he would have been entitled not only to his chance of proving this, but to discovery of documents upon that point.

In 1882, when the Transfer of Property Act was enacted in India, English experience had shown that the right to call for the lessor's title had been a source of unnecessary inconvenience and expense; and, without trenching upon the lessor's right to obtain a valid lease, the lessor had been relieved of the obligation to show his title to the free-hold by producing the documents upon which he depended and verifying the documents and the facts. Accordingly, when I find that in S. 108 the provision which corresponds to Cl. (a), S. 55, sub-S. (1) is carefully adapted to the case of a lease and Cls. (b) and (c) are omitted altogether, I cannot but conclude that the plaintiffs here cannot succeed by resting their case upon an obligation on the defendant to produce to them before completion satisfactory evidence of his title to the minerals, or upon a right in themselves, if I may use the words of the Act of 1874, to "call for" the title to the minerals. I think the plaintiffs here are much in the same position as a lessee in England under the Act of 1874. They may show that the title is bad but it is for them to show it. What, then, for this purpose, is it necessary that the plaintiffs should establish? I do not think that it is necessary for them to establish that the defendant has no good right to convey, i. e. to prove breach of a warranty that he has right to the minerals and power to grant a lease thereof. The case is not like that of a purchaser who has definitely agreed that he will not take any objection to the title: *cf.* *Scott* v. *Alvarez* (17). A person may have a right in land which is precarious in the sense that an event may or may not happen to defeat it. He may have a title though the circumstances under which the land has been acquired make it difficult or perhaps impossible for him to establish his right. Restrictive covenants or negative easements are of course another matter as they trench upon the owner's right itself. Upon proof that the interest which, upon completion, would be conveyed to the lessee would be either nugatory, precarious or incomplete, it is clear in the absence of special contract that he could, under S. 25, Specific Relief Act, resist a claim for specific performance. That section treats a contract for the letting of property in the same way as a contract for sale. While it is true that on grounds of hardship, delay and on other grounds, specific performance may be resisted by a promiser, I think that the statute law of India shows no sign of departure from the principle which was stated (in terms of the old English law, be it observed) in *Souter* v. *Drake* (15).

"All these were cases in equity arising on bills for specific performance: and Lord Eldon, and more particularly Sir W. Grant both advert to the possibility of a distinction between them and actions for damages to be recovered at law for breach of contract. We cannot, however, help thinking, that the opinions of these eminent Judges and the decisions, especially that of *Purvis* v. *Rayer* (18), are authorities upon the general question, whether it arises in a Court of law or equity, and that the true ground of refusing relief by a specific performance in these cases is, that the vendor by his contract was bound to make out a good title in all respects to the subject agreed to be sold, including the right of the lessor to demise, and that he had not done so. If that is his contract, he must equally fail in a Court of

(16) [1890] 43 Ch.D. 574=62 L.T. 471=38 W.R. 725.

(17) [1895] 1 Ch. 596=64 L.J.Ch. 376=72 L.T. 455.

(18) 9 Price 488=23 R.R. 707.

law, unless he can prove a performance of it on this part: per Denman, C. J.. See also *Hall* v. *Betty* (19)."

I do not think that the statute of law of India intends a new cleavage between law and equity. This would be contrary to its general policy at any time and S. 18, Cl. (*l*), Specific Relief Act, shows, if it be compared with such decisions as *Scott* v. *Alvarez* (17), an intention to close up any gaps. I do not think that Indian law makes a distinction in principle between the obligation of a lessor and of a vendor so far as regards the duty to give a good title, though the incidents of these different types of contract may be different as regards the obligation to give disclosure or to furnish proof thereof.

In the end, therefore, it seems to me that the Court has on the evidence before it, to decide whether the plaintiffs have now shown that the lease offered to them is not a secure and valid lease. The position is not that the defendant has or had to prove something and that a miss is as good as a mile. It is that the plaintiffs repudiate their agreement because they alleged that the defendant was not ready and willing to give them such a lease. This allegation has to be established by the plaintiffs. It is for them to shake the title—to show that it is infected with doubt in a reasonable sense.

The defendants' manager in his letter of 11th July forwarded the settlement records as proof that the tenure-holders were holding under the defendant as zamindar and claimed that this showed that the right in the underground minerals was vested in the defendant. On the 17th the plaintiffs' solicitors wanted to know whether the mineral rights of the mouzahs had not been parted with by the ancestors of of the defendant and say:

"We think you will admit that copies of the debuttar and brahmottar grants are necessary to arrive at a decision. We shall therefore thank you to send copies of the documents, failing which we are afraid that an indemnity of the Raja Bahadur will be necessary to safeguard the interests of our clients."

The answer of the defendants' manager dated 24th is:

"I am looking up the whole records to find out copies of the debuttar and brahmottar grants in respect of the above mouzahs and will send you copies as soon as they are traced."

On 5th August, however, he writes that these grants were made by the ancestors of the defendant in days long gone by and that no trace of the origin of the grant can be found out. It is upon this that the plaintiffs rescind the contract.

Now, I am not sure whether the learned Judge considered that this correspondence shows that the grant of these tenures was originally by written instruments, but I can see nothing in their correspondence or in the evidence which amounts in any reasonable sense to proof of this. Until the approximate date of each grant can be fixed it is difficult to say whether the probability that these grants were originally effected by documents has any real strength. At present no trace has been discovered of the origin of the grants. The defendants' witness gives evidence which shows it to be improbable that there were written grants of these tenures during the time of Raja Nilmoni Singh, the defendants' predecessor. This, however, does not carry us far. The position is that in law it was not impossible to make such grants without written instruments until 1882, but that since the Registration Act of 1865 such grants, if made by written instruments, would be invalid unless registered. The plaintiffs have adduced no proof of any registered instrument trenching upon the defendants' title and the possibility upon which they enlarge must be the possibility of the instance of documents in writing dated prior to 1866 or proof being forthcoming of grants made without writing of the minerals prior to 1883. When one considers the change of attitude on the part of the plaintiffs since 1923-24, when they were pressing for execution of the lease, one cannot help doubting whether the superior caution of 1925 is entirely due to a revelation from their lawyers of the necessity of being particular about title. It may certainly be taken that from the beginning the plaintiffs were well aware that these mouzahs were not khas in the hands of the zamindar— that they were settled with tenants of some kind, either tenure-holders or raiyats, though

(19) [1842] 4 M. & Gr. 410=5 Scott (N.R.) 508 =11 L.J.C.P. 256.

there is no reason to suppose that they had made more particular enquiries.

I hesitate much to lay down that a zamindar does not show a good title to the underground unless be can disprove the suggestion that tenure-holders of long standing have not been given underground rights—that is, be it understood, in the absence of anything in the history of the land or the conduct of the parties to give grounds for suspicion to this effect, and in the absence of any stipulation imposing such a burden upon him. The reasons which underlie the rule of law that tenure-holders claiming to have rights in the underground must show an express grant thereof and that such phrases as "with all rights," *Giridhari* v. *Megh Lal* (6), convey no title to the minerals, that no argument whatever lies from the existence of a tenure to any probability of a right to the minerals.

"It must be borne in mind also that the essential characteristic of a lease is that the subject is one that is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear. In order to cause the latter speciality to arise minerals must be expressly denominated so as thus to permit the idea of partial consumption of the subject leased: *Giridhari* v. *Megh Lal* (6)."

In *In re, Ford & Hill* (20), James, L.J., speaking of the English law, said:

"A vendor is bound to furnish an abstract of title upon the requisition of the purchaser, to verify it or complete it on any point on which it appears defective. That is evidence verifying the title shown by the abstract. But if in addition to this, questions are to be asked for the purpose of negativing the existence of incumbrances where is the matter to end?"

The requisition in that case was of a character entirely directed to possibilities of documents, judgments or charges existing and not noticed in the abstract. Bramwell, L. J. said:

"Suppose that the vendor refuses to answer these requisitions and the purchaser thereupon refuses to complete and brings an action for his deposit. He would have to make out a breach of contract, and for that purpose must establish that the vendor had refused to answer a question which it was his duty to answer, or that a good title had not been shown. He could not make out either of these points."

In Dart on Vendors and Purchasers, Edn. 7, pp. 366-7, it is pointed out that where a title commences with a conveyance by a person who conveys as an heir-at-law, the purchaser cannot require any other evidence in the ancestor's intestacy than such (if any) as in the vendor's possession. The general rule is stated thus:

"that where a prima facie title is shown the purchaser cannot require evidence not in the vendor's possession or power tending to negative any matter the existence of which may not be presumed from the contents or nature of the abstracted document or according to the ordinary rules regarding presumptions"

In the present case it appears to me that while the plaintiffs have shown that there are tenure-holders upon this land and that they have permanent rights as many tenure-holders have, the plaintiffs have done nothing more; and upon the evidence as it stands the title of the zamindar to the minerals has not been shown to be such as prevented him from giving to the plaintiffs a secure and valid lease.

In my opinion the appeal should be allowed and the suit dismissed with costs in both Courts.

Buckland, J.—I agree.

R.M./R.K. *Appeal allowed.*

(20) [1879] 10 Ch. D. 365.

:* A. I. R. 1930 Calcutta 568

B. B. GHOSE AND BOSE, JJ.

Bidhu Bhusan Pal Chowdhury—Defendant 11—Appellant.

v.

Umesh Chandra Banerjee and *others*—Plaintiff and Defendants—Respondents.

Appeal No. 286 of 1927, Decided on 2nd July 1929, from original decree of First Sub-Judge, Hooghly, D/- 30th May 1927.

*** Transfer of Property Act, S. 55—Provision under S. 55 (1) (g) cannot be enforced against vendor without express covenant after completion of purchase—Where covenant is one which cannot be implied from sale deed, Art 116 does not apply—Limitation Act, Art. 116.**

The provision under S. 55, para. (1) (g) is one which cannot be enforced against the vendors without an express covenant after the completion of purchase.

A purchased from *B* by an Indenture certain property subject to an incumbrance of Rs. 16,300 by a deed of charge of mortgage in favour of *K*. There was a stipulation that *B* would keep *A* harmless and would indemnify him in respect of any charge save and except the charge in favour of *K*. There was no other charge or incumbrance. Before the sale in the preliminary decree on the mortgage the amount due to the mortgagee was found to be Rs. 16 000, but after the sale was complete the decree was amended and the mortgagee was held to be entitled to a sum of Rs. 21,000. *A*

had to pay Rs. 23,000 in order to satisfy the mortgage decree and to get a deed of release from the mortgagee. *A* therefore sued *B* for the difference between the sum he paid to the mortgagee and the sum of Rs. 16,000.

Held: that *A* took the property subject to the liability of the mortgage of *K*. On a proper construction of the Indenture *A* was bound to discharge the incumbrance of *K* entirely and not merely to pay the sum mentioned in it, and in absence of any express covenant to the effect that *B* would be bound to pay any excess due on the mortgage *A* was not entitled to the amount claimed by him.

Held further: that it was not a covenant which could be implied from the sale deed and therefore Art. 116 did not apply: 24 *Mad.* 233, *Rel. on.* [P 571 C 2; P 572 C 1]

Panchanan Ghose, *Durgadas Roy* and *Dhirendra Krishna Roy*—for Appellant.

Manmatha Nath Ganguly—for Respondents.

B. B. Ghose, J.—This is an appeal by defendant 11 against the judgment and decree of the Subordinate Judge First Court, Howrah, by which the learned Judge decreed the suit brought by the plaintiff. The facts are these: the appellant along with the other defendants 1 to 13 and the father of defendants 14 and 15 were the owners of two items of properties with which we are concerned. One was 2 bighas 5 cottahs in area and the other was only 5 cottahs in area. The mortgage was dated 14th May 1910 and the principal amount of the loan was Rs. 7,000. A preliminary decree was obtained by the mortgagee named Khirod Chandra Ghose on 20th July 1917 on his mortgage, by which decree the amount due to the mortgagee was found to be Rs. 16,000 odd. An appeal was taken by the mortgagor against the decree which was dismissed by this Court on 30th April 1920. By an indenture dated 3rd March 1921 the plaintiff purchased from all the mortgagors the bigger plot the area of which was 2 bighas 5 cottahs. In that indenture it was stated that the property was subject to an incumbrance of Rs. 16,300 by a deed of charge of mortgage in favour of Khirod Chandra and the property was sold subject to that incumbrance. The mortgagors received Rs 11,751 as the consideration of the sale of their interest. There was a stipulation that the sellers would keep the purchaser harmless and indemnify him against any charge save and except the charge in favour of Khirod. There was the usual covenant for title and assurance, that apart from the incumbrance of Khirod, subject to which the property was sold, there was no other charge or incumbrance on the property. After the sale aforesaid, the decree in favour of the mortgagee was amended by this Court by an order dated 22nd August 1921 by which it was decreed that the mortgagee would be entitled to a sum of Rs. 18,000 odd with interest thereon at the rate of 6 per cent per annum from 20th January 1918, the date of redemption fixed under the decree. The result was that at the date of the sale the dues of the mortgagee amounted to something like Rs. 21,000. The mortgagee was paid by the purchaser who is the plaintiff in the case out of which this appeal has arisen, a sum of Rs. 23,000 odd on 3rd July 1922 in order to satisfy the mortgage decree and he got a deed of release from the mortgagee. The present suit was brought on 22nd December 1925 by which the plaintiff asked for the recovery from the defendants the difference between the sum he paid to the mortgagee in order to satisfy the mortgage decree and the sum of Rs. 16,000 odd that was mentioned in the indenture of sale of 3rd March 1921 as the amount of the incumbrance on the property.

The learned Subordinate Judge made a partial decree in favour of the plaintiff. He held that there was an express covenant in the indenture by which the plaintiff purchased the property to indemnify the plaintiff with regard to any sum that would be paid in satisfaction of the mortgage over and above the sum of Rs. 16,000 odd that was mentioned in the document as the amount of the charge. But he held that the plaintiff was entitled only to the money which would have been payable to the mortgagee on the date of the purchase minus Rs. 16,000 odd. He held that the plaintiff having delayed in paying off the mortgagee and thereby the amount having swelled by the running of interest, he cannot get the excess amount from the vendors. He therefore made a decree for Rs. 6,958 odd with costs as against defendants 1 to 11 and 14 and 15. The suit was dismissed against defendants 12 and 13 who, the learned Subordinate Judge found, had no interest in the property. Defendant 11

as aforesaid appeals primarily because defendant 11 is a solvent person against whom the decree is likely to be executed and the other defendants have been made respondents in the appeal.

Two points have been raised on behalf of the appellant by his advocate. The first is, that the learned Subordinate Judge is in error in holding that there was an express covenant indemnifying the purchaser against any payment in excess of Rs. 16,300 with regard to the incumbrance in favour of Khirod Chandra, subject to which he purchased the property, as stated in the indenture. There being no such express covenant, the Subordinate Judge ought not to have made a decree in favour of the plaintiff. The second point urged was that the learned Subordinate Judge is wrong in holding that the suit is not barred by limitation. The Subordinate Judge held that Art. 116 read with Art. 83, Lim. Act, is applicable to this case, and as the payment was made on 23rd July 1922 the present suit has been brought within the period of limitation. It is contended that as there was no contract to indemnify, Art. 83 has no application. Besides as there is no contract in writing and registered, on which the plaintiff can base his case, Art. 116 has no application.

The learned advocate for the appellant concedes that the defendants were bound to pay a rateable amount of the mortgage money which was a charge on the 5 cottah plot, because the mortgage on that piece of land has been paid off by the plaintiff. But he says that the present suit is not for recovering any such amount which could only be ascertained on evidence as to the respective value of the properties on 3rd July 1922, for a rateable distribution. Besides he contends that any claim for such contribution was barred by limitation at the date of suit.

The learned advocate for the plaintiff-respondent concedes that on a proper reading of the indenture dated 3rd March 1921, it would appear that there is no express covenant to indemnify with reference to any payment which the plaintiff was compelled to make in order to exonerate the property from the charge of Khirod. But he supports the decision of the learned Subordinate Judge on the ground that there is an implied covenant under which the plaintiff is entitled to claim compensation as against the vendors. He .refers to S. 55; sub-S. (1), Cl. (g), T. P. Act, in support of his contention. His argument shortly stated comes to this: that here the property was sold subject to the incumbrance of Khirod. Accerding to the provision of that clause the seller was bound to pay interest due on the incumbrance on the property sold on the date of sale. But for the covenant in the indenture that the purchaser would have to pay Rs. 16,300 to the mortgagee, the seller under the provision of that clause would have been bound to pay the whole of the interest due up to that date and although the purchaser bought the property subject to the incumbrance, he would have to pay only the principal and the interest accrued subsequent to the date of sale. He, therefore, contends that although the reasoning of the learned Subordinate Judge cannot be supported, the decree made by him is quite correct. Under the express covenant in the indenture the plaintiff was only bound to pay Rs. 16,300 in discharge of the incumbrance; but under the implied covenant according to the provisions of the law the seller was bound to pay the balance of the mortgage amount.

With regard to the question of limitaion, the learned advocate argued that Art. 116 is applicable, because the claim arises under an implied covenant in the indenture of sale which is a registered instrument. In support of his contention he relied on the case of *Krishnan Nambiar* v. *Kannan* (1).

The respondent raises an interesting point of law not quite free from difficulty. We have heard the careful arguments on both sides. The learned advocate for the appellant contends that the provisions contained in S. 55, sub-S. (1), Cl. (g), T. P. Act, are not implied covenants for the breach of which a purchaser after the completion of the purchase can claim damages, or ask for rescission of the contract. His argument is that under Sub-S. (1), S. 55 the seller is bound to do certain things in the absence of a contract to the contrary before the completion of the purchase. There are certain provisions which according to the sec-

(1) [1898] 21 Mad. 8.

tion itself would render the seller liable on the ground of fraud. This is stated in the last paragraph of that section, as follows : An admission to make such disclosures as are mentioned in this section, para. (1), Cl. (a) and para. (5), Cl. (a) is fraudulent. There are certain provisions in para. (1) which relate to acts to be done by the seller after the conveyance is complete. But other provisions in para. (1) of the section relate to things which the seller is bound to do before the completion of the purchase ; and he contends that after the purchase is effected and the transaction completed, the purchaser cannot hold the seller liable for non-compliance with any of those conditions unless there is any express covenant in the deed under which the seller is liable. He relies in support of his contention on certain observations made in the well-known commentaries of Shephard and Brown on the Transfer of Property Act, Edn. 7. At p. 192 the learned authors say :

"The distinction between the antecedent contract and the conveyance between the duties of the parties before and after the sale is not clearly marked in the section. The rules contained in para. 1, with the exception of Cl. (f) in Cl. (a) para. 4 and in Cls. (a) and (b), para. 5, refer to matters antecedent to the sale and should, therefore, be taken with the provisions of the Specific Relief Act relating to the contract between seller and buyer. On the other hand, Cl. (f), para. 1, para. (2), para. (4) (b), para. (5, (c), (d) and para. (6) (a) define the relation of the parties after the sale. The purchasers' rights stated in para. (3) and para. (6) (b) depend on payment having been made by him and not on the contract alone."

Before that passage they say that except on the ground of fraud, which term includes any such omission as is mentioned in the last paragraph of the section, or under the covenant for title or some express contract for compensation, the purchase money cannot be recovered or damages claimed. It is urged that this matter not falling within the ground of fraud or of any express contract for compensation, the money that was claimed by the plaintiff is not recoverable from the sellers. As an illustration, the learned advocate points out that if there is no express covenant for indemnity in case there is a misdescription in the area of the property sold, and the purchaser finds that the area is less than what was stated in the sale deed he is not entitled to any damages for the defect in area. In support of this contention the case of *Abdullah Khan* v. *Abdur Rahman Beg* (2) may be cited. The question therefore is this : Is there an implied covenant in the deed of sale for the breach of which the purchaser is entitled to damages, or is it one of the obligations which the seller was bound to discharge before the completion of the sale ? If there was no express covenant with regard to it, whether after the sale the obligations should not be in accordance with the rights of the parties to the property ? It is contended by reference to the case of *Waring* v. *Ward* (3) (at p. 337) which has been referred to in the judgment of the Privy Council in the case of *Izzatunnissa Begum* v. *Kunwar Pertab Singh* (4) (at p. 209 *of* 36 *I. A.*) that after the purchase of the equity of redemption the purchaser is bound to discharge the incumbrances. However that may be, it seems to me that in this case the purchaser took the property subject to the liability on the mortgage of Khirod. The amount that was stated in the Indenture as due to the mortgagee was the actual amount found due under the mortgage decree then made by the Court, and by the indenture of sale the purchaser undertook to discharge the entire amount of the liability to Khirod as was found according to the decision of the Court. But the decree was amended by an order subsequent to the purchase of the plaintiff. If by the amendment the amount had been reduced the plaintiff would have profited by it. As the amount was increased the plaintiff was bound to pay the entire amount.

On a proper constuction of the instrument it seems to me that the plaintiff was bound to discharge the incumbrance of Khirod entirely and not merely to pay the sum mentioned in it. In the absence of any express covenant to the effect that the seller would be bound to pay any excess due on the mortgage the plaintiff is not entitled to the amount claimed by him. After

(2) [1896] 18 All. 322=(1896) A. W. N. 81.
(3) 7 Ves. 322.
(4) [1909] 31 All. 583=3 I. C. 793=36 I. A. 203 (P.C.).

carefully considering the arguments of both sides it seems to me that the contention on behalf of the appellant that the provision under S. 55, para. (1)(g) is one which cannot be enforced against the vendor without an express covenant after the completion of purchase is sound. There is no question of fraud in this case as the vendor stated the exact amount then decreed to the mortgagee.

With regard to the question of limitation also I agree with the contention on behalf of the appellant. It is true it has been held as contended by the learned advocate for the respondent that where there is an implied covenant arising out of a deed which is in writing and registered, the period of limitation would be governed by Art. 116, Lim. Act. But this is not a covenant which can be implied from the sale deed and Art. 116, Lim. Act, would not apply. The authority for this proposition is to be found in the case of *Avutha* v. *Dayamma* (5) at p. 237 where the case of *Krishna Nambiar* v. *Kannan* (1) cited on behalf of respondent is considered and distinguished. It was pointed out that under S. 55, para. (2), there is an implied covenant of title by the seller and therefore any suit for the breach of that covenant would be governed by Art. 116, Lim. Act, but not such a case as this.

The result, therefore, is that the judgment and decree of the learned Subordinate Judge must be set aside with costs against the plaintiff-respondent in this Court as well as in the lower Court. As this is not a suit for contribution for a rateable amount charged on the 5-cottah plot we need not say anything with regard to the right of the purchaser to claim any portion of the money which he paid for redeeming both the properties. That matter is left open. The defendants-respondents will bear their own costs.

Bose, J.—I agree.

R.M./R.K. *Appeal allowed.*

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(5) [1901] 24 Mad. 233.

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SUHRAWARDY AND JACK, JJ.

Kalimuddin Shaik and *others*—Defendants—Appellants.

v.

Baidyanath Saha and *others*—Plaintiffs—Respondents.

Appeal No. 2177 of 1926, Decided on 27th May 1929, from appellate decree of 3rd Sub-Judge, Mymensing, D/- 21st May 1926.

Transfer of Property Act, S. 101—Purchaser without knowledge of intermediate incumbrance paying off prior mortgage—Prior mortgage is kept alive if it is to purchaser's advantage.

Although ordinarily when the interests of the mortgagor and mortgagee are united in the same person, it is not necessary for him to keep them distinct; equity will keep them distinct when it is the intention of the party, express or implied, that they should be so kept distinct; it depends on the intention actual or presumed of the person in whom the interests are united; and this person will be presumed to intend that which is most to his advantage; a mortgage substantially satisfied may be kept alive in equity only when this is requisite to the advancement of justice.

Where a purchaser has by fraud been kept from the knowledge of a subsequent encumbrance the puisne mortgagee should not be allowed to reap an advantage from a transaction to which he was stranger at the expense of the purchaser to whom the property was sold as free of encumbrances and in such cases an intention to keep alive the prior mortgage can be presumed in the interests of justice.

If it is found that the mortgage of a prior mortgagee was paid off out of consideration of the kabala by the purchaser and that the continuance of the charge would be for the benefit of the purchase of the property, the fact that they were actually unaware of the second mortgage at the time of their purchase would not prevent them retaining the prior mortgage as a shield against the sale of the property by the puisne mortgagees without refunding to the purchasers the amount paid to satisfy the prior mortgage: (*Case law referred*)

[P 573 C 1, 2; P 574 C 1]

A. S. M. Akram for *Nurul Huq*—for Appellants.

Rupendra Coomar Mitter and *Navadwip Chandra Saha*—for Respondents.

Jack, J.—This appeal has arisen out of a suit for recovery of Rs. 1,153-12-0 alleged to be due on a mortgage bond. The appellants are purchasers of the mortgaged property by the kabala Ex. B. The appellants claim that the property was mortgaged to them for Rs.390 on 3rd Baisakh 1329. Two days later they purchased the property for Rs. 800 and out of the consideration of the two transactions Rs. 700 was paid in satis-

faction of a prior mortgage of Samiruddin and the property was sold to them free of encumbrances, the existence of the plaintiff's mortgage being concealed from them.

It is urged on their behalf that the plaintiffs are not entitled to enforce their mortgage without refunding Rs. 700 paid by the appellants to redeem the prior mortgage. The Court of first instance has found that Samiruddin's mortgage was paid off by the mortgagors previously. The lower appellate Court finds that inasmuch as the amount of the prior mortgage was admittedly actually paid by the mortgagors, the appellants cannot claim that they are entitled to recover the amount from the plaintiffs as subsequent mortgagees before the latter can put the property to sale to enforce their mortgage.

It is clear that if, as found by the first Court, the prior mortgage was paid off by the mortgagors previously to, and independently of, the appellant's purchase, the prior mortgage was extinguished as the mortgagors could have had no advantage in keeping it alive and could not have intended to do so, but, assuming that the prior mortgage was paid off, as claimed, from the consideration of the kabala at the time of the purchase, by agreement between the mortgagors and the purchasers, must the prior mortgage to regarded as extinguished or can the purchasers hold it as a shield to protect their property against the puisne mortgagees? This is a question which depends entirely on the circumstances in which the mortgage of Samiruddin was paid off. The learned Subordinate Judge has unfortunately come to no finding as to what these circumstances were: he disposed of the matter by simply saying that the appellants are not entitled to claim the money paid to Samiruddin (the prior mortgagee) because, on their own case, they did not pay anything to Samiruddin in addition to the consideration of the kabala. But the appellants' claim is that the amount paid to Samiruddin was included in the amount paid for the kabala so that the argument of the learned Subordinate Judge appears to be entirely futile.

Although ordinarily when the interests of the mortgagor and mortgagee are united in the same person, it is not necessary for him to keep them distinct; equity will keep them distinct when it is the intention of the party, express or implied, that they should be so kept distinct; it depends on the intention actual or presumed of the person in whom the interests are united; and this person will be presumed to intend that which is most to his advantage; a mortgage substantially satisfied may be kept alive in equity only when this is requisite to the advancement of justice: *Bhawani Kuar* v. *Mathura Prosad* (1). On this principle it has been held both in England and America that in the case of a purchaser of the equity of redemption as against subsequent encumbrances of which he had no notice, where it is for his advantage that the charge should be kept alive, an intention against merger should be presumed. For instance in the case of *Young* v. *Morgan* (2) cited in Sheldon on Subrogation S. 25, it was held that if a purchaser has paid off a mortgage in ignorance of the subsequent encumbrance he could, in spite of its discharge, claim the benefit of subrogation to its lien. Intention will be presumed where it is for the purchasers' benefit to keep the charge alive: *Estates Purchase Co.* v *Willoughby* (3), *Re: Gibbon, Moore* v. *Gibbon* (4), *Manks* v. *Whitely* (5) and *Whitely* v. *Delaney* (6). In India the principle is embodied in S. 101, T. P. Act, as follows:

"Where the owner of a charge or other incumbrance on immovable property is or becomes absolutely entitled to that property, the charge or incumbrance shall be extinguished, unless he declares, by express words or necessary implication, that it shall continue to subsist, or such continuance would be for his benefit."

So that non-merger is presumed when it is to the interest of the payer of the charge.

It would be manifestly unjust that where a purchaser has by fraud been kept from the knowledge of a subsequent encumbrance, the puisne mortgagee should be allowed to reap an advantage from a transaction to which he was a stranger at the expense of the purchaser to whom the property was sold as free of

(1) [1907] 7 C. L. J. 1.
(2) 89 Ills. 199.
(3) [1898] A. C. 321.
(4) [1909] 1 Ch. 367=78 L. J. Ch. 264=100 L. T. 231.
(5) [1913] 1 Ch. 785.
(6) [1914] A. C. 1[illegible]=83 L. J. Ch. 319=58 S. J. 218=110 L. T. 494.

encumbrances and, as pointed out, there is authority for holding that in such cases an intention to keep alive the prior mortgage can be presumed in the interests of justice.

This principle was adopted in *Gokul Das Gopal Das* v. *Puranmal Premsukhdas* (7) and many following cases in some of which the rule is applied also in the case of purchasers who are not mortgagees: *Prayag Narain* v. *Chodi Rai*(8) and in cases where the purchasers had no notice of the subsequent encumbrance: *Andi Thevan* v. *Naguyasami Chettiar* (9) and *Durasami Naidu* v. *Panadai Asari* (10).

Whenever the Court has to presume an intention it takes no heed of what might have been present in the mind of the person, but only considers whether the continuance of the charge would have been for his benefit at the time the payment was made: *cf. Mahomed Ibrahim* v. *Ambika Prasad* (11). Thus, in the present case, if it is found that the mortgage of Samiruddin was paid off, as claimed out of consideration of the kabala, and that the continuance of the charge would be for the benefit of the appellants as purchasers of the property, the fact that they were actually unaware of the second mortgage at the time of their purchase would not prevent them retaining the prior mortgage as a shield against the sale of the property by the puisne mortgagees without refunding to the appellants the amount paid to satisfy the prior mortgage.

The Court should find whether at the time of their purchase:

(1) The appellants had no knowledge of the puisne mortgage.

(2) It was agreed with the vendor that the prior mortgage should be paid off from the consideration money and it was so paid off.

(3) Whether the nominal continuance of the charge would at that time have been for the benefit of the appellants? If these questions are answered in the affirmative the claim of the appellants would be established.

The appellate Court having come to no findings on these points, the case must go back for decision in the light of these observations. Costs to abide by the final result.

Suhrawardy, J.—I agree.

M.N./R.K. *Case remanded.*

(7) [1884] 10 Cal. 1035=11 I. A. 126=4 Sar. 543 (P.C.).
(8) [1910] 7 I. C. 979.
(9) A. I. R. 1928 Mad. 703=111 I. C. 266.
(10) [1928] M. W. N. 592.
(11) [1912] 39 Cal. 527=14 I. C. 496=39 I. A. 68 (P.C.).

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Special Bench

RANKIN, C. J., AND BUCKLAND AND SUHRAWARDY, JJ.

In re, the Bar Councils Act.

Reference, Decided on 8th July 1929, made by tribunal under Bar Council on 22nd June 1929.

Bar Councils Act (38 of 1926), Ss. 10, 11 and 13—Complaint referred by High Court to the tribunal through Bar Council—Tribunal must come to some decision either way—It cannot drop proceedings for want of prosecution.

Where a complaint has been made to the Chief Justice and the Judges of a High Court under S. 10, Bar Councils Act, and such complaint has been referred to the Bar Council to be enquired into by a tribunal, it is incumbent upon the tribunal to come to some finding or other and it cannot abandon the proceeding merely because the complainant withdrew the compiaint.

Per *Rankin, C. J.*—It is highly unsatisfactory from the point of view of advocates and of the public that anyone should make a solemn complaint against one of them to the High Court and have the matter referred to the tribunal and that then, without any finding which could clear the advocate, the enquiry should be dropped. The complainant after the matter has been referred to the tribunal is not in any way a person who is like a plaintiff dominus litis and if such complainant withdraws the complaint, and if from circumstances and evidence the tribunal is of opinion that there is no need to investigate and the charge preferred has no substance, it can so report. In other circumstances it is open to the tribunal to exercise its own discretion whether to employ its power to summon the complainant personally or other people. The Act requires that the tribunal should come to a finding. [P 575 C 1, 2]

Per *Buckland, J.*—Bar Council is in the position of a trustee and guardian of the dignity and privileges of the Bar and the rights and duties of its members, and it is to the interest of the profession that when a charge is made against an advocate it should either be cleared or brought home to him. The rules are so designed that on a charge of misconduct there should be a finding one way or the other. [P 575 C 2]

S. N. Banerjee—for Advocate.

Rankin, C. J. — In this case it appears to me to be necessary that this Court should exercise its power under Cl. 4, S. 12, Bar Councils Act, and refer the matter back to the tribunal through the Bar Council. A

complaint was made against the advocate in question. The High Court did not think fit to summarily reject the complaint and was obliged, therefore, to refer the case for enquiry to the Bar Council. It was referred to the tribunal and it appears that, after certain evidence had been taken on affidavits on 22nd June 1929, a letter was produced from the solicitor of the complainant to say that he had a talk with the advocate concerned and had to inform the Bar Council that his client did not wish to proceed with the matter further, and that he therefore withdrew the complaint. On this the tribunal has reported. "In these circumstances, the enquiry cannot further be proceeded with." With the greatest possible respect to the learned lawyers who composed that tribunal, the position is very different. It was quite possible for the tribunal to proceed to investigate the complaint, and it had ample power to compel the attendance of witnesses under S. 13 of the Act. The complainant, after the matter has been referred to the tribunal, is not in any way a person who is like a plaintiff dominus litis.

The Act requires that the tribunal should come to a finding. The question is not whether the complainant has a grievance, but whether a member of the profession against whose conduct the complaint has been made—a matter in which the public has an interest—is to be found to have done something that he should not have done or whether he should be cleared of the charge. It appears to me highly unsatisfactory from the point of view of advocates and of the public that anyone should make a solemn complaint against one of them to the High Court and have the matter referred to the tribunal, and that then, without any finding which could clear the advocate, the enquiry should be dropped. I quite appreciate that, in this particular case, there may well have been circumstances and evidence before the tribunal which would entitle it upon consideration to say that it was satisfied that there was no need to further investigate the matter and that there was no proof that the charge preferred had any substance. In these circumstances it would certainly be open to the tribunal to exercise its own discretion, whether to employ its power to summon the complainant personally or other people. It was in no way obliged to do so if it did not think this necessary in order to arrive at a finding upon the question. But the report as drawn clearly imports that the tribunal was of opinion that the enquiry necessarily came to an end. I am so well satisfied that this view would deprive the new enactment—the Bar Councils Act of much of its advantage to the public that it appears to me desirable on the whole to make an order referring the matter back to the tribunal and the tribunal will, I trust, make up its mind as regards this matter and come to a definite finding on which this Court will be entitled to take action either by dismissing the complaint or otherwise as the circumstances may require.

Buckland, J.—I desire to add a few words to what has fallen from the learned Chief Justice. The situation which has arisen in this particular matter appears to have been foreseen by those who framed the rules under the Bar Councils Act. Under R. 3 it is provided that when a complaint has been made by a person other than a Court or by the Bar Council, such person or the Bar Council shall be entitled to appear before the tribunal to prosecute the complaint. The object of that is that, if the complainant will not prosecute the complaint, the Bar Council may do so and bring the matter to a final conclusion. The Bar Council, I apprehend, is in the position of a trustee and guardian of the dignity and privileges of the Bar and the rights and duties of its members, and it is to the interest of the profession that, when a charge is made against an advocate, it should either be cleared up or be brought home to him. The rules are so designed that a charge of misconduct should not be left in the position in which this case comes before us, but that there should be a finding one way or the other. The present position is unsatisfactory from every point of view and I concur in the order to be made.

Suhrawardy, J.—I agree with the learned Chief Justice. I do not understand what the tribunal meant by saying that the matter cannot be further proceeded with. If they mean to say that, because the parties compromised the

matter, the law does not empower them to proceed further, then they are wrong. On the other hand, if they are satisfied that, in the circumstances of the case, and on the material before them the matter should not be proceeded with further, then they should have said so in so many words.

V.B./R.K. *Case remanded*

A. I. R. 1930 Calcutta 576

C. C. GHOSE AND PATTERSON, JJ.

Abdul Kuddus Gazi—Petitioner.

v.

Mutual Indemnity and Finance Corporation (India) Ltd.—Opposite Party.

Civil Revn. No. 467 of 1930, Decided on 14th May 1930, from order of Addl. Dist. Judge, 24-Parganas, D/- 1st March 1930.

Provincial Insolvency Act, S. 27—Case brought within four corners of Act—No abuse of process of Court—Adjudication must be made - Subsequent conduct may be considered at the time of discharge.

Where a petitioner has obviously brought his case within the four corners of the Act, he is entitled to an order of adjudication as a matter of right where there is no question of abuse of the process of the Court. It may be that when the petitioner applies for discharge, his conduct during the time which will elapse between the date of the adjudication and the date of the application for discharge will have to be scrutinized and scrutinized carefully and whether an order for discharge should be eventually made or not must depend on various circumstances which are independent of the circumstances brought to the notice of the Court by the insolvent when he filed his application for being adjudicated as insolvent: *A. I. R* 1916 *P. C* 64, *Rel. on.*; 44 *Cal.* 899 and *A. I R.* 19 3 *Cal* 703 *Dist.* [P 576 C 1. 2]

Niamali—for Petitioner.

Parimal Chandra Guha—for Opposite Party.

Judgment.—We have examined the record in this case and having regard to the judgment of their Lordships of the Judicial Committee in the case of *Chhatrapat Singh* v. *Kharag Singh* (1), we are unable to say that the order made by the learned District Judge can be sustained. The petitioner, it appears to us, has obviously brought his case within the four corners of the statute, namely the Provincial Insolvency Act and he was entitled to an order of adjudication as a matter of right. There is no question of abuse of the process of the Court. It may be that when the petitioner applies for discharge, his conduct during the time which will elapse between the date of the adjudication and the date of the application for discharge will have to be scrutinized and scrutinized carefully and whether an order for discharge should be eventually made or not must depend on various circumstances which are independent of the circumstances brought to the notice of the Court by the insolvent when he filed his application for being adjudicated as insolvent.

The two cases to which our attention has been drawn viz, the case of *Mal Chand* v. *Gopal Chandra Ghosal* (2) and the case of *Re: Ballav Chand Serowgee* (3) have no bearing whatsoever. As regards the earlier of the two cases, it appears that the judgment therein was pronounced in September 1916, that is before the date of the decision of their Lordships of the Judicial Committee in the *Chhatrapat Singh's* case (1) referred to above. Therefore, the authority of that case must be taken to be considerably discounted by the observations made by their Lordships of the Judicial Committee. As regards *Baldeo Chand Serowgee's* case (3), it may be mentioned that it was not a case for adjudication. It was a case for annulment of adjudication and as has been pointed out in various cases both under the Presidency Towns Insolvency Act and under the Provincial Insolvency Act, the discretion of the Court in annulling adjudications cannot be limited except in manner provided by the statute. The Court has a large discretion in the matter and in the exercise of its discretion which on the facts could not be curtailed, Greaves, J., made the order which he did in *Baldeo Chand Serowgee's* case (3). To our mind that case has no bearing and the really important case which determines this case is *Chhatrapat Singh* v. *Kharag Singh* (1). In that view of the matter, the order of the District Judge, dated 1st March 1930, must be set aside and that of the Subordinate Judge, dated 21st December 1929, restored. There will be no order as to costs.

M.N./R.K. *Order set aside.*

(1) A. I. R. 1916 P. C, 64=39 I. C. 788=44 I. A. 11=44 Cal. 555 (P.C.).

(2) [1916] 44 Cal. 899=39 I. C. 199.

(3) A. I. R. 1928 Cal. 703=80 I. C. 651.

A. I. R. 1930 Calcutta 577 (1)

RANKIN, C. J., AND C. C. GHOSE, J.

Nirode Basini Mitra — Plaintiff—Appellant.

v.

Sital Chandra Ghatak—Defendant—Respondent.

Appeal No. 89 of 1928, Decided on 10th March 1930, from appellate decree of Special Judge, Khulna, D/- 20th September 1927.

(a) Bengal Tenancy Act, S. 109-A— Claim for additional rent for additional area — Appeal is not barred under S. 109-A.

An appeal from a decree rejecting a claim for additional rent for additional area is not barred under S. 109-A as there is no question of settlement of fair and equitable rent. [P 577 C 2]

(b) Stamp Act, S. 36 — Document admitted rightly or wrongly on record by civil Court cannot be called in question at any stage of suit.

A document having once been admitted in evidence is not to be called in question at any stage of the same suit. Under S. 36 it matters nothing whether a document was wrongly admitted or rightly admitted or admitted without objection or after hearing or without hearing such objection. [P 577 C 2]

Sarat Chander Roy Choudhury, Khitish Chandra Chakrabutty and *Panchanan Ghosal*—for Appellant.

Bishindra Nath Sarkar and *Subodh Chunder Datta*—for Respondent.

Biraj Mohan Majumdar—for Deputy Registrar.

Rankin, C. J.—In this case, plaintiffs appeal from a decree of the Special Judge who has refused their claim for additional rent for additional area. It appears that the first Court, that is to say, the Assistant Settlement Officer decreed the suit and when the matter was taken on appeal to the Special Judge the learned Judge refused the relief asked for because he rejected a dowl kabuliyat as being insufficiently stamped, although it had been admitted in the first Court. The Judge then held that as there was no evidence as to what the original area was, no case had been made out for additional rent.

In this appeal it is objected, first of all, on behalf of the respondents that, under S. 109-A, Bengal Tenancy Act, no appeal lies and the decision in *Nafar Chandra Pal Choudhury* v. *Nur Ali* (1) has been cited to us. In my opinion the present is not a case in which the prohibition of S. 109-A applies at all. There is no question here of settlement of fair and equitable rent.

On the merits of the appeal it appears to me that S. 36, Stamp Act, makes it reasonably clear that the instrument having once been admitted in evidence is not to be called in question at any stage of the same suit. The Special Judge has seen this section but has thought to avoid the consequence of it by taking notice of an affidavit in which it is said that the tenure-holders did object when the document was tendered and that there was a discussion as to its admissibility. The learned Judge has entirely failed to see that under S. 36 it matters nothing whether it was wrongly admitted or rightly admitted or admitted without objection or after hearing or without hearing such objection. These stamp matters are really no concern of the parties and if the objection was taken at the time when the record was made up by the trial Court, there it might be rejected, if not, the matter stopped there. In my opinion, the appeal must be allowed, the decree of the lower appellate Court must be set aside and the case must be sent back to that Court to deal with it on the footing that the dowl kabuliyat is rightly in evidence. The appellants are entitled to their costs of this appeal.

C. C. Ghose, J.—I agree.

M.N./R.K. *Appeal allowed.*

(1) A. I. R. 1929 Cal. 496=111 I. C. 79=55 Cal. 619.

A. I. R. 1930 Calcutta 577 (2)

PEARSON AND JACK, JJ.

Meher Sardar and *another* — Accused —Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 1 and 2 of 1930, Decided on 22nd May 1930.

Forests Act, S. 59—Interpretation—Words "any person claiming to be interested in the property" in S. 59 are not limited to case contemplated by S. 57—Words "so seized" refer to seizure under S. 52.

The first canon of construction of a statute is that you must take the language as it stands and if it is clear, give effect to it. There is no possible ground for saying that the phrase "any person claiming to be interested in the property so seized" occurring in S. 59 could be construed as limited to the case contemplated

by S.·57 when no mention is made of any such limitation, the language of the section is perfectly clear and unrestricted in its terms and must be given effect to accordingly. Apart from that, the words "so seized" logically and grammatically refer to the seizure under S. 52, which includes seizure of tools, boats, etc.

[P 578 C 1, 2]

Suresh Chandra Taluqdar and *Hari Das Gupta*—for Petitioners.

Anil Chandra Roy Chowdhury — for the Crown.

Judgment.—In this case an order has been made by the Sub-Divisional Magistrate of Khulna confiscating a boat said to belong to the petitioner, under the provisions of Chap. 9, Forests Act. The boat has been confiscated under the provisions of S. 55. On appeal to the learned Judge he has dismissed the appeal holding apparently inter alia that the applicant was no party to the proceedings in the original Court and no investigation as to his claim for relief from confiscation was made in that Court, and that under the provisions of S. 59, Forests Act, he is not entitled to a determination of that question on appeal.

The language of S. 59 is this:

"The officer who made the seizure under S. 52 or any of his official superiors, or any person claiming to be interested in the property so seized may apppeal from the order of confiscation."

The contention before us has been that the phrase "or any person interested in the property so seized" has reference only to the circumstances previously contemplated and provided for in S. 57. S. 57 provides a special procedure when the offender is not known or cannot be found and it relates to the forest produce and provides that no order of confiscation is to be made in that case amongst other things without hearing the person if any claiming any right thereto and the evidence if any which he may produce in support of his claim. We are unable to give effect to the contention that the clause already quoted from S. 59 is to be confined in its scope to the conditions contemplated in S. 57. The first canon of construction of a statute is that you must take the language as it stands and if it is clear give effect to it. There is no possible ground for saying that the phrase "any person claiming to be interested in the property so seized" should be construed as limited to the case contemplated by S. 57 when no mention is made of any such limitation; the language of the section is perfectly clear and unrestricted in its terms and must be given effect to accordingly. Apart from that, the words "so seized" logically and grammatically refer to the seizure under S. 52, which includes seizure of tools, boats and etc.

The only other argument placed before us was that even if it was conceded that the present applicant had any locus standi before the appellate Court it should be laid down that his contention there must be limited to this: that the order for confiscation will not stand because the boat was not used in the commission of the offence; and that once it is shown that it was in fact used, the order for confiscation must stand as a matter of course. To any such proposition laid down in such broad terms we are unable to assent. It need only be said that the matter is one to be determined upon such evidence as there may be in the particular circumstances of each case. The Rules accordingly are made absolute in these terms and the matters must go back to the learned Judge for determination of the question according to law.

M.N./R.K. *Rules made absolute.*

A. I. R. 1930 Calcutta 578

SUHRAWARDY AND COSTELLO, JJ.

Nagendra Nath Chakravarty and *another*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 21 of 1929, Decided on 7th May 1930, from an order of Sess. Judge, Hooghly.

Criminal P. C., S. 476—Forgery in civil suit—Appeal filed — Proceedings under S. 476 need not be stayed—Question of stay does not come under Civil P. C., S. 115.

When the Court has found a forged document used by a party before it, it is entitled to make a complaint and there is no reason why the making of the complaint should be stayed till the final disposal of the appeal which may pass through more Courts than one. The disallowance of a petition of stay by lower Court cannot come under S. 115, Civil P. C.

[P 579 C 1]

Herambo Chunder Guha and *Hara Krishna Pramanik*—for Petitioners.

Judgment.—This Rule was issued under S. 115, Civil P. C., against an order passed by the Sessions Judge of Hooghly under S. 476-B, Criminal P. C.,

on appeal from an order under S. 476 by the Munsif of Amta. The petitioners are two in number, Nagendra Nath Chakraverty and Giribala Devi. Petitioner 2 brought a suit in the Court of the Munsif of Amta and in support of her claim got a document produced through petitioner 1 which was found by the Munsif to be a forged one. He accordingly made a complaint under S. 476 against the plaintiff Giribala Devi as well as against her witness Nagendra Nath Chakraverty who is the son of Giribala. The learned Judge on appeal has upheld the order of the Munsif. As regards Giribala Devi, in our judgment, no case has been made out for our interference with the order of the Courts below. She was the plaintiff in the suit, the document was produced on her behalf and she may be presumed to know the nature of the document. Any point that may be urged in defence will undoubtedly be dealt with by the trial Magistrate. It is further urged on her behalf that she has filed an appeal against the judgment of the Munsif and therefore proceedings under S. 476, Criminal P. C., should be postponed till the disposal of the appeal. That is not a matter which comes exactly under the provisions of S. 115, Civil P. C. The learned Judge says that when the Court has found a forged document used by a party before it, he is entitled to make a complaint and there is no reason why the complaint should be stayed till the final disposal of the appeal which may pass through more Courts than one. The result is that the Rule obtained by Giribala Devi is discharged.

As regards the petitioner Nagendra Nath Chakraverty the point is raised that he not being a party to the suit the Court has no jurisdiction to lodge a complaint against him under S. 476 read with S. 195, Criminal P. C., in view of the alteration in the law made by the Amending Act of 1923. We think that the question is of some importance and we should like to have the help of the Crown in this matter. We accordingly direct that the papers be sent to the Legal Remembrancer with a request to make it possible for him to appear before us by an advocate to show cause in this case on the ground stated above. Let this matter be placed before us as soon as the Legal Remembrancer has entered appearance. The order staying further proceedings in this matter will continue to be in force until the disposal of this Rule.

M.N./R.K. *Order accordingly.*

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* A. I. R. 1930 Calcutta 579

SUHRAWARDY AND JACK, JJ.

Muktakeshi Dasi—Defendant—Appellant.

v.

Manilal Jana—Plaintiff — Respondent.

Second Appeal No. 996 of 1927, Decided on 16th April 1929, from appellate decree of Addl. Dist. Judge, 24-Parganas D/- 28th February 1927.

(a) Civil P. C., S. 11—Decision in previous rent suit regarding title arrived at incidentally is not res judicata in subsequent suit for declaration of title.

In a previous rent suit, the Court found that the landlord had failed to prove that a certain plot appertained to the disputed holding of the tenants. It was also remarked that the evidence adduced by the landlord to identify the land as included in the kabala was neither sufficient nor reliable. In a subsequent suit for declaration of title to that plot by the landlord :

Held: that the previous decision regarding title was incidentally arrived at in the course of the determination of the principal case regarding the right to recover rent and as such was not res judicata: 11 *Cal.* 301 (*P.C.*), *Rel. on.* [P 580 C 2]

*** (b) Civil P. C., S. 11—Rent suit—Tenant's plea of jus tertii upheld—Landlord's subsequent suit for declaration of title is not barred—Whether third party is made defendant or not is immaterial.**

In a previous rent suit the defendant-tenant pleaded jus tertii and his plea was upheld. The landlord brought a suit for declaration of title against the tenant without making the third party a defendant.

Held: that the decision in a rent suit with reference to title is not res judicata in a subsequent declaratory suit. It is immaterial whether the third party under whom the defendants claimed to have held the land was made a party, or not: 26 *Cal.* 428, (*F.B.*). *Rel. on.*; 12 *C.L.R.* 38; 10 *C. W. N.* 820 and 12 *I.C.* 9, *not Foll.* 13 *I.C.* 40, *Dist.*: (*Case Law Referred*). [P 580 C 2, 581 C 1]

(c) Limitation Act, Art. 144—Suit against tenants for declaration of title and fixation of rent—Defendant's plea of jus tertii overruled—Defendants found to be tenants who had never claimed higher rights—Art. 144 applies.

The findings in a suit for declaration of title and fixation of rent against the tenants were that the defendants held the land as tenants. They never claimed title in themselves. Instead of saying that they were the plaintiffs' tenants they set up a third party. But they never claimed any higher right than that of a tenant.

Held: that if the defendants did not occupy the land as included within their holding, it should be assumed that they were encroaching upon the land of their landlord when the land in suit is found to be the plaintiffs' and not of the third parties as alleged by the defendants. In a case like this, Art. 144 applies: *A. I. R.* 1921 *Cal.* 355 and 14 *I C.* 212, *Ref.* [P 583 C 1]

Sharatchandra Ray Choudhuri and *Shantikumar Ray Chaudhuri*—for Appellant.

Nasim Ali—for Respondent.

Suhrawardy, J.—The facts leading to this litigation are that the plaintiff brought a suit against the defendants in 1916 for rent in respect of several plots, including plot 5, which is involved in the present suit. The defendants in that suit admitted their liability for rent, but averred that they held plot 5 not under the plaintiff but under a third party, the Satkhira Babus. That suit for rent was decreed. But the defendants' plea that plot 5 did not form part of the holding under the plaintiff prevailed. That judgment was pronounced in 1918. In 1923 the present suit was brought by the plaintiff for declaration of his title to and recovery of possession of the land, which was plot 5 in the rent suit. Subsequently, the plaintiff gave up his claim for khas possession, but asked the Court, under S. 157, Ben. Ten. Act, to settle fair and equitable rent in respect of it. The trial Court dismissed the plaintiff's suit on the question of title, holding that the plaintiff had failed to prove that plot 5 was included within his tenure. Upon appeal, the learned Additional District Judge held, on an examination of the evidence, that the plaintiff had succeeded in proving that the land in suit was included within his tenure. Against that decision this appeal is preferred by the defendants and two questions of law are urged before us. It is conceded that the finding that the land in suit was included within the plaintiff's tenure cannot be assailed in second appeal, being a finding of fact. The two questions on which we have been addressed are with reference to the pleas of res judicata and limitation. Both these grounds were decided against the defendants by both the Courts below.

The objection on the ground of res judicata arises in this way. In the previous rent suit, the Court found that the plaintiff had failed to prove that plot 5 appertained to the disputed holding of the defendants. It was also remarked that the evidence adduced by the plaintiff to identify the land as included in his kabala was neither sufficient nor reliable. The issue which was framed by the learned Subordinate Judge in the appellate Court in the rent suit was in these terms:

"Is plot 5 of the plaint included in the disputed holding."?

It is argued on the authority of a number of cases that the decision in the rent suit that the plaintiff had no title to the land in dispute is res judicata in the present suit, as the finding in that suit was the ground-work for the decision arrived at, namely that the plaintiff was not entitled to rent in respect of that plot. This argument is met on behalf of the plaintiff-respondent on two grounds. First, that the finding in the previous suit that the plaintiff had failed to prove his title to plot 5 was incidentally arrived at in the course of determination of the principal issue in the suit, namely, whether the plaintiff was entitled to recover rent in respect of that plot. Secondly, it is submitted that a decision in a rent suit with reference to title is not res judicata in a subsequent declaratory and possessory suit. With regard to the first point, the best authority is the decision of their Lordships of the Judicial Committee in *Run Bahadur Singh* v. *Lucho Koer* (1). In that case, a suit for rent was brought by the widow of a deceased Hindu. The brother of the widow's husband intervened and challenged the right of the widow to sue alone for rent on the ground that he had joint interest and ownership in the land with his deceased brother. That suit was decided in favour of the widow. Subsequently, the brother brought a suit against the widow for a declaration that he was joint with the widow's husband. It was argued that the decision in the previous rent suit was res judicata on this question. Their Lordships of the Judicial Committee after disposing of the plea on several other grounds observed:

"Having regard, however, to the subject-matter of the suit, to the form of the issue."

(1) [1884] 11 Cal. 301=12 I A. 23=4 Sar. 602 (P.C.).

(which was set out),

"and to some expressions of the learned Judge, their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, namely, whether any and what rent was due from the tenant and that on this ground the judgment was not conclusive."

But this case has been strenuously argued before us on the ground that the decision in the previous rent suit is res judicata in the present suit. In my judgment, this point seems to be covered by the Full Bench decision of this Court in the case of *Dwarkanath Roy* v. *Ram Chand Aich* (2). A distinction was attempted to be made on the ground that, in that case, the third party under whom the defendants claimed to have held the land was made a party and, therefore, the question decided in the rent suit was not res judicata in the title suit. In the present suit it is true that the Satkhira Babus had not been impleaded. In order to understand what that case really decided, it may be useful to refer to the case which led to the reference to the Full Bench. In *Gopal Das* v. *Gopinath Sircar* (3), a suit for rent in which the defendants denied the plaintiff's title alleging that some other persons along with the plaintiff were his landlords having been dismissed on the ground that the plaintiff had failed to prove his title, another suit was brought by the plaintiff for recovery of possession against the tenant and the other persons alleged to be the plaintiff's cosharers. It was held that the suit was barred by S. 13 of the old Civil P. C. The learned referring Judges in *Dwarkanath's* case (2) dissented from this view on the ground that the only question that arose for determination in the previous suit was as to the relationship of landlord and tenant between the parties to the suit during the period for which rent was then claimed. The judgment of the learned Chief Justice in the Full Bench case is based not, however, on the fact that the third party was a party to the second suit, but on the general principle which he enunciated thus:

"The issue determined in the previous suit (a rent suit) was whether the relation of landlord and tenant existed at the time when that suit was instituted between the present plaintiff and the then defendant, and whether the then defendant was liable for the amount then claimed as rent for a certain period. That issue was decided against the present plaintiff, and as it is conceded that nothing has occurred in the interval to change the position of the parties, that question must be treated as res judicata as against the plaintiff, and in the defendant's favour. But the relief sought in the present suit is absolutely different from the relief sought in the previous suit. The present issue is whether the land in dispute belongs to the plaintiff . . . . . It is impossible to say that the plaintiff is barred in this suit from establishing his title to the land both as against the alleged tenant and also against the persons whose title as landlord the tenant defendant had set up in the rent suit."

The other learned Judges were of the same opinion and a very cogent reason was given by some of them for holding that the decision in the rent suit should not be treated as res judicata in a subsequent title suit; the basis of their decision was that the cause of action of the title suit arose from the successful termination in favour of the defendant of the rent suit. The observation I have quoted of the learned Chief Justice did not confine itself to the case as between the plaintiff and the third party set up by the tenant. In fact the presence of the third party does not affect the question of res judicata as between the plaintiff and the tenant defendant. Of course the decision cannot be treated as res judicata between the plaintiff and the third party, but whether the third party is or is not a party to the suit, the plea of res judicata as founded upon the decision of the rent suit would be available to the tenant defendant in every case in which a suit for recovery of possession on declaration of title is brought against him. There is no reason why the decision in the rent suit should operate as res judicata in favour of the defendant, if he is sued alone and would not operate as res judicata in his favour if a third party is joined. This point seems to be conclusively covered by the Full Bench decision quoted above. But as reference has been made to various cases I will just shortly refer to some of them and try to find out what I understand to be the present law. The view taken in the Full Bench case was adopted in *Nitya Nunda Sarkar* v. *Ram Narain Das* (4).

In *Sahadeb Dhali* v. *Ram Rudra Haldar* (5) a distinction was attempted

(2) [1899] 26 Cal. 423=3 C. W. N. 256.
(3) [1882] 12 C. L. R. 88.
(4) [1901] 6 C. W. N. 66.
(5) [1906] 10 C. W. N. 820.

to be made between cases in which the defendant in the rent suit set up his own title and cases in which the defendant pleaded jus tertii. It was held, in the first class of cases, that the decision in the rent suit should operate as res judicata, as it was a decision between parties laying conflicting claims to the property under similar title. In the second class of cases it was held that the decision in the rent suit should not operate as res judicata. This distinction was kept in view in *Panchu Mandal* v. *Chandra Kant Saha* (6).

In *Nanji Koer* v. *Umatul Batul* (7) the landlord brought a suit against the tenant for rent. The tenant pleaded that he was holding the land as tenant of third persons. The tenant's defence was investigated and overruled and the suit was decreed in favour of the landlord. The tenant then brought a suit for declaration that the third party and not the plaintiff in the rent suit was his landlord. It was held that the suit was barred by res judicata. The question which was decided in the previous rent suit was whether there was relationship of landlord and tenant between the plaintiff and the defendant and it was held that such relationship existed. In the subsequent suit brought by the tenant for declaration that this relationship did not exist, the decision in the previous suit was conclusive, for the only issue finally decided in a rent suit was whether relationship of landlord and tenant existed between the parties to the suit for the period for which rent was claimed. This case is of no help to us in the present controversy.

In *Mane Mahammad Nasya* v. *Dhani Mahammad* (8) the facts were that in the previous suit for rent the plaintiff alleged that the defendant held along with some plots a plot which was abandoned by another tenant of the plaintiff and taken possession of by the defendant at the rental of Rs. 30. It was decided in that suit on an objection taken by the defendant that the jama was only Rs. 16 and that the defendants' tenancy included the plot of land which the plaintiff alleged had been abandoned by a tenant. The plaintiff landlord subsequently brought a suit against the defendant for establishment of his title to the plot and for rent in the alternative. It was held that the decision in the rent suit was res judicata in the title suit and this view is supported by the accepted view that a decision in a rent suit relating to the relationship of landlord and tenant operates as res judicata in a subsequent suit either for title or for rent. In the previous rent suit it was held that the relationship of landlord and tenant existed between the plaintiff and the defendant in respect of the plot said to have been abandoned. The same question the plaintiff wanted to reopen in the subsequent title suit and it was held that he could not do so on the principle of res judicata. The decision is correct and does not in any way modify or qualify the Full Bench decision in *Dwarkanath's* case (2).

In the *Midnapur Zemindari Co. Ld.* v. *Jagendra Kumar Bhaumik* (9), both the suits were suits for rent and it was held that the decision in the previous rent suit, although it went to the very root of the matter, was res judicata in the subsequent suit. It will be useful here to refer to another case in the same volume decided by the same Judges. In *Mrigendra Nath Saha* v. *Krishna Chandra Saha* (10) the previous suit for rent was dismissed on the ground that the plaintiff had failed to prove the relationship of landlord and tenant. Subsequently, the plaintiff instituted a suit in ejectment and it was held that the judgment in the previous suit was conclusive between the parties upon one and one point only, namely that there was no relationship of landlord and tenant between the parties during the period for which rent was claimed in that litigation, but it was open to the plaintiff to establish in a subsequent suit that he had a subsisting title and that the defendants were liable to be ejected because they were not tenants as they had themselves pleaded in the rent suit. The view taken in the last case is in agreement with that taken in the Full Bench case of *Dwarkanath Ray* (2) and is suppor-

(6) [1909] 12 I. C. 9.
(7) [1911] 13 I. C. 40.
(8) [1912] 16 I. C. 22.
(9) A. I. R. 1921 Cal. 750=62 I. C. 491.
(10) A. I. R. 1921 Cal. 355=61 I. C. 201.

ted by the decision in *Goher Sheikh* v. *Alifuddin Sheikh* (11).

The findings of fact arrived at by the lower appellate Court are that the defendants have failed to prove settlement from Satkhira Babus and that the plaintiffs have succeeded in proving that the plot of land in dispute is included within their purchase. On these findings the lower appellate Court is justified in passing a decree in favour of the plaintiffs.

The second question raised on behalf of the appellants is that the suit is barred by limitation. It is argued that the present suit was brought by the plaintiffs treating the defendants as trespassers. It was found in the previous suit that the tenants did not hold this land under the plaintiffs, so that the defendants must have been for more than 12 years in adverse possession to the plaintiffs. This objection should also fail. The findings in this case are that the defendants held the land as tenants. They never claimed title in themselves. Instead of saying that they were the plaintiffs' tenants they set up a third party. But they never claimed any higher right than that of a tenant. If the defendants did not occupy this land as included within their holding, it should be assumed that they were encroaching upon the land of their landlord when the land in suit is found to be the plaintiffs' and not of the Satkhira Babus as alleged by the defendants. In a case like this, Art. 144, Lim. Act, applies. Apart from this the learned Subordinate Judge observes:

"The plaintiffs were all along treating the defendants as tenants in respect of this land. The defendants were holding this land but never asserted any adverse title until the decision of the rent suit; and since then the defendants' possession must be taken to be adverse to the plaintiffs."

In the case of *Mrigendra Nath Saha* v. *Krishna Chandra Saha* (10), a similar objection was taken and it was held that on the finding that the land belonged to the plaintiffs and was in the possession of the defendants as tenants it must be held that so long as the defendants did not successfully deny the tenancy under the plaintiffs the plaintiffs were in possession of this land through the tenant defendants. Both the Courts have concurred in finding that, though the defendants were in possession of the land for more than 12 years before suit, no case has been made out by them to show that their possession was adverse to the plaintiffs and that the first occasion on which adverse possession was asserted was in the course of the rent suit in 1916. In *Gopal Krishna Jana* v. *Lakhiram Sardar* (12), it was held that when a tenant encroaches upon the land of his landlord, he does so as a tenant and the landlord's right to recover possession of the land encroached upon may be lost by the tenant having adversely to the landlord asserted his title as tenant to the land for more than 12 years. By such assertion, the tenant gets a limited interest in the land encroached upon to the extent to which he asserts adverse possession. On the findings of this case it cannot be successfully pleaded that the plaintiff's suit for recovery of rent is barred by limitation. The appeal, accordingly, fails and is dismissed with costs.

Jack, J.—I agree.

S.N./R.K. *Appeal dismissed.*

(11) [1919] 51 I. C. 356.

(12) [1912] 14 I. C. 212.

A. I. R. 1930 Calcutta 583

RANKIN, C. J., AND MUKERJI, J.

Fulmani Dasi—Appellant.

v.

Priya Nath Sen and *others*—Respondents.

Appeal No. 235 of 1928, Decided on 9th April 1930, from decrees of 2nd Addl. Sub-Judge Zillah, 24 Parganas, D/- 24th February 1928.

Hindu Law—Religious endowment—Heir of founder bringing suit for account or framing a scheme or removal of shebait has to prove mismanagement or failure in some important duty—Mere shebait's refusal to show account is not misconduct.

Even if a person as one of the heirs of the founder of the trust is entitled to complain of waste or mismanagement of the trust fund, yet, in order that he may bring a case for account, still more a case for the framing of a scheme of the removal of a shebait it is necessary that he should show that there has been some default on the part of the shebait, either mismanagement or failure in some important duty. It is not a sound proposition that he is a person who has any right to see the account and mere refusal by shebait to allow him to see the account will not amount to misconduct. [P 585 C 1, 2]

Pyari Mohan Chatterji and *Bankim Chandra Roy*—for Appellant.

Sarat Chandra Bose and *Lalit Mohan Sanyal*—for Respondents.

Rankin, C. J.—In my opinion, this appeal must succeed. The suit is by a son against his mother and certain brothers and it appears that the father by his Will made certain properties subject to trust for the benefit of a family Thakur. The Will recites that there is an idol Shiva installed at Benares and that the testator desires certain pujas to be continued to be performed for ever without interruption and, to that reason he creates a trust of the property in Sch. (ka) for the performance of all those pujas, and appoints his wife as the sole trustee for the term of her life for the purpose of carrying out the said debsheba and for performing the puja. It is provided that the wife will take possession of the property and, on receiving the profits, will perform the puja and carry out the sheba as mentioned in the schedule as trustee for the term of her life. It is further provided that, on her death, the sons and their descendants are to become trustees and to have certain palas or turns of worship. There is a provision that if there is any saving or a balance of money left, Government promissory notes shall be purchased and so forth. The shedule contains a series of sums of money specified for particular purposes ; as for the Autumnal Durga Puja Rs. 500; for the Annapurna Puja, Rs. 400; for the worship of Shiva installed by self Rs. 480; and so forth. These being the terms of the Will it appears that a certain amount of money was saved out of the income of the dedicated properties and we come to a time when one of the sons brings a suit against the mother and that suit is compromised by a solenama. The suit was a suit of 1913 and it was compromised on 17th February 1915. First of all, the parties gave up their respective claims against each other for partition and accounts and :

"none of the parties, shall be competent to claim any account against another party or the other parties for the period up to the present date. As defendant 1 is the mother of all the other parties, she shall remain the sole shebait or trustee of the debuttar property as long as she will remain alive under the provisions of the Will of the late Gangadhar Sen."

The first of the terms recites that by the Will certain properties were made debuttar. It then recites that the mother, the shebait and trustee of the debuttar property, purchased the three properties in Sch. (ga) as such trustee and it says that :

"all the eight properties or any other property which may be afterwards purchased for the purpose of the debuttar estate shall be treated as absolute debuttar property under the terms of the Will of the late Gangadhar Sen."

The solenama goes on to say that :

"as the amount of costs fixed for carrying on the works of the debseba by the Will was insufficient, we all parties unanimously fix the amount of the said costs at the total sum of Rs. 3,120 as mentioned in Sch. (gha) below."

Thereafter, the terms of the compromise go on to arrange that certain of the parties are to take lease from the shebait of certain portions of the debuttar property at certain rents. That being the position, the plaintiff brings the present suit in 1924 and he alleges first of all, that he is a shebait of the idol which was established by his father, though there is no proof whatever of that fact. He then recites the solenama and says that defendant 1 has not been making proper expenses for the upkeep of the sheba, that she is not carrying out the worship properly, spends too little on ceremonies, does not offer bhog or puja properly and does not make the yearly allowances for the puja as provided by the Will. The plaintiff then alleges that he wanted to look into the accounts of the trustee or shebait but the defendants failed to show him the accounts, that he gave a pleader's letter and that he did not receive any reply. He then alleges in general terms mismanagement and misappropriation of money and says that defendant 1 is not fit to be a shebait and should be removed and that a new scheme according to requirements should be framed on the basis of the solenama. On that case the parties went to trial and the evidence adduced before the learned Subordinate Judge was in a very narrow compass.

There were three witnesses for the plaintiff. First of all the plaintiff himself. He says that he never has been allowed to see the accounts. But in spite of that, he says:

"The Benares property fetches an income. The said income is not entered in the accounts of the trustee."

He alleges also that the trustee does not pay the revenue or the rents of the debuttar property. It turns out that the plaintiff's wife was a person to whom certain rent was payable that some quarrel took place between the parties and that there was one suit by the plaintiff's wife. He then says that he demanded inspection of the debuttar accounts and was refused, that he sent a pleader's letter and that he was never allowed to inspect the accounts. He also says that there used to be certain articles for the worship of the deities and he does not see where they are now. He admits that there was a burglary and that he has not any idea as to what became of those articles. The only rent in arrear, according to his evidence, appears to be the rent due to his wife. He then makes a complaint that as regards the portion of the debuttar property which is let out to him, he has not had his fair share of repair; his brothers have had their portions repaired and his portion has not been repaired. That is the only evidence that is given by the plaintiff. He calls a witness who says that the plaintiff bought some building materials from him to construct a privy. The plaintiff calls a third witness who says that Durga Puja, Annapurna Puja and Jagadhatri Puja are now performed by the defendants on the same scale in which they were performed before. The plaintiff's case is then closed.

Now, the question we have to ask ourselves is whether the plaintiff has made any case whatever for a decree for account against his mother, the trustee and shebait. I am very clearly of opinion that the plaintiff discloses no case upon which the Court can be asked to make a decree for accounts against his mother as the shebait and trustee. I will assume for the sake of argument and also because I think it is probably the law that the plaintiff being one of the heirs of Gangadhar Sen was a person who would be entitled to complain of waste or mismanagement of this trust fund; but, in order that he may bring a case for account—still more a case for the framing of a scheme or the removal of a shebait, it is necessary that he should show that there has been some default on the part of the shebait—either mismanagement or failure in some important duty. His evidence that the lady did not keep the account is utterly unsubstantial. Taking the plaintiff's evidence by itself. his own story is that he asked to see the account and was refused. It does not appear to me to be a sound proposition that he is a person who has any right to see the account; and in my judgment it is not established that the shebait misconducted herself in refusing to let him see the account. His complaint about the non-repair of his particular portion of the property and his allegation that certain sums of money have not been entered in the account which he says he never saw are merely materials for a very weak case.

However, the plaintiff's brother was put into the box for the defendants. He is one of the brothers whom the mother has employed to manage this debuttar property. This brother says that the plaintiff did not at any time ask him to show the account of the debuttar estate. He says that the accounts were written by a Sirkar and were kept by him for his mother. He talks about the pay they gave to the Sirkar. He denies that he did receive any pleader's letter. He says that certain property has been repaired and the inner portion of the plaintiff's rooms was not repaired because the plaintiff had the key. He brings the accounts with him and exhibits them one by one saying in whose handwriting they were, He says that they were kept correctly and regularly in the ordinary course of business and that the sums spent on the pujas are greater now than used to be spent before. He explains about the rent suit of the plaintiff's wife on the ground that the plaintiff having become an insolvent, there was some question about the title of the plaintiff. He explains also about the articles that were lost by the burglary and what articles were lost. That witness having come into the box is not cross-examined at all about the account or any portion of the account. No attempt is made to show by cross-examination that the income of the Benares property has not been correctly entered. No attempt is

made to show that the accounts are in any way defective.

It was open to the plaintiff, had he been so minded, to obtain discovery of the accounts. It was quite open to him when he came to Court to have the accounts carefully scrutinized and to have cross-examined defendant's witness to show the defects in the accounts or to show waste or mismanagement on the part of the lady. Nothing of the sort was attempted. The defendant's witness having brought the accounts into Court is not cross-examined about them. In these circumstances it appears to me that the duty of the Subordinate Judge was to dismiss with costs. It is true that the defendants did not object to the solenama which was scheduled to the decree in the previous suit being amended by the addition of certain provisions for the keeping of account and on another matter, and to that extent there might have been a decree by consent. But this plaintiff has proved nothing against the shebait; no failure of any duty either in the way of management or in the way of keeping the account. The learned Judge appears, notwithstanding that there was no evidence against her on any point in the account, to have gone through the accounts for himself later on and because certain things seemed to him to require explanation—no explanation having ever been asked for from the defendants' witness, he makes a preliminary decree for account against the lady. The learned Judge was wrong in so doing. He ought to have held at the end of the plaintiff's evidence that there was nothing to answer; at all events at the end of the defendant's evidence he ought to have held that the plaintiff's case had been blown out of water so far as the accounts were concerned, the plaintiff having been entirely unable to substantiate by cross-examination his case as made in the plaint.

In my judgment, therefore, this appeal, so far as it is an appeal from the preliminary decree must be allowed save that part which was not objected to, namely the scheme on the basis of the solenama and the two amendments to that which were consented to at the hearing. Save that the suit should be dismissed and in my judgment, the plaintiff should pay the costs of the lower Court at the preliminary hearing. As regards the appeal from the final decree it is only necessary to say that that will be allowed and the decree of the Court below will be set aside with the costs of that hearing too. The defendant-appellant must have her costs of this appeal.

Mukerji, J.—I entirely agree.

M.N./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 586

S. K. GHOSE, J.

Jadav Chandra Karmarkar and *others*—Plaintiffs—Appellants.

v.

Akrur Chandra Karmarkar and *others*—Defendants—Respondents.

Appeal No. 2273 of 1927, Decided on 17th December 1929, from appellate decree of First Sub-Judge, Barisal, D/- 17th June 1929.

(a) Civil P. C., O. 21, R. 95— Property in possession of judgment-debtor —Purchaser can get possession out of Court or by application under R. 95.

Under O. 21, R. 95, where the immovable property sold is in the occupancy of the judgment-debtor and the purchaser applies, the Court is to order delivery to be given to the purchaser. It does not follow that in every case the purchaser has no choice but is bound to apply for delivery of possession. It is possible that by an amicable arrangement possession is given up by the judgment-debtor, and in such a case the law does not require for the purpose of limitation that the auction-purchaser must proceed by way of application under R. 95. [P 587 C 2]

(b) Civil P. C., S. 47—Purchaser from decree-holder-auction-purchaser who had not obtained possession cannot bring separate suit for possession—If possession of judgment-debtor is as licensee from decree-holder suit is governed by Limitation Act, Art. 142.

A decree-holder auction-purchaser sold the property before obtaining possession from the judgment-debtor who was alleged to have remained in possession as licensee of the decree-holder. The purchaser from decree-holder sued for possession.

Held: that if the judgment-debtor was in possession as licensee as alleged then the suit would be governed by Art. 142, otherwise the plaintiff being a respresentative of the decree-holder, the suit was barred under S. 47: 21 *All.* 82 (*F. B.*), *Dist.*; 28 *Mad.* 87, *Rel. on.* and *A. I. R.* 1926 *Cal.* 798 (*F. B.*), *Ref.* [P 587 C 2]

Gunada Charan Sen, Jitendra Nath Roy, Bansori Lal Sirkar for *Sudhansu Sekhar Kar*—for Appellants.

Hemendra Chundra Sen—for Respondents.

Judgment.—This appeal arises out of a suit for khas possession of lands on declaration of title thereto. The plain-

tiff's case is that defendant 5 auction-purchaser the lands in suit on 13th February 1914 in execution of a decree on simple mortgage as against defendant 1 and the predecessor-in-interest of defendant 2. On 23rd December 1925 defendant 5 sold the lands to the plaintiff by executing a kabala. The plaintiff's case is that after the death of Baikuntha the predecessor-in-interest of defendant 2, defendants 1 and 2 entreated defendant 5 not to take possession of the lands and that, in accordance with such entreaty, defendant 5 did not take possession. The plaintiffs after their purchase sought to take possession, but were resisted by the defendants. Hence the suit. The main defence is that the plaintiff, having purchased from the decree-holder-auction-purchaser should come in by way of execution under S. 47, Civil P. C. and not by a separate suit. Both the Courts below have agreed in giving effect to the defence and have dismissed the suit. Hence this second appeal by the plaintiffs. In this appeal the point is whether the suit is maintainable.

In support of the appeal it is contended that S. 47, Civil P. C., does not apply. It may be stated here that defendant 5 auction-purchaser on 13th February 1914 and this sale was confirmed on 18th March 1914. He did not however take possession through Court. It is alleged in the plaint, as mentioned already, that defendant 5 refrained from taking possession on account of the entreaties of defendants 1 and 2 and that defendants 1 and 2 were thereafter allowed to remain in possession of the lands by license on the part of the plaintiff's vendor. It is contended that in these circumstances it must be held that defendant 5 was in constructive possession and that the actual possession of defendants 1 and 2 was that of licensees. The dispossession occurred when, after their purchase, the plaintiffs sought to take actual possession and were resisted by defendants 1 and 2. It is contended that in these circumstances it is not a matter under S. 47, Civil P. C. and that properly speaking it is a suit which comes under Art. 142, Lim. Act. In reply to this it is argued that the law requires that symbolical possession should be taken to avoid the bar of limitation and the fact that defendant 5 actually did not take symbolical possession does not operate in his favour. Under O. 21, R. 95, Civil P.C., however, it is not necessary that in every case delivery of possession of the property must be taken through Court. Under that rule where the immovable property sold is in the occupancy of the judgment-debtor and the purchaser applies, the Court is to order delivery to be given to the purchaser. It does not follow that in every case the purchaser has no choice but is bound to apply for delivery of possession. It is possible that by an amicable arrangement, possession is given up by the judgment-debtor, and in such a case the law does not require for the purpose of limitation that the auction-purchaser must proceed by way of application under R. 95. Whether in the present case, defendants 1 and 2 were in possession as licensees is a question of fact. It may be mentioned that in para. 7 of the written statement the allegation in para. 4 of the plaint is not exactly traversed but on the other hand some sort of amicable arrangement with the auction-purchaser is alleged. The trial Court did not go into the question as to whether this happened in fact and if this allegation of fact on the part of the plaintiffs is proved, it would follow that defendant 5 was in possession through defendants 1 and 2 as his licensees, and therefore, the relief asked for by the plaintiffs cannot be said to be one which should properly be a subject-matter of an application under S. 47, Civil P. C. It is, therefore, necessary that the case should be remanded to the trial Court for decision on the question of fact which is referred to above. If it is decided that defendant 5 was in possession through defendants 1 and 2 as his licensees, then the suit would be governed by Art. 142, Lim. Act, and it would be within time. In that case the Court should proceed to try the suit on merits. If on the other hand, it is found that defendant 5 was not in possession then Art. 142 would not apply. I may mention here that if S. 47, Civil P. C., does not apply, then the plaintiffs would be entitled to the benefit also of Arts. 136 and 138, Lim. Act, and even then the suit would be within time. On this point, see the decision in *Sati Prosad Sen* v. *Jogesh Chandra Sen* (1).

(1) [1904] 31 Cal. 681=8 C. W. N. 476 (F.B.).

If, however, it is found that defendant 5 was not in possession, as stated above, then the question would be whether S. 47, Civil P. C., should apply. On behalf of the appellants it is contended that S. 47 would not apply, because the plaintiffs being purchasers on a private kabala from defendant 5, could not be his representatives-in-interest within the meaning of S. 47, Civil P. C. In support of this I am referred to *Bhagwati* v. *Banwari Lal* (2), and particularly to the remarks reported at p. 99. In the course of his judgment, Banerji, J., observes as follows:

"In the present case the plaintiff cannot at all be regarded as the decree-holder. The decree itself was never assigned to her. It was the property sold by auction which was transferred to her by gift by the auction purchaser. Under that transfer she acquired no interest in the decree itself and in no sense can it be said that she is the holder of the decree or the representative-in-interest of the decree-holder *qua* the decree."

Stress is laid on this passage as laying down the rule that a private transferee from a decree-holder auction-purchaser is not his representative-in-interest. In that case, however, the question that was raised was something entirely different from that in the present case. The question was whether a suit by the auction purchaser or his representative-in-interest against the judgment-debtor or his representative-in-interest for possession of the property sold was barred by the provision of S. 244, Civil P. C. The remarks, on which stress is laid, were made in consideration of a decree which was one for delivery of possession and as bearing on the question whether the private transferee was in the position of the decree-holder auction-purchaser. Those remarks may not exactly apply to the point for determination here. On the other hand the case *Sandhu Taraganar* v *Hussain Sahib* (3), directly decided that a private purchaser from the heirs of a decree-holder auction-purchaser was a party who stood in the shoes of the latter for the purposes of an application under S. 244, Civil P. C. This case considered and followed an earlier case: *Ishan Chandra Sircar* v. *Beni Madhav Sircar* (4). In this latter case the term "representative" was explained as including the purchaser and the test that was laid down was whether he would be bound by the decree. It is pointed out by the learned advocate for the respondents that the present plaintiffs, having purchased from the decree-holder auction-purchaser, cannot fail to be bound by the decree for possession, and this follows from the decision in the *Madras* case referred to above, which has not been dissented from in any case and which is to be read along with the decision of the Full Bench in *Kailash Chandra Tarafdar* v. *Gopal Chandra Poddar* (5). There it was decided that the question as to delivery of possession under O. 21, R. 95, comes under S. 47 of the Code. It follows from these decisions that if it is found that defendant 5 was not in actual possession through defendant 1 and 2 as his licensees, then the plaintiffs being his representatives-in-interest, a separate suit would be barred. The plaintiff's only remedy would be by application under S. 47 and that must be held to be barred by reason of Art. 181, Lim. Act, as decided by the learned Subordinate Judge.

The result is that I remand the case to the trial Court for determination of the question of fact which is referred to above; and if this question is decided in favour of the plaintiffs, the suit will be heard on merits. Otherwise the suit will stand dismissed with costs. As in the Court of appeal below the question as to the applicability of Art. 142, Lim. Act, was not raised, the costs of this appeal will abide the result. The appeal is allowed on these terms.

M.N./R.K. *Case remanded.*

(2) [1909] 31 All. 82=1 I.C. 416 (F.B.).
(3) [1904] 28 Mad. 87=14 M.L.J. 474.
(4) [1897] 24 Cal. 62=1 C.W.N. 36 (F.B.).
(5) A.I.R. 1926 Cal. 798=95 I.C. 494=53 Cal. 781 (F.B.).

A. I. R. 1930 Calcutta 588

MUKERJI AND GUHA, JJ.

Rajani Kanta Saha and *others* — Defendants—Appellants.

v.

Arjun Chandra Chakravarty—Plaintiff—Respondent.

Appeal No. 198 of 1929, Decided on 15th January 1930, from appellate order of Addl. Sub-Judge, Zillah Jessore, D/- 14th December 1928.

Civil P. C., S. 11—Previous suit as against trespassers—Defendants proving possession as tenants — Subsequent suit as against

tenants—Dismissal of previous suit is no bar to subsequent suit.

A previous suit for possession against the defendants as trespassers was dismissed as it was found that the defendants were in possession for more than 12 years as tenants. A subsequent suit after giving the requisite notice was brought against the tenants.

Held: that the legal relation put forward in the subsequent suit being different from what was alleged in the previous one the subsequent suit was not barred because it could not be said of any matter that it ought to have been set up as a ground of attack in the former suit if its introduction would have been incongruous to the matter of that suit: 29 *All.* 331 (*P. C.*) and 35 *All.* 227 (*P. C.*), *Ref.*

[P 590 C 1]

Gopal Chunder Das and *Provas Chandra Chatterjee* for *Bhuban Mohan Saha* — for Appellants.

Hemendra Chandra Sen and *Satyendra Chunder Sen* — for Respondent.

Judgment. — The respondent as plaintiff instituted a suit against the appellants as defendants for ejecting the latter on declaration of his own title on the following allegations that the lands were purchased at a rent-sale by the landlords in execution of a decree for rent obtained by them against one Bishun Charan Das and others and that the landlords took symbolical possession after such purchase and thereafter leased the same out to the respondent but when the respondent went to take possession he was resisted by the appellants who had no title. The appellants in their defence alleged that they had been in possession for many years as occupancy ryots under the tenure-holders and that the plaintiff himself had recognized them as such. This suit was dismissed. The judgments of the trial Court and of the appellate Court in that suit are not very clear but it appears to have been held by the latter Court that though the recognition had not been proved the respondent or his lessor had never been in possession, and that the appellants had been in possession for over 12 years and so the suit was barred by limitation.

The respondent then instituted the present suit with the same prayer but this time alleging that the appellants were under-ryots and professing to have served notices on them under S. 49, Bengal Tenancy Act. The trial Court held, on a preliminary issue, that the suit was barred by res judicata in view of the earlier decision aforesaid. On appeal by the respondent the Subordinate Judge had held that the suit is not so barred and has remanded the suit for trial on the other issues. Hence the present appeal.

The decision of the Subordinate Judge has been assailed upon two broad grounds, being the grounds on which the Munsiff rested his decision. They are first, that a prayer for declaration of title such as there was in the previous suit not having been granted should be deemed to have been refused under Expln. 5, S. 11 of the Code and so the present suit is barred and second, the present suit is also barred because of the principle of constructive res judicata as enunciated in Expln. 4 to that section.

Now on a perusal of the judgments of the two Courts in the previous suit it is quite clear that the plaintiff's title under the lease was never disputed and was not put in issue, and therefore, was not a matter on which any adjudication was called for. It is true that the suit was dismissed on the ground of limitation, but that only meant that the defendants were in occupation as tenants which was the only right they claimed well over 12 years. The declaration of title was asked for on the footing of the defendants being trespassers. But once the defendants asserted only a tenancy right and in this case they went further and pleaded recognition by the plaintiff, there was no necessity for the Court to go into the question of the plaintiff's title. It may be mentioned that it is only by a form of pleading peculiar to this country that a declaration of title as ancillary to the relief for possession is generally sought for. The silence of the decree on the question of the plaintiff's title, in view of the pleadings, cannot, in our judgment be construed as negativing the plaintiff's title which was admitted.

Then, as regards constructive res judicata. The causes of action in the two suits are entirely different. At the time of the first suit the cause of action on which the present suit was based did not come into existence and so in no view can it be said that the two causes of action could be joined

together to form the foundation for relief in the previous suit. Even in cases in which the plaintiff might have made the second line of attack an alternative basis for his prayer for relief as to khas possession, the question always remains, whether he ought to have done so, for the words of the explanation are "might" and "ought." There is abundant authority for the view that where the legal relation put forward in the subsequent suit is different from what was alleged in the previous one the subsequent suit is not barred because it is clear that it cannot be said of any matter that it ought to have been set up as a ground of attack in the former suit if its introduction would have been incongruous to the matter of that suit. Unless it can be said that it was obligatory on the plaintiff to adopt that course the principle of constructive res judicata cannot apply: *Deputy Commissioner of Kheri* v. *Khanjan Singh* (1), *Soni Lal* v. *Kanhaiya Lal* (2). Where a plaintiff sues for khas possession against a defendant alleging trespass, it is hardly obligatory on him to plead in the alternative that the defendant is a tenant; the two are certainly inconsistent pleas. There is no provision of law which makes it obligatory on a plaintiff to unite the two causes of action, even if such union is permissible under the law.

The result is that in our judgment the present suit is not barred and the Subordinate Judge's order is right. The appeal is accordingly dismissed with costs two gold mohurs.

V.B./R.K. *Appeal dismissed.*

(1) [1907] 29 All. 331=10 C. C. 117=34 I. A. 72 (P. C.).

(2) [1913] 35 All. 227=19 I. C. 291=40 I. A. 74 (P. C.).

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* A. I. R. 1930 Calcutta 590

MUKERJI AND GUHA, JJ.

Ramesh Chandra Sil and *another*—Appellants.

v.

Charu Chandra Mohuri and *others*—Respondents.

Appeal No. 190 of 1923, Decided on 6th December 1929, from original order of Dist. Judge, Chittagong, D/- 14th February 1928.

*** (a) Provincial Insolvency Act, S. 17—Application by creditor for debtor being adjudicated insolvent—Debtor dying before adjudication — Proceedings can continue after latter's death in presence of heirs.**

Under S. 17 an application by a debtor or a creditor for adjudicating himself an insolvent filed while he was alive can be continued and adjudicated even after his death.

A creditor made an application for a debtor being declared an insolvent and the debtor died before the adjudication. The Court ordered the proceedings to be continued in presence of the heirs of the deceased who were to be brought on record for the purpose of realization and distribution of the debtor's assets.

Held: that under S. 17 the order of the Court was a competent order: *A. I. R.* 1928 *Mad.* 476 and *A. I. R.* 1928 *Mad.* 480, *Rel. on.* [P 591 C 1]

(b) Provincial Insolvency Act, S. 75—Application by creditor for declaring debtor insolvent—Debtor dying before adjudication—Court ordering proceeding to continue after bringing debtors' heirs on record—Whether order is appealable is doubtful even though leave is obtained under S. 75(3)—Question should be decided in reference to Civil P. C.

Quaere: Where a creditor makes an application for a debtor being declared insolvent and the debtor dies before the adjudication and the Judge orders the proceedings to be continued in presence of the heirs of the deceased who are to be brought on record for the purpose of realization and distribution of the debtor's assets, it is a question whether an appeal lies from such interlocutory order, after leave has been obtained under S. 75 (3). In deciding the question whether an appeal should or should not be held maintainable even though leave of the Court is obtained under S. 75 (3) is to be determined with reference to the Civil Procedure Code. [P 590 C 2; P 591 C 1]

Nripendra Chandra Das—for Appellants.

Narendra Kumar Das—for Respondents.

Judgment.—This appeal has been preferred from an order passed by the District Judge of Chittagong on 14th February 1928 by which he ordered the heirs of one Hargobinda Sil against whom a petition had been presented for declaring him an insolvent to be brought on the record as necessary parties for the limited purpose of being present for the realization and distribution of the property of the debtor. The respondents urged that no appeal is maintainable from this order because the order in its nature is an interlocutory one and should not be regarded as one from which an appeal is allowed under the law. Now, in deciding the question as to whether an appeal should or should not be held maintainable even though the leave of the Court has been obtained under S. 75, sub-S. (3), Prov. Insol. Act, the provisions of the Civil Procedure

Code may well be looked into as a guide for the determination of the question. That has been held in the case of *Munnu Lal* v. *Kunj Bihari Lal* (1). As however leave has been obtained and the matter is not so very clear we have gone into the merits of the case and we are of opinion that, even if an appeal lay under the law and the present appeal was maintainable, on the merits the appeal must fail. On the presentation of the application against Hargobinda Sil an interim receiver was appointed. No order for adjudication was made, but Hargobinda died in the meantime. Upon that all that the learned Judge did was not to make an order for substitution of the heirs of Hargobinda in his place, but to hold that the proceedings should be continued in their presence in so far as it was necessary for the realization and distribution of the property of the debtor. It has been contended before us that S. 17, Prov. Insol. Act, under which the aforesaid order was passed by the learned Judge, would not warrant the making of such an order until and unless an order of adjudication was passed. This contention was considered in two recent decisions of the Madras High Court, namely *Venkatarama Aiyar* v. *The Official Receiver, Tinnevelly* (2) and *Ramathai Anni* v. *Kanniappa Mudaliar* (3). In these cases it has been held that under S. 17, Prov. Insol. Act, an application by a debtor or a creditor for adjudicating himself as an insolvent filed while he he was alive can be continued and adjudication made even after his death. We are of opinion that the reasons given by the learned Judges of the Madras High Court in these two decisions are sound, and following them we hold that it was well within the competency of the learned Judge to make the order as he did. Indeed it seems to us that when the proceedings were to be continued and it was not necessary that they should be dropped, it is only right that they should go on in the presence of the heirs of Hargobinda Sil in so far as such presence was necessary for the continuance of the proceedings for the purpose of realization and distribution of the property of the debtor.

We are of opinion that on the merits the appeal, even if maintainable, fails, and we accordingly dismiss it with costs, hearing fee being assesssed at one gold mohur.

R.M./R.K. *Appeal dismissed.*

(1) A. I. R. 1922 All. 206=67 I. C. 317=44 All. 605.
(2) A. I. R. 1928 Mad. 476=109 I. C. 94=51 Mad. 944.
(3) A. I. R. 1928 Mad. 490=110 I. C. 167=51 Mad. 495.

✻ A. I. R. 1930 Calcutta 591

GRAHAM AND MITTER, JJ.

Chainta Dasya—Plaintiff—Appellant.

v.

Bhalku Das—Defendant—Respondent.

Appeal No. 2690 of 1927, Decided on 17th March 1930, from appellate decree of Offg. Sub-Judge, Jalpaiguri, D/- 25th July 1927.

✻ (a) Pardanashin Lady—Rule regarding transaction by pardanashin woman equally applicable to illiterate and ignorant woman though not pardanashin.

There is no reason why a rule which is applicable to pardanashin ladies on the ground of their ignorance and illiteracy should be restricted to that class only and should not apply to the case of a poor woman who is equally ignorant and illiterate and is not pardanashin, simply because she does not belong to that class. If that view of the matter were adopted the effect clearly would be to confer an unfair advantage upon rich women as compared with poor women. The object of the rule of law is to protect the weak and helpless and it should not be restricted to a particular class of the community. Consequently even in a case of woman who is outside the regular pardanashin class, it is for those who deal with her to establish that she had the capacity of understanding that she entered into the transaction voluntarily and with full knowledge and import of what the transaction meant: 23 *All.* 137 (*P. C.*), *Rel. on.* [P 592 C 2]

(b) Civil P. C., S. 100—Question of fact—Finality attaching to question of fact can be disturbed in second appeal if onus wrongly put on parties—Civil P. C., S. 103.

Although the findings of fact of the lower appellate Court are findings conclusive on the Court of second appeal, where that Court misplaces the burden of proof on a party, it is permissible for the Court of second appeal to examine the finding which is not binding on it because of wrong onus placed on a party: *A. I. R.* 1929 *P. C.* 13, *Rel. on.* [P 592 C 1, 2]

Jitendra Kumar Sen Gupta—for Appellant.

Prafulla Chandra Nag — for Respondent.

Graham, J.—This is an appeal by the plaintiff from a decision of the Subordinate Judge of Jalpaiguri reversing a decision of the Munsif, 2nd Court, Jalpaiguri, and arises out of a suit brought by the plaintiff to set aside a kabala on the ground that it was ob-

tained by fraud, misrepresentation and undue influence. The plaintiff was a tenant of the defendant and her case was that she was tricked into executing a document which she believed to be a mortgage bond on a representation made by the defendant that he had got a decree against her for Rs. 500 and that upon that pretext the document was executed by her. It proved however eventually to be a kabala whereby she disposed of her entire properties including her homestead. The defence was that the kabala in question was executed for good consideration which consisted of: (1) a debt of Rs. 117 due in respect of two bonds; (2) a debt for arrears of rent and (3) a sum of Rs. 112 odd in cash. The trial Court upon a consideration of the evidence and all the circumstances of the case came to the conclusion that no consideration had been paid to the plaintiff and that she had been tricked into executing the kabala under the belief that what she was executing was a usufructuary mortgage with the object of discharging her liabilities.

The Munsif in arriving at his decision attached a good deal of importance to the fact that the plaintiff was an illiterate woman of low mentality and also to the fact that in carrying out the transaction she had not had the advice or assistance of any relative or of any person who could give her independent or intelligent advice. The evidence establishes that her husband was away at the time and that her son-in-law who might have been present was in fact not present and knew nothing about the transaction. The Munsif therefore decreed the suit with costs. The defendant then appealed to the District Court and the learned Subordinate Judge who heard the appeal reversed the findings of the trial Court and held that the sale deed was not taken by fraud, it was not liable to be declared as void and nugatory and that it was executed for good consideration. This appears to be a finding of fact with which we are not at liberty to interfere in second appeal unless it can be shown that the finding has been arrived at through some error of law. On the whole the conclusion at which I have arrived, speaking for myself, is that the finding of the lower appellate Court is vitiated by what appears to me to be a fundamental error in regard to the established rule of law relating to transactions of pardanashin women. The learned Subordinate Judge has observed in his judgment:

> "She was not a pardanashin lady and she was bound to prove all these allegations of fraud and misrepresentation. This in my opinion she has failed to do."

Further on he says:

> "So the whole case of the plaintiff rests upon her own uncorroborated testimony. In the circumstances her suit could not have been decreed even if the defendant had not adduced any rebutting evidence."

The rule of law so far as pardanashin women is concerned is well known and has been clearly laid down in many decisions of the Privy Council. It is true that most of those decisions relate to the case of pardanashin ladies. We have not been referred to any case in which the principle has been extended to the case of other women who do not come within that class; but that does not seem to be any reason why a rule which is applicable to pardanashin ladies on the ground of their ignorance and illiteracy should be restricted to that class only and should not apply to the case of a poor woman who is equally ignorant and illiterate and is not pardanashin simply because she does not belong to that class. If the view of the matter were adopted the effect clearly would be to confer an unfair advantage upon rich women as compared with poor women. The object of the rule of law is to protect the weak and helpless, and it should not, in my judgment, be restricted to a particular class of the community. It seems to me that what the learned Subordinate Judge has done amounts in a manner to misplacing the onus of proof. The plaintiff proved certain facts, for example, that her husband was away and her son-in-law also was not present at the time of the transaction, that she had no independent advice, that she was not in such need of money at the time, as would necessitate the sale of her entire land; further she herself deposed that she was given to understand that the deed in question was a usufructuary mortgage and that she had no idea that she was selling the land outright. These facts, it seems to me, were sufficient to discharge the onus which lay upon the

plaintiff and shift on to the defendant the onus of satisfying the Court that the nature of the transaction had been duly explained and properly understood by the plaintiff. That in my judgment is the point of view from which the evidence should have been examined.

The result is that the decree of the lower appellate Court is set aside and the case is sent back to that Court in order that the appeal may be reheard and decided according to law in the light of the observation made above. Costs will abide the result.

Mitter, J.—I agree with my learned brother that this appeal should be allowed. It seems to me that the lower appellate Court in arriving at a conclusion of facts which cannot be assailed in second appeal has misplaced the burden of proof on the plaintiff and that consequently it is permissible to us in second appeal to examine the findings of fact as the findings of fact are not binding on us by reason of the onus having been wrongly placed on the plaintiff. That this is the true legal position has been pointed out by their Lordships of the Judicial Committee in the case of *Peddi Reddi Jogi Reddi* v. *Chinnabbi Reddi* (1). Their Lordships say this:

"Their Lordships would further observe that all the Courts below seem to have thrown the onus upon the appellant of proving that the properties he claimed were his own, instead of placing it, as it should be, upon the plaintiff. It therefore appears to their Lordships that there is no question of fact to be found that can be binding upon an appellate Court on a second appeal and that it is necessary for them to consider what is the true position."

It appears in this case that the suit was brought by the plaintiff to set aside a deed of sale alleged to have been executed by her on the 2nd Falgoon 1331 B. S. on the ground that the said deed was obtained by fraud, misrepresentation and undue influence. It appears that the appellant is a tenant of the defendant-respondent and her case is that she was lured into executing this document in the belief that she was really executing a deed of mortgage in consideration of certain debts which owing to the landlord both on account of arrears of rent and on account of money advanced to her. It appears and it is not disputed that the plaintiff is an illiterate village woman. She is not in the strict sense of the term pardanashin woman and the question arises whether the same protection which is thrown round a transaction entered into with a pardanashin woman should be extended to the plaintiff in the present case. It is true that outside the class of regular pardanashin women it must depend in each case on the character and position of the individual woman, whether those who deal with her are or are not bound to take special precautions that her action should be intelligent and voluntary and to prove that it was so in case of dispute. That was laid down by the Judicial Committee of the Privy Council in the case of *Hodges* v. *The Delhi and London Bank, Limited* (2). So even in the case of a woman who is outside the regular pardanashin class it is for those who lived with her to establish that she had the capacity of understanding the transaction that was entered into and that she entered into the transaction voluntarily and with full knowledge and import of what the transaction meant. The lower appellate Court found that she had stated that in the absence of her husband and son-in-law she was led to execute this document which had the effect of transferring all that she had in this world to the present defendant; she has given her evidence and the lower appellate Court says that the whole case rests upon her own uncorroborated testimony and therefore in that view of the lower appellate Court her suit could not have been decreed even if the defendant had not adduced any rebutting evidence. This seems to me to be an inversion of the rule with regard to the burden of proof. The first Court had an opportunity of seeing her and the burden was certainly on the defendant to establish that she understood the true import of the transaction; in other words, that she understood that she was parting for all time to come with all that she had in order to pay off certain debts which she owed to the present defendant. The lower appellate Court, as my learned brother has pointed out, has misca:st the burden of proof and the case should therefore be sent back in order that the appeal may be reheard after pro-

(1) A. I. R. 1929 P. C. 13=114 I. C. 5=56 I. A. 6=52 Mad. 83 (P. C.).

(2) [1900] 23 All. 137=27 I. A. 168=7 Sar. 767 (P. C.).

perly placing the burden of proof on the defendant to show that she understood the true import of transaction.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 594

PANCKRIDGE, J.

Preotama Devi—Petitioner.

v.

Chandra Kumar Ghosh and *another*—Opposite Party.

Civil Revn. Jurisdiction No. 1512 of 1929, Decided on 12th May 1930, from order of Dist. Judge, Dacca.

Guardians and Wards Act, S. 35—Court has discretion to order assignment in favour of transferee of ward who has attained majority.

The words "as trustee for the ward" in S. 35 do not prevent the Court's ordering an assignment in favour of the transferee of a ward who has attained majority. The exercise of the jurisdiction to assign is undoubtedly discretionary ; 30 *Bom.* 164, *Ref.* [P 594 C 2]

Naresh Chandra Sen Gupta and *Ramani Mohan Chatterjee* — for Petitioner.

Ramgati Sarkar—for Opposite Party.

Judgment.—This is a rule issued by my learned brother S. K. Ghose, J., calling on the opposite party to show cause why the order passed by the learned District Judge of Dacca on 31st July 1929 rejecting the petitioner's application for the assignment of a bond under S. 35, Guardians and Wards Act 1890 should not be set aside. It seems that one Rajani Kanta Ghose was in 1898 appointed guardian of the persons and properties of two minors and on his appointment one Chandra Kumar Ghose executed a bond to the extent of Rs. 1,000 for the due performance of the guardian's duty to account for the property of the wards. One ward died while still a minor. The other attained majority in 1915, and thereafter assigned all his property including his right to recover any claim he might have against the guardian to the petitioner and one Hemlata Devi who subsequently transferred her interest under the aforesaid assignment to her co-assignee. The petitioner thereafter instituted an account suit against the guardian which was decreed on appeal. On accounts being taken the guardian was ordered to pay a decretal sum of Rs. 2,910 and Rs. 1,434-13-3 as costs. The greater part of this decree remains unsatisfied. An application for assignment of the surety bond to the petitioner was made to the District Judge and it was opposed by the legal representatives of the deceased surety and rejected. I am disposed to think that the form of the application before the District Judge was misconceived in that the petitioner thereby prayed that the bond should be assigned for realization of the sum of Rs. 1,000 in execution of the final decree passed in the account suit.

Before me the learned advocate for the petitioner conceded that the assignment of the bond will not entitle the assignee to execute the decree against the estate of the deceased surety without instituting a fresh suit based on the bond. Since this concession the opposition to the application has been less vigorous although it has in no sense been withdrawn. Looking at the substance of the matter I think the learned Judge erred in refusing the application for assignment. He says that a purchaser from a ward cannot be held to have an assignable interest as trustee of the ward or to be a person seeking to recover on his behalf. The cases show that the Court has jurisdiction to assign the bond to the ward himself on attainment of majority. Moreover in *Ganpat Tatia* v. *Anna* (1) Jenkins, C. J., and Aston, J., held that the District Judge was wrong in holding that he had no power to assign the bond in favour of the heir of a deceased ward. I do not think that the words "as trustee for the ward" in S. 35 prevent the Court's ordering an assignment in favour of the transferee of a ward who has attained majority. The exercise of the jurisdiction to assign is undoubtedly discretionary, but I do not think that any useful purpose would be served by my remanding the application. The learned Judge does indeed say that it would not be equitable to allow the petitioner to proceed against the representative of the surety. However he gives no reason for taking this view nor has any been advanced before me. I make the rule absolute and I direct that the surety bond be assigned in favour of the petitioner.

Of course these proceedings will in no way operate to the prejudice of any defence the surety's representatives may

(1) [1903] 30 Bom. 164.

have in a suit brought on the bond. As to costs, in view of the form of the application in the District Judge's Court I do not think that in any event the opposite party should be compelled to pay the petitioner's costs of the rule. If a suit be instituted within three months of the assignment of the bond, the costs of the opposite party will be dealt with by the Court disposing of the suit. If no suit be instituted within such period the petitioner will pay the opposite party's costs of this rule as well as her own. I assess the hearing-fee at two gold mohurs.

M.N./R.K. *Rule made absolute.*

A. I. R. 1930 Calcutta 595

SUHRAWARDY AND COSTELLO, JJ.

Benod Kumar Roy Chowdhury and *others*—Plaintiffs—Appellants.

v.

Ganga Charan Mestari and *others*—Defendants—Respondents.

Appeal No. 889 of 1928, Decided on 11th March 1930, from appellate decree of 2nd Sub-Judge, Backerganj, D/- 28th November 1927.

(a) Bengal Tenancy Act (8 of 1885), S. 52—Scope.

Section 52 speaks of additional rent or of reduction of rent in respect of a particular area for which rent has been previously paid and it says that additional rent is to be paid if it is proved that such excess is due to the addition to the tenure or holding for which rent was not being previously paid. [P 595 C 2]

(b) Bengal Tenancy Act (8 of 1885), S. 52—"Area"—Meaning of "area" and scope of section indicated.

The word "area" in S. 52 clearly indicates a definite quantity of land. A share in a plot cannot be brought within the significance of that word; and the subsequent use of "tenure" or "holding" shows that the legislature had in contemplation an entire plot of land within definite boundaries and not an undivided share. The enhancement under S. 52 can accordingly be claimed only where it is found that the land in the possession of the tenant is in excess of a definite quantity of land for which he was paying rent previously: 40 *I.C.* 535, *Ref.* [P 595 C 2; P 596 C 1]

(c) Bengal Tenancy Act (8 of 1885), S. 52—Applicability.

Section 52 does not apply to a tenancy composed of some definite plots and an undivided share in another plot. [P 596 C 1]

(d) Bengal Tenancy Act (8 of 1885), Ss. 52 and 105—Enhancement or settlement of fair and equitable rent cannot be claimed if tenancy is composed of undivided share.

The landlord may claim under S. 105 enhancement or settlement of fair and equitable rent under S. 52, but it seems that if the tenancy in respect of which additional rent is claimed under S. 52 is composed of an undivided share the claim will not be admitted under S. 105 also. [P 596 C 1]

(e) Landlord and Tenant—Kabuliat in favour of one cosharer—Other cosharers cannot take advantage of it when not executed in their favour, to sue for enhancement of rent.

If a tenant enters into a contract with a cosharer landlord, the other cosharers have no right to take advantage of it and sue for enhancement on the basis of that kabuliat though it is not executed in their favour: 7 *C.W.N.* 670, *Dist.* [P 596 C 1, 2]

Abinash Chandra Guha and *Bhupendra Nath Das*—for Appellants.

Mukunda Behari Mullik—for Respondent.

Biraj Mohan Majumdar—for Dy. Registrar.

Judgment.—This appeal arises out of a suit brought by the plaintiff landlord for enhancement of rent under Ss. 30 (b) and 52, Ben. Ten. Act. The tenancy covered by khatian 34 mouzah Debidaskuthi consists of nine entire plots and an undivided 10 annas eight pies' share of another plot, the five annas four pies' share of which appertains to a different khatian. Both the Courts below have held that the tenancy in the present case is not a holding and therefore its rent cannot be enhanced either under S. 30 (b) or S. 52, Ben. Ten. Act. It is conceded before us that the view of the Courts below in so far as it relates to S. 30 (b), cannot be assailed inasmuch as that section speaks of a holding; and a holding as defined in the Act before its recent amendment did not include an undivided share in a plot. But it is argued that S. 52 does not necessarily refer to a holding and that the rent of a tenancy even if it consists of an undivided share of a plot may be brought under that section. This argument also must fail. S. 52 speaks of additional rent or of reduction of rent in respect of a particular area for which rent has been previously paid and it says that additional rent is to be paid if it is proved that such excess is due to the addition to the tenure or holding for which rent was not being previously paid. The word "area" in that section clearly indicates a definite quantity of land. A share in a plot cannot be brought within the singnificance of that word; and the subsequent use of "tenure" or "holding" shows that the legislature had in contemplation an entire plot of land within definite

boundaries and not an undivided share. The enhancement under S. 52 can accordingly be claimed only where it is found that the land in the possession of the tenant is in excess of a definite quantity of land for which he was paying rent previously. This view is supported by the decision of the Patna High Court in the case of *Harnandan Rai* v. *Kesho Prosad Singh* (1) the judgment of which is to be found in (1) the facts of which are exactly similar to the present case. I do not wish to lay down in this case that a tenure within the meaning of S. 52 may not be composed of undivided shares though the word "area" used in the section suggests the view. The tenancy involved in the present suit is a holding and I have no doubt in my mind that a holding cannot be composed of an undivided share and that S. 52 does not apply to a tenancy composed of some definite plots and an undivided share in another plot. Some difficulty is felt in construing S. 52 along with S. 105 Ben. Ten. Act. In S. 105 the word usad is "land" and it has sometimes been interpreted as including an undivided share in a plot. The landlord may claim under S. 105 enhancement or settlement of fair and equitable rent under S. 52 but it seems that if the tenancy in respect of which additional rent is claimed under S. 52 is composed of an undivided share the claim will not be admitted under S. 105 also.

It is next argued that the present suit is based not upon S. 52 alone but upon the contract between the parties. It is said that in the kabuliyat executed by the defendants in favour of the 10 annas cosharer landlords they agreed to pay additional rent if in future the lands in their possession were found to be in excess of what were mentioned in the kabuliyats. The kabuliyat has not been placed before us and we do not know its exact terms. But the present suit is by the 16 annas landlord. So far as the 6 annas landlords are concerned, there is no contract between them and the defendants and therefore as has been rightly observed by the trial Court the case must fall under 52, Ben. Ten. Act. The learned advocate for the appellants argues that if a tenant enters into a contract like the present with a cosharer landlord, the other cosharers have the right to take advantage of it and may sue for enhancement on the basis of that kabuliyat though it was not executed in their favour. In support of this contention, which on the face of it seems to be illogical, he relies upon the decision in the case of *Gobind Chandra Pal* v. *Hamidulla Bhuian* (2). The facts of that case were peculiar. The tenant executed a kabuliyat in favour of 5 annas cosharer landlord in respect of not his share in the holding, but of a definite quantity of land representing his share and he stipulated that if the land in his possession was found to be in excess of the quantity mentioned in the kabuliyat as representing his share, the tenant would be liable to additional rent. A suit was brought by the landlord in whose favour the kabuliyat was executed. The learned Judges forming the Bench, who heard the appeal, originally differed in opinion, one of them being of opinion that in spite of the contract such a suit would not lie under S. 188, Ben. Ten. Act; the other learned Judge was of opinion that the suit as based upon the contract between the parties was rightly constituted. The matter came up before Prinsep, J. as the third Judge and that learned Judge held that the matter was outside the scope of the Bengal Tenancy Act altogether and came within the domain of the law of contract. That case accordingly has no bearing upon the question which we are asked to consider in this case. The result is that we agree with the view taken by the Courts below and dismiss the appeal with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1917] 40 I. C. 585.

(2) [1903] 7 C. W. N. 670.

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* A. I. R. 1930 Calcutta 596

S. K. GHOSE, J.

Meherulla—Defendant—Petitioner.

v.

Sariatulla — Plaintiff — Opposite Party.

Civil Revn. No. 803 of 1929, Decided on 20th November 1929, against judgment and decree of Sm. C. C., Judge, D/- 18th March 1929.

*** (a) Contract Act, S. 23—Agreement by person bailed to indemnify person standing bail is illegal and surety cannot recover amount paid by him—Contract Act, S. 145.**

A person standing bail for an accused in

criminal case and forfeiting the bail bond on account of the laches of the accused is not entitled to recover from him the amount so paid on any express or implied contract, such an agreement being illegal as opposed to public policy : *Consolidated Exploration and Finance Co.* v. *Musgrave* ; (1900) 1 *Ch. D.* 37 ; 28 *I. C.* 560 and 56 *I. C.* 539, *Rel. on.* [P 597 C 2]

(b) Provincial Small Cause Courts Act, S. 25—Scope.

Where a decree is opposed to public policy it is not improper to interfere with it.

[P 598 C 1]

Priyanath Dutt—for Petitioner.

Birendra Kumar De— for Opposite Party.

Judgment.— The plaintiff opposite party brought a suit against the petitioner in the 3rd Court of the Munsif at Habiganj, exercising Small Cause Court powers, for the recovery of the sum of Rs. 100 with damages. The plaintiff's case was that he had executed a bail bond for Rs. 100 for the release of the petitioner from custody in a criminal case in which the latter was an accused and that the plaintiff had to pay the amount as the bail bond was forfeited on account of the laches of the petitioner. The defence inter alia was that the plaintiff was not legally entitled to recover the amount. The trial Court decreed the suit. Against that order the petitioner has obtained the present rule.

The trial Court has proceeded upon the view that there was an implied contract by the defendant to indemnify the plaintiff upon the bail bond. It is pointed out on the other side that the bail bond itself is not on the record. But I take it that it was properly proved, otherwise it takes away the very foundation of the case. It is admitted that there was no express contract and the point is whether the trial Court is correct in its view that there was an implied contract to indemnify the plaintiff and that on such implied contract the plaintiff is entitled to succeed. It is contended in support of the rule that there was no such implied contract and further that, even if there was an implied contract, it could not be legally enforced. Upon the terms of the surety bond, a copy of which has been produced, it may be said that there was an implied contract that the accused should duly appear on the date fixed for the hearing. But I do not think that the implication went any further and that there was an implied contract that the accused should either appear on the date fixed or pay the amount which his surety had to pay. It may be noticed here that the accused himself had also furnished a bail bond.

Upon the further question as to whether any such implied contract, upon which the lower Court has relied, is enforceable in law, authorities seem to be against the view taken by that Court. The law on the subject of contract is summarized as follows :

" Where the defendant in a criminal case has been ordered to find bail, a promise given either by him or by a third person to indemnify his surety against liability on his recognizances is illegal, because it deprives the public of the protection which the law affords for securing the appearance or good behaviour of the defendant ; Halsbury's Laws of England, Vol. 7, Art. 826, at p. 398."

In the case of *Consolidated Exploration and Finance Co.* v. *Musgrave* (1), it was held that any indemnity given to bail whether by the person bailed or another, is illegal. It is essential that the person giving bail should be interested in looking after the accused and, if necessary exercising the legal powers he has to prevent the accused from disappearing. The surety is bound to see that his principal obeys the order of the Court. But if the money for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed. Therefore, it is held that a contract like this is tainted with illegality. Following this rule it was held in *Prosanna Kumar Chakravarty* v. *Prokash Chandra Dutt* (2) and *Bhupati Chandra Nandy* v. *Golam Ehibar Chowdry* (3) that an agreement by a third party to indemnify a surety is illegal and cannot be enforced.

It is contended in behalf of the opposite party that although there may not be an express contract, still there may be an implied contract. But under S. 9, Contract Act, the difference between the promises express and implied

(1) [1900] 1 Ch. D. 37=69 L. J. Ch. 11=16 T. L. R. 13=81 L. T. [illegible]=48 W. R. 288=64 J. P. 89.
(2) [1915] 28 I. C. 560.
(3) 56 I. C. 539.

P. N. Das
Advocate High Court
Jammu & Kashmir

is that the former is made in words, while the latter is made otherwise than in words. It makes no difference whether the contract is express or implied. But it must be an agreement which is enforceable by law, otherwise it is no contract at all.

It is contended lastly by the learned advocate for the opposite party that since interference under S. 25, Provincial Small Cause Courts Act is discretionary it would not be proper to interfere with the decree in this case. But if the decree is opposed to public policy, it cannot be said that it would be improper to interfere with such decree. The equities of the case are also not entirely in favour of the opposite party as mentioned already. The accused himself is liable for his own bail bond and the plaintiff must be taken to have acted with full knowledge of his responsibilities.

Having regard to all these circumstances, it seems to me that the decree of the lower Court is not in accordance with law and it should be reversed. The rule is made absolute and the judgment and decree of the Small Cause Court Judge are set aside. The parties will bear their own costs.

R.M./R.K. *Rule made absolute.*

A. I. R. 1930 Calcutta 598

LORT-WILLIAMS, J.

In re Tarunchandra Ghosh — Applicant.

Ordinary Original Civil Jurisdiction Appln. Decided on 8th May 1929.

Guardians and Wards Act, S. 3—Original Side of High Court has jurisdiction to appoint guardian of person and property of minor—Letters Patent (Cal.) 1865, Cl. (17).

There is no restriction in the powers granted to either the Supreme Court or the High Court which limits the exercise of guardianship jurisdiction to the town or to European British subjects, and even if any such limitation exists, it does not apply where person who is outside the limits of ordinary original jurisdiction or who is not a European British subject desires to avail himself of the jurisdiction of the Court and there is no opposition thereto. 2 *Cal.* 357; 21 *Bom.* 137 and 2 *N. W. P. H. C. R.* 79, *Ref.* and 21 *Cal.* 206, *Dist.* [P 598 C 2]

J. C. Sett—for Applicant.

Judgment. — S. 3, Guardians and Wards Act, 1890, provides that nothing in this Act shall be construed to take away any power possessed by any High Court established under 24 and 25 Vict. By that statute High Courts were established in the place of the Supreme Courts and Sudder Courts, which had hitherto existed, and, under S. 9, it was provided that they should exercise all such powers as should be granted by Letters Patent and, save as by such Letters might be otherwise directed, the said High Courts should have and exercise all jurisdiction vested in any of the Courts so abolished, i. e., the Supreme and Sudder Courts. Under Cl. 17, Letters Patent, 1865, it was provided that the High Court should have the like power with respect to infants and others within the Bengal Division of the Presidency of Fort William as was vested in the said High Court immediately before the publication of those presents. The power therein referred to was contained in Cl. 16, Letters Patent, 1862, which ordained that the Court should have the same jurisdiction over infants as was then vested in the Supreme Court. The power vested in the Supreme Court was contained in the Charter establishing that Court, which gave that Court all the powers of the Court of Chancery, and by Cl. 25 thereof it was provided that the Supreme Court should be authorized to appoint guardians and keepers for infants and their estates according to the order observed in that part of Great Britain called England. There is no restriction, therefore, in the powers granted to either the Supreme Court or the High Court which limits the exercise of guardianship jurisdiction to the town of Calcutta or to European British subjects, and I am of opinion that, even if any such limitation exists, it does not apply, where the person who is outside the limits of the ordinary original jurisdiction or who is not a European British subject desires to avail himself of the jurisdiction of the Court and there is no opposition thereto.

The Court of Chancery has power to appoint a guardian on petition without suit and to appoint a guardian for an infant residing abroad. The Indian High Courts now exercise both these powers: *In the matter of Bittan* (1) and *In re, the Estate of H. G. Meakon* (2).

The only cases directly upon the point are *In re, Shannon* (3) in which it

(1) [1877] 2 Cal. 357.
(2) [1896] 21 Bom. 137.
(3) [1870] 2 N. W. P. H. C. R. 79.

was decided that the High Court had power to appoint a guardian, even when the minor resided outside and had no property within the limits of its ordinary original civil jurisdiction and the case of *In the matter of Srish Chunder Singh* (4) in which Sale, J. decided that he had no such power. In the latter case, however, the learned Judge arrived at this conclusion, for the sole reason, as he says in his judgment, that he was not aware of any instance in which the Court had exercised jurisdiction in the case of an infant residing outside the ordinary original civil jurisdiction and who was other than a European British subject. Moreover the facts of that case are distinguishable, because there were already in existence testamentary guardians whom the learned Judge was asked to displace, and the case was strongly contested by them. There is no opposition in this case, and I am satisfied that the Court has jurisdiction to make the order asked for.

v.B./R.K. *Application allowed.*

(4) [1893] 21 Cal. 206.

A. I. R. 1930 Calcutta 599

GRAHAM AND MITTER, JJ.

Khyarennessa Choudhurani and *another*—Plaintiffs—Appellants.

v.

Satya Bhanu Ghosal and *others*—Defendants—Respondents.

Appeal No. 1027 of 1927, Decided on 12th June 1929, from appellate decree of Addl. Dist. Judge, Tipperah, D/- 3rd January 1927.

(a) Bengal Public Demands Recovery Act (3 of 1913), S. 20—Sale of patni taluq not confirmed—Patni taluq sold under Regulation (8 of 1917), S. 14—Latter sale is not bad—Bengal Regulation (8 of 1919), S. 14.

If on the date of sale of patni taluq under S. 14 of the Regulation (8 of 1819) there is another order existing for the sale of the same property under Public Demands Recovery Act, unless this latter sale is confirmed thereby vesting the title in the purchaser, under S. 20 of the Public Demands Recovery Act, the sale under S. 14 of the Regulation is not bad, and passes good title to the purchaser: *A. I. R.* 1918 *P.C.* 159, and 15 *Cal.* 546 *Ref.* 12; *Cal.* 597, *Dist.* [P 599 C 2, & P 601 C 1]

(b) Bengal Regulation (8 of 1819), Ss. 8 and 10—Validity of notice.

As regards validity of notice S. 8 is to be read with S. 10: 20 *Cal.* 86. (*P. C.*), *Dist.* [P 602 C 1]

S. C. Basak and *Syed Nasim Ali*—for Appellants.

Brojolal Chakrabarty, *Surendra Nath Guha*, *Atul Chandra Gupta* and *Bhagirath Chandra Das*—for Respondents.

Mitter, J.—In this case the appellants who were the plaintiffs below challenge the validity of the sale of a patni taluq held under S. 14, Reg. 8 of 1819. The sale took place on 19th November 1923 for the arrears due for the first six months of the year 1330 B. S. and the patni taluq was purchased by Kalachand Roy, 2nd party defendant, now respondent. The patni which is held under the Zemindari of Kumar Satya Bhusan Ghosal and others who are the first party defendants belong to plaintiffs and pro forma defendants 11 to 21. Plaintiffs' share in the patni is seven annas and that of the pro forma defendants nine annas. The nine annas share holders have not joined with the plaintiffs in the suit to set aside the sale.

The Subordinate Judge of Tipperah who tried the suit has refused to set aside the sale and has dismissed plaintiffs' suit. On appeal to the learned Additional District Judge of Tipperah this decision has been affirmed. The plaintiffs have appealed to this Court.

There are four grounds upon which this appeal rests. We shall deal with the grounds in the order they were dealt with by the learned advocate for the appellants. The first ground taken is that at the date of the sale under the regulation there was in fact another order existing for the sale of the same property and that therefore nothing passed by the subsequent sale which is now in question. It appears that the estate of the first party defendants (the Ghosals) is under the managment of the Court of Wards. The Court of Wards under the certificate procedure as laid down in the Public Demands Recovery Act (3 of 1913) B. C., sold the patni in question on 29th October 1923 and the Court of Wards purchased the property for the nominal sum of Re. 1. The sale was for the arrears of patni rent of 1328 and 1329 B. S. Three days before this sale the Court of Wards presented to the Collector a petition with a statement of the balances of amount of rent for the sale of the patni taluq on the 1st Agrahayan 1330 under S. 8, Cl. 3,

Patni Regulation. In pursuance of these summary proceedings the patni was sold on 19th November 1923. On 28th November 1923 the certificate sale was set aside on the deposit by plaintiff 1 of the amount required to be deposited within 30 days of the date of sale. The certificate sale was therefore never confirmed or made absolute. It is argued, however, for the appellant that the certificate sale was a good sale until it was set aside on 28th November and therefore the sale of the patni under S. 14 on 19th November passed no title to the purchaser defendant. In support of this contention reliance has been placed on the decision of this Court in *Pran Gour Mazumdar* v. *Hemanta Kumari Debi*(1). We are of opinion that the principle of this decision cannot apply to the facts of the present case. The decision in the case cited rested on an application of the law as laid down in S. 316, Act 10 of 1879, before it was amended by Act 12, 1879. Under Act 10 of 1877 the title of the purchaser accrued from the date of the sale and not from the date of the confirmation of sale as was the case when the amending Act of 1879 was passed. Under the Public Demands Recovery Act the title to immovable property rests in the purchaser after the sale has become absolute when it relates back to the date of the sale. S. 20 (2), Public Demands Act, runs as follows:

"Where immovable property is sold in execution of a certificate, and such sale has become absolute, the purchaser's right, title and interest shall be deemed to have vested in him from the time the property is sold and not from the time when the sale becomes absolute."

It is clear from this that it is only when the sale becomes absolute that the property vests in the purchaser. But though the property does not vest in the purchaser until the sale has become absolute, when it does vest in him it shall be deemed to have vested on the sale becoming absolute from the time when it was sold. The provisions of S. 65, Civil P. C., may be compared with S. 20, Cl. (2), Public Demands Recovery Act, and we think that both under S. 65 and under S. 20 title does not vest in the purchaser until the sale is made absolute. In this case the sale was never confirmed and therefore title did not vest in the zamindar defendant on 29th October and consequently the sale in question at a subsequent date was a good one. In support of the view we take reference may be made to the decision of the Judicial Committee of the Privy Council in the case of *Jeuna Bahu* v. *Parmeswar* (2). Dealing with a contention of the kind raised by the first ground their Lordships, in agreement with the High Court, held that the second sale was not bad. The judgment of the High Court is to be found at *Jeuna Bahu* v. *Parmeshwar* (2). The following passage from the judgment of the High Court, to which our attention has been drawn by Mr. Gupta who appears for the respondents, may be usefully referred to as bearing on the present controversy:

"As regards the second ground reliance has been placed on the decision of this Court in *Pran Gour Mazumdar* v. *Hemanta Kumari Debi* (1). The facts of that case are somewhat similar to the facts of the present case. It appears that the respondent Hemanta Kumari had obtained two decrees for rent, in execution of one of which she sold the property in dispute in that case. During the pendency of the proceedings to set aside the sale and before confirmation thereof she caused the sale of the same property under her second decree. The Court held that the second sale was void and ineffectual, and therefore, should be set aside. It is contended before us that the same principle should apply to the present case and that, as long as the proceedings for setting aside the sale at the instance of Tripe were not concluded in favour of the judgment-debtor these properties could not be sold at the instance of Thomas & Co. We are of opinion, as has been pointed out in the later case of *Prem Chand Pal* v. *Purnima Dasi* (3), by one of the learned Judges who had decided the above case, that the decision in that case rested on an application of the law as laid down in S. 316, Act 10, 1877, before it was amended by Act 12 1879. Beverley, J., in the later case of *Premchand Pal* v. *Purnima Dasi* (3), in which he, with his learned colleague practically differed from the principle laid down in *Pran Gour Mazumdar* v. *Hemanta Kumari Debi* (1), said: "But as one of the Judges who decided the case of *Pran Gour Mazumdar* v. *Hemanta Kumari Debi* (1), I wish to say that that case appears to have been argued and decided on the supposition that it was governed by S. 316, Act 10, 1877 before that section was amended by Act 12, 1879. The rule of law as laid down in Act 10 of 1877, as also the decision before the amending Act of 1879 was passed, was that the title of the purchaser accrued from the date of the sale and not from the date of the confirmation of the sale as laid down

(1) [1886] 12 Cal. 597.

(2) A.I.R. 1918 P.C. 159=49 I.C. 620=46 I.A. 294=47 Cal. 370 (P.C.).

(3) [1888] 15 Cal. 546.

by the amending Act of 1879. If that was so and that was undoubtedly the law before 1879, the law which was applied in the case of *Pran Gour Mazumdar* v. *Hemanta Kumari Debi* (1) the purchaser at the second sale obtained no title. There was nothing to sell. But under the amending Act 12 of 1879 and Act 14 of 1882 the title of the purchaser dates from the date of the confirmation of sale. The sale in execution, therefore, did not of itself vest in the purchaser a right to the property. The right to the property continued in the judgment-debtor whose property was sold until confirmation and there is no reason why, under the present Code i. e., S. 316 of Act 14 of 1882, we should hold that there was nothing which could be sold in the execution of the decree of Thomas & Co."

This conclusion of the learned Judges of the High Court was affirmed by their Lordships of the Judicial Committee for their Lordships say:

"The High Court dealt effectively with the contention that in these circumstances there was nothing that could be sold on 15th December 1891, and to their judgment their Lordships have nothing to add."

Having regard to these considerations we are of opinion that the first ground is not tenable and must fail.

The second ground taken is that the notice under S. 8, Cl. (3), Regn. 8, 1819 is defective in essential particulars and this defect is sufficient to vitiate the sale. This ground was not taken in either of the Courts nor was it taken in the memorandum of appeal, but we have allowed the appellant to take this point. It was said that the objection arose upon the notice which the zamindar himself gave and did not raise any matter for enquiry. In the case before us six months' arrears of rent having become due Cl. 3, S. 8, is applicable. That clause is in these terms:

"On the first day of Kartick in the middle of the year, the zamindar shall be at liberty to present a similar petition with a statement of any balances that may be due on account of the rent of the current year up to the end of the month of Aswin, and to cause similar publication to be made of a sale of the tenures of defaulters, to take place on the first of Agrahayan, unless the whole of the advertised balance shall be paid before the date in question, or so much of it as shall reduce the arrear, including any intermediate demand for the month of Kartick, to less than one-fourth, or a four anna proportion of the total demand of the zamindar, according to the kistibundi, calculated from the commencement of the year to the last day of Kartick."

It is said that there has been a non-compliance with this clause in : (1) that the notice states that not only the balances due on account of rent of current year but also the cess and interest on the same which have been included in the advertised balance should be paid. The rent of Rs. 775 for the Aswin kist is shown in addition to cess as the advertised balance and there has been a non-compliance of the terms of the regulation; (2) the amount which shall reduce the intermediate demand for the month of Kartick to less than one-fourth has not been shown; (3) the date on which the advertised balance has to be paid has not been mentioned in the notice. In support of the contention that the notice is essentially defective and is fatal to the sale reliance has been placed on the decision of the Judicial Committee in *Ashanulla Khan* v. *Hari Charan Mazumdar* (4). That case is obviously distinguishable, for in that case the notice did not contain the intimation that payment of three-fourths of the arrears would prevent a sale but contained a distinct statement that unless the whole of the arrears were paid the sale would take place. In short the notice followed the terms of Cl. (2) of S. 8 whereas the case was under Cl. 3. In these circumstances their Lordships of the Judicial Committee held that the notice was defective in essential particulars and the sale could not be sustained. In the present case the intimation as required by S. 8, Cl. 3, was conveyed by the notice and it was said either the whole of the advertised balance or three-fourths of arrear should be paid. A translation of notice is given below:

"Whereas on an application for sale of the mahal described in the schedule below for realization of arrear rent, cess, interest, etc., relating to the aforesaid estate under Act 8, 1819 and Act 9, 1880. Monday the third Agrahayan 1330 corresponding to 19th November 1923 has been fixed as the date of sale in the kutcherry of the Collector of District Tipperah, information is given by this proclamation that if the whole arrear described in the schedule or the 12 annas of the arrears up to Kartick kist together with interest in arrears and all costs be not paid by the defaulter, the defaulting Mahal will be sold on the date fixed in the kutcherry of the Collector of the said district. Any one who is willing to purchase the same, may attend the said kutcherry on that date and purchase it and deposit the proper advance money and the balance of the purchase-money according to law, otherwise the law shall come into force. Finish. Dated the 9th Kartick 1330 B.S."

(4) [1893] 20 Cal. 86=19 I.A. 191 (P.C.).

Touzi No.	Lot No.	Number of registered Zamindar.	Name of Mahal.	Name of the proprietor.	Sadar Jama.	Extent of value to be sold in auction.	Description of the total dues.	Extent of amount due.
No. 208. No. 1457.	397	No. 10 Pergana Taluk.	Mouza Khatra Rudraram-pur, Sherpur, Moricha in District Tipperah.	Sm. Khair-un-nessa Bibi and others.	1550/-	Sixteen annas.	Rent due up to Aswin kist 1330.	Rs. as. ps. 775 0 0
							After deducting the payments made	34 14 0
							Claim : Interest.	177 15 6
							Cess, Interest.	2 10 9
								990 8 3
								775 0 0
								34 14 0
								177 15 6
								2 10 9
								990 8 3

It is true that the amount of the three-fourths arrear was not stated, but S. 8 has to be read with S. 10 of the Regulation and the amount could certainly be ascertained and verified on the date of the sale. The plaintiffs who are the patnidars would certainly know what the Kartick kist would be and the amount could be easily worked out. With regard to the defect about including the cess in the advertised balance the patni pattah has not been produced and we do not know if under the engagements entered into by the patnidar the cess subsequently to be levied were to be regarded as part of the fixed rental, and we find that the form of notice in general use which has been sanctioned by the Board of Revenue includes the cess in the advertised balance. Besides the cess which is not considerable is shown separately from the rent. The plaintiffs might have deposited the balance of rent before the date of the sale and might have insisted on the sale being stayed. I do not think this is a defect in the essential part of the notice. With regard to the date when the balance was to be paid the notice states by the plainest implication that arrears were to be paid by the first Agrahayan. We think the notice was in substantial conformity with S. 8, Cl. 3 and this ground of appeal must fail.

The third ground taken is that the learned District Judge has erred in holding that the service of the mofussil notice on the defaulter is an alternative method of service to that in the kutcherry and this error has affected his decision on the question of service of the mofussil notice. This is not a fair criticism of the judgment of the learned District Judge for he finds that the peon first made enquiry for Mahabat, plaintiffs' Tahsildar and in the end got the signature of his brother Roshan Ali to the sticking up of the notice at Lalmia's house. The learned Judge says again that :

"the peon swears that he was unable to find Mahabat Ali and the notice was affixed in the presence of his brother. I find that this was good service. He was therefore entitled to take three signatures in place of that of the defaulter's agent."

No exception can be taken to this finding of the learned Judge for the Regulation requires that :

"the notice required to be sent into the mofussil shall be served by a single peon who shall bring back the receipt of the defaulter or of his manager for the same ; or in the event of his inability to procure the signatures of three substantial persons residing on the neighbourhood in attestation of the notice having been brought and published on the spot. (S. 8, Cl. 2)."

Their Lordships of the Judicial Committee of the Privy Council in the case of *Maharaja of Burdwnn* v. *Tara Sundari Devi* (5) at p. 21 (*of* 10 *I. A.*) said :

"It seems to their Lordships that the object of the regulation was that due service of publication should not be left matter of controversy. The evidence should be secured immediately afterwards, and exist in writing, and be referred to by the proper officer as part of the

(5) [1882] 9 Cal. 619=10 I.A. 19 (P.C.).

foundation of the sale. Accordingly if, immediately upon posting the notice, the peon posting it can find the defaulter or his manager, he is bound to ask for a receipt from the defaulter or his manager, signed under his hand, and if he gets such a receipt there is an end to all questions as to the service. If he does not find the defaulter or his manager, or if that person will not sign a receipt then he is to call in three substantial people of the village to attest the fact, which will be apparent to their eyes, that the notices in question have been published."

It is an alternative mode of service in the sense that endeavour must first be made to serve the notice on the defaulter or his manager. It does not mean that one or other alternative methods have to be adopted, it does not mean that the peon is not to make any enquiry about the defaulter or his manager and that it is sufficient compliance with the regulation if without making such enquiry he is to take the signature of three substantial persons. We do not think the learned District Judge meant this, for he rightly approaches the question of the attempt to serve on Mahabhat Ali and failure in that direction first and then deals with the attestation by three substantial persons. This ground of appeal seems to be without substance and must fail. Both the Courts below have concurrently found that although the peon in his report does not state that he could not find Mahabat Ali he states definitely in his evidence that he searched for him and could not find him. We think the mofussil notice was properly published.

The fourth and last ground taken is that the notice was hung up in a jhika tree in the garden of a private individual and this is not a conspicuous place in the village. This is a question of fact and depends on whether the garden is situated in a place to which the public has access. This ground is wholly without substance.

The result is that all the grounds urged in appeal fail and the appeal must be dismissed with costs. The costs are to be divided equally between the Court of Wards who was represented by Mr. Surendra Nath Guha, Senior Government Pleader, and the auction purchaser who was represented by learned advocates Mr. Brajalal Chakravarti and Mr. Atul Chandra Gupta.

Graham, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 603

COSTELLO, J.

J. W. Nunn—Plaintiff.

v.

Calcutta Tramways Co. Ltd.—Defendant.

Original Civil Suit No. 905 of 1927, Decided on 4th January 1929.

Tort—Damages — Plaintiff dashed from behind by tramcar and received injuries— If plaintiff's own negligence is last act which brought about accident, he cannot recover damages although driver of car was also negligent in not stopping his car when he first saw plaintiff in his way.

When a collision is brought about by negligence on the part of both the vehicles or the vehicle and the person coming into collision, if nevertheless one of the two parties could by using due care and diligence have avoided the accident, then the negligence of the other, even if he centributed in a sense to the accident, does not necessarily disentitle him to succeed. The real question is: Whose was the last act of negligence that brought about the accident? [P 604 C 1]

Plaintiff sued the Calcutta Tramways Co. Ltd. claiming damages for personal injuries sustained by him in an accident. Plaintiff who was anxious to get away to Sealdah station, did not wait at the "stop," but went forward to meet his car and saw a car coming towards him. But afterwards he discovered that the approaching car was not his car and dashed off the path and went in front of the car. Then he suddenly saw that another car was coming from behind. The driver of this car saw him but did not stop his car before reaching the plaintiff. Plaintiff then made an attempt to get on to trailer of the car which he wanted to board. This resulted in his being carried nearer the car coming from behind and in the circumstances gave no opportunity to the driver of it to stop his car in time. The plaintiff was struck from behind and received injuries.

Held: that although there was negligence on the part of the driver in not stopping his car when he saw that plaintiff was in his way, still as the plaintiff caught the trailer of the other car, his was the last act which brought about the accident and so was not entitled to claim damages: *Gaffney* v. *Dublin United Tramways Co. Ltd.* (1916) 2 *I. R.* 472 and *R. and W. Paul Ltd.* v. *Great Eastern Ry. Co.* (1920) 36 *T. L. R.* 344, *Cons.* [P 610 C 1]

F. H. R. Surita and *N. Barwell*—for Plaintiff.

J. W. Langford James, *A. K. Roy* and *Clough*—for Defendant.

Judgment.—This is a claim by James William Nunn against the Calcutta Tramways Co., Ltd. claiming damages for personal injuries sustained by him in an accident, which occurred on 10th September 1926, when admittedly the plaintiff was injured by a tramcar belonging to the defendants. The plaintiff says that the defendant

Company were guilty of negligence, and he claims to recover from them a substantial sum by way of damages, because by reason of the accident he has lost his employment as an engineer in the service of the Eastern Bengal Railway Company, where he was employed on a salary of something like Rs. 1,200 a month together with certain allowances. The defendants by their defence deny that they were guilty of any negligence. They say that the accident was caused solely by the negligence of the plaintiff himself and, in the alternative, they say that, in any event, even if they were guilty of negligence, the plaintiff was guilty of contributory negligence and that the accident was brought about by the negligent conduct both of the plaintiff and of the defendants' driver.

No real difficulty arises as to the law which is applicable to a matter of this kind. A great many cases have been put before me, but they only serve to emphasize the proposition that when a a collision is brought about by negligence on the part of both the vehicles, or the vehicle and the person coming into collision, if nevertheless, one of the two parties could, by using due care and diligence have avoided the accident, then the negligence of the other, even if he contributed in a sense to the accident, does not necessarily disentitle him to succeed.

A great many expressions have been used from time to time in cases of this kind, as for example "the last opportunity" or "causa causans" and "causa sine qua non," but, put simply, it all comes to this :—the real question is what was the last act of negligence that brought about the accident? In the case before me the real question is whose was the act of negligence, if there was negligence, which actually brought about the injuries of which the plaintiff complains. There were certain admitted facts in the case. It was not disputed that the accident did occur on 10th September 1926, at or about 4-30 in the afternoon, and that by such accident the plaintiff suffered serious personal injuries. It is admitted that the accident occurred in Dalhousie Square, and that it happened because the plaintiff had walked from the side path on to the tramway track.

The plaintiff's version of the matter is this : He says that on the afternoon in question he was desirous of proceeding to his home at Dum Dum : and for that purpose he was intending to take a tramcar to convey him to Sealdah station. He crossed Dalhousie Square somewhere on the west side of the square and then proceeded along the north side of the Square to meet a car of the kind which he desired to take, that is, a car which was likely to be marked as a "Dharamtala" car. The plaintiff says that as he was proceeding eastward along the north side of the Square he saw a car approaching which he took to be Dharamtala car, and indeed he says that it displayed the appropriate notice-board in front of it, but, says the plaintiff, he was expecting that a car going to Dharamtala would be a car of the kind which is known as the "open-type" car, and he was accordingly expecting to find on the near side of the car a series of openings leading direct to transverse seats stretching from one side to the other. The plaintiff says that though the car was marked as a "Dharamtala" car, it was not of that particular type, or he thought it was not, because he could not detect these openings on the near side of the car, and that thereupon he proceeded to walk in front of the car, for the purpose of entering it from the other side. Having looked to the left to ascertain whether any car was approching from the westward, he proceeded across the southern track and held up his hand to the driver of the Dharamtala car to warn him to slow down, and then he proceeded down the space between the two tracks, which has been described as the "clearway," for the purpose of entering the car on the off side.

No sooner had he got into the clearway, or almost immediately afterwards, than he discovered that after all there were no openings on the offside of the car at all ; and accordingly he abandoned all idea of entering that particular car and proceeded down the inter-track space with the intention of crossing behind the car and so regaining the footpath after the car had passed him. The plaintiff says that he had proceeded some 12 or 14 paces down the inter-track space when suddenly and without warning of any kind he

was struck from behind by a car which was coming from the west towards the east, and which in the course of the case has been described as the "Nimtala car." As a result of the impact, according to the plaintiff, he was then whirled round between the two cars. The plaintiff used the expression "milled" between the two cars and ultimately was thrown to the ground and the wheel of one or other of these cars either passed over his left foot or at any rate struck it in such a manner that it was very seriously injured. (The judgment then discussed the injuries sustained by the plaintiff and found that there was no real controversy with regard to the same and also discussed the previous conflicting accounts given by plaintiff as to what really occurred on the afternoon of 10th September 1926.) The first of these statements is contained in a letter (Ex. C) which was written by the plaintiff or rather on his behalf to the Tramway Company on 30th October 1926. This statement of 28th October was taken down by the plaintiff's wife at his dictation while he was still confined in hospital and in it he says:

"At about 4-40 p. m., on 10th September, I was on the side of the Dalhousie Square opposite Writers' Building, on the pavement looking out for a Dharamtala tram; seeing one approaching at a quite slow pace, I looked out for an entrance door. Not seeing one I concluded the entrance doors were on the other side, and I crossed over the track and walked down between the two tracks to find the entrance and board the car. Finding that I had made a mistake, I was walking on, intending to cross back to the pavement behind the rear of the car, when I was struck from behind by a tram car coming from the opposite direction to the one I was intending to board. Both cars were travelling dead slow, or I would have been knocked down at once. I managed to keep my feet for some time, and hoped they would stop, but both kept moving, milling me between them, until finally I fell between them and one wheel of the Dharamtala car passed over my left foot, and then both cars came to a stand."

It is to be observed that that account, which the plaintiff gave on 28th October 1926, a little more than a month and a half after the accident, tallies substantially with the account which he gave in the witness box in the course of this trial, but a month or two after (on 10th January 1927) a letter was written to the defendants by the plaintiff's solicitors, Messrs. Clarke, Rawlins and Kerr, in which they said:

"Our client, Mr. J. W. Nunn, has placed with us all the correspondence and the papers in connexion with injuries received by him by a tramcar belonging to your company and has instructed us to address you as follows:

"That at about 5 o'clock in the afternoon of Friday, 10th September last, while two tram cars belonging to your company were being rashly and negligently driven opposite Writers' Building, Dalhousie Square North, our client, who was crossing the roadway from Dalhousie Square towards Writers' Buildings, was caught between the cars, knocked down and run over, thereby sustaining serious injuries to his body and shock to his system necessitating his immediate removal to hospital and then to a nursing home where he still remains under treatment."

And then the letter goes on to make a claim upon the defendants.

The story of the occurrence, as contained in this letter, is clearly different from the one which the plaintiff himself gave in the statement which he sent either by himself or through his wife to the defendants on 28th October. At the time when this solicitor's letter was written, it would appear that they had in their possession certain information which they had acquired as the result of advertising for witnesses of the accident because two witnesses have been called in the course of this case, a Mr. Scott and a Mr. Banerjee, both of whom say that they answered an advertisement which appeared in "The Statesman" and also in "Forward" and that they sent to the plaintiff's solicitors a statement giving their account of the accident which they say they saw on 10th September 1926. It is to be noted in passing that the statement which these witnesses made, and indeed the evidence which they gave in the witness box here, corroborates to a certain extent the account of the accident as given by the plaintiff in his original letter of 28th October. That being the case, it is difficult to understand how it came about that Messrs. Clarke, Rawlins and Kerr wrote the letter of 10th January because their version of the accident which they there gave is wholly inconsistent with that which the plaintiff himself had previously given to the defendants and which he has subsequently given in this witness box.

Further, to those two divergent accounts of the accident, yet another and different version or what is apparently

a different version is given in the plaint in this suit, for in para. 3 of the plaint it is stated that:

"At or about 4-40 p. m. on 10th September 1926, and as he was preparing to mount and enter one of the defendants' tram cars then proceeding in a western direction along with north side of Dalhouse Square in Calcutta, the plaintiff was violently struck by the defendants' tram car No. 141 coupled to trailer No. 141 then proceeding in an easterly direction, and so carelessly, negligently and unskilfully managed and driven by the defendant company's servant, that the plaintiff on being finally struck as aforesaid, was made to fall between the two tram cars . . . . ."

In that paragraph it seems clear that the plaintiff is setting up the case that he was struck

"as he was preparing to mount and enter one of the defendants' tram cars then proceeding in a westerly direction."

It is obvious that that averrment in the plaintiff's plaint is on the face of it inconsistent with either of the two stories which he had previously given or caused to be given to the defendants in the letters to which I have already alluded. It may be, however, that the explanation of that paragraph is that what the plaintiff really intended to say or what he intended the pleader to say was that he was struck at a time when he had intended to board the defendants tramcar (the one which I have referred to as the "Dharamtala" car), though I think it would be a straining of the language used if I were to take the view that para. 3 meant anything other than that the plaintiff was really mounting or about to mount one of the defendants' cars at the moment when he was struck. Presumably the plaint was drafted after a careful consideration of the plaintiff's case.

Now the plaintiff in answer to a question from me admitted that the course he took was of a negligent character and indeed it must have been apparent to anyone who heard the evidence that the conduct of the plaintiff himself was indeed lacking in care and prudence and in the ordinary caution which a reasonably-minded person would take in the circumstances, because on the plaintiff's own showing he left the footpath and crossed in front of an on-coming car and then proceeded to walk down the inter-track space after taking at the most only a casual glance to his left to ascertain whether any traffic was approaching from the westerly direction paying no real heed to the traffic in his rear or considering the possibility of his being struck from behind. (Plaintiff's evidence was then discussed.) As I have stated I find as a fact on the evidence before me, and indeed upon the plaintiff's own version of the matter, that he was guilty of negligence, but that is really the second stage of the case, because before the plaintiff could succeed in any event he has to discharge the burden which lies upon him of showing that the defendants were guilty of negligence. For the purpose of determining that question it is necessary to consider the behaviour of the Nimtala car.

Mr. Barwell has pointed out that upon the assumption that the Nimtala car was not proceeding at a pace greater than that of six miles an hour, it might have moved from the stopping place which has been described as the "Black Board Stop," to the point where the accident occurred within the space of less than sixty seconds at the very outset. I think upon the evidence that that is probably substantially correct because the evidence shows that the actual impact occurred practically in the centre of the north side of the Square, that is, opposite an opening which there is in the boundary railings of the garden in the centre of the Square, and putting the accident at that point it comes to this: that there is a distance of something just over 300 feet between the stopping place and the point of impact.

It is to be borne in mind that the plaintiff said he had no knowledge whatever that the Nimtala car was approaching from behind until the very moment when he found himself struck and eventually hurled to the ground. I have no doubt that the plaintiff is correct when he says that he had no knowledge that this car was "on him" (if I may use that expression) because otherwise he would undoubtedly have turned round or taken some steps to have averted the collision. I think the real truth is that the plaintiff was in ignorance of the imminence of the collision until at any rate just before it actually took place.

The driver of the Nimtala car, a man called Buldeo Misser, gives this account of the matter. He says that when he first left the stopping place he could see

all the way down the track and that after a moment or two he saw the Dharamtala car approaching; and he saw the plaintiff almost at the same time. He saw the plaintiff passing in front of the Dharamtala car. Apparently he actually saw the plaintiff leave the footpath and proceed across the track. He says that by that time he had slowed down his car because there is a rule that a car should be slowed down after passing the "section-box." Then he goes on to say that the plaintiff on reaching the space between the two pairs of lines turned towards the east and walked a few paces, two or four, and stood there. Then, says the driver, the Dharamtala car came up and the plaintiff thereupon caught hold of the iron stanchion on the trailer and attempted to climb on to the car.

It is clear from the answers which driver Misser gave to me that in fact at no time did he intend to stop his car as he considered there was no need to do so because he thought the plaintiff would get out of the way. What he says is this:

"As a matter of fact as my car was moving slowly a slight tightening of my brake was sufficient for my purpose."

In answer to the next question he says:

"It was not completely stopped, but before my car came up to him (the plaintiff) it was completely under my control."

And the explanation which the driver of the Nimtala car gives for the actual collision was that although he had his car completely under control he did not actually bring it to rest because he thought that the plaintiff would move out of the way of the on coming car whereas instead of doing that the plaintiff tried to mount on the Dharamtala car with the result that there was an unforeseen and unexpected situation created whereby the plaintiff, instead of keeping clear of the Nimtala car, was actually carried forward by the Dharamtala car in such a way as to cause him to be struck by the Nimtala car.

It is conceded by Mr. Barwell on behalf of the plaintiff that if the version given by the driver of the Nimtala car is substantially correct then the plaintiff would be out of Court in this case and the defendants are not liable. If in fact the plaintiff did board or attempt to board the Dharamtala car it might be right to take the view that the defendants were not negligent at all in the circumstances. Assuming that the driver of the Nimtala car had it completely under control, it may be that up to that point at any rate there was no negligence; but even supposing there was negligence on the part of the defendants in the first instance by reason of the fact that the driver did not completely stop the Nimtala car, obviously there was such negligence on the part of the plaintiff as would disentitle him to succeed because no question could then arise as to what was the approximate cause or the causa causans of the actual impact. In those circumstances as described by the driver of the Nimtala car undoubtedly the impact would be due to the fact that the plaintiff had not only put himself into a situation where there was a potential danger, but had actually caused himself to be carried forward towards the on-coming Nimtala car. No question could possibly arise in those circumstances as to whether or not, assuming there was negligence on the part of both sides, the defendants' driver could, by using due care, still have avoided the consequence of the plaintiff's negligence. The whole thing happened within such a comparatively short space of time that if by reason of panic or otherwise the plaintiff did mount the Dharamtala car, there was obviously no lost "opportunity" for the defendants' driver to avoid the accident.

I desire to say at this stage that if the plaintiff's story as told in the box is substantially correct, although I am of opinion that he was guilty of negligence in crossing the tramway track in the way he did and proceeding down the inter-track space, which obviously is too narrow to permit anyone to walk along with safety when cars are passing although I consider that the plaintiff was negligent in putting himself into that position, that would not justify the defendants' driver in allowing his car to proceed in such a way as to strike the plaintiff, and if he did so, clearly the defendants would be guilty of negligence. In that connexion there was cited to me the case of *Gaffney* v. *Dublin United Tramways Co. Ltd* (1). That was a case of a partially deaf man cros-

(1) [1916] 2 I. R. 472.

sing the thoroughfare in Dublin who was knocked down and injured by a tramcar. The driver prior to the accident sounded the gong and shouted, but he did not slacken speed. The jury found that the plaintiff was negligent in not keeping a proper lookout, but that the driver by exercise of due care could have avoided the consequence of the plaintiff's negligence.

Now, in this instance I am satisfied from the evidence given by the defendants driver, and from the evidence given by the two conductors of the Dharamtala car that the driver of the Nimtala car did in fact sound his gong or his bell and did shout a warning to the plaintiff. The plaintiff says that he heard neither the bell nor the shout, and in fact (as I have already mentioned) knew nothing about the matter at all till the car actually struck him. In connexion with this point Mr. Barwell also referred to a case *R. and W. Paul, Ltd.* v. *Great Eastern Railway Co.* (2), which is very germane to the present circumstances. In that case Lush, J. said this:

"He (the person who ordinarily would be in the position of the plaintiff) certainly, according to the ordinary meaning of the expression, contributed to the accident by his own negligence. But it does not follow that he was guilty of contributory negligence in law. What is the true test to apply? What direction should be given to a jury on the facts of this case? It must depend on the facts of the particular case whether they should be told if the plaintiff could, by the exercise of reasonable care, have avoided the accident, they should find for the defendants, or that if the defendant could, by the exercise of reasonable care, have avoided running over him, they should find for the plaintiff. Neither direction would be universally right. If the first was always right, then if a man lay down on a highway where he knew traffic would pass, he could not recover damages against the driver who seeing him there, negligently drove over him."

The real test, in my opinion, is this: whether the driver of the vehicle realizes or ought to realize that the pedestrian, who is in the path of the vehicle or in such a position that the vehicle may possibly strike him, does not know that the vehicle is there and therefore is not likely to move out of the way. It is clear that the driver of the vehicle, however much he shouts or rings his bell, is not then entitled to drive on recklessly and run over someone merely because that person does not get out of the way. Therefore in the present case, if the facts were that the Nimtala car proceeded along the track and struck the plaintiff solely by reason of the fact that the driver of the Nimtala car did not bring his car to a standstill, I think not only would the defendants have been guilty of what I may call initial negligence, but they would clearly have shown that want of due care which might have avoided the accident despite the contributory negligence of the plaintiff in having put himself into a dangerous situation.

It follows from that, therefore, that even if I come to the conclusion, as I do that the plaintiff is guilty of negligence, yet if the defendant Company could in the result, by the use of ordinary care and negligence have avoided the mischief which in fact happened, then the plaintiff's negligence will not exculpate and excuse the defendants. Like all cases of this class the matter in the end resolves itself solely and wholly into a question of fact. There is really no difficulty whatever with regard to the law which is applicable. The law applicable to this class of case is tolerably clear. Prima facie if *A* is injured by the negligence of *B*, *A* can recover damages against *B*, by reason of that fact. If the occurrence is occasioned, or partly occasioned, by negligence on the part of *A* as well as on the part of *B*, then if the negligence of both parties really brings about the accident, then *A* cannot recover from *B*. But over, and above that, if despite the negligence of *A*, *B* might still have avoided the accident by the use of ordinary care and diligence, then *B* will still be liable though in certain circumstances, as was pointed out by Lush, J., in the case to which I referred just now, it may be that *A* cannot recover against *B* because he himself might have done something to have avoided the consequences of the joint negligence of himself and *B*.

It has been said in this case by Mr. Langford James on behalf of the defendants that the real approximate cause of the accident was the fact that the plaintiff did not keep a proper look out or keep his ears open, with reference to the possibility of an on-coming car from west to east, and that that was really the cause of the accident, or else, if he did

(2) [1920] 36 T. L. R. 344.

know of the approach of the Nimtala car, had he chosen he would still have had time to have escaped injury either by going across the track in front of the Nimtala car to the roadway or by keeping ahead of it, especially as admittedly the car in any case was only moving at little more than a walking pace. The plaintiff in his original version of the matter said that both cars were going slowly. I have no doubt, and I find as a fact that that was correct. This is not a case where an accident was caused by excessive speed on the part of the driver of the vehicle concerned.

The real question that I have to determine is this: Did the plaintiff merely walk down this inter-track space intending to await his chance to pass behind the Dharamtala car? If so, I think, despite his negligence in putting himself into that position, he would be entitled to succeed against the defendants by reason of the fact that the driver of the Nimtala car ought to have realized that the defendant was not going to move out of the way and consequently ought to have brought his car to a complete standstill—having it under control, as he says—before it actually reached the plaintiff and struck him. On the other hand, if I take the view that the plaintiff's version is not quite accurate, and that in fact he did attempt to climb upon the Dharamtala car, then, as I have already said, there was, in my judgment, no time for the defendant's driver to have done anything more than he did in fact do. In that case he was faced by an unexpected and totally abnormal situation because I do not think it can be said that a driver of a tramcar can reasonably be expected to contemplate that any ordinary human being will attempt to board a tramcar coming in the opposite direction from the offside. It may be that the driver of the Nimtala car was justified in the first place in thinking, as he says he did think, that the plaintiff would get out of his way, and it was only because the plaintiff took a totally unexpected and abnormal course by getting on the Dharamtala car that the accident occurred.

I pointed out during the hearing of the case that the question of liability really lay within a very narrow compass as it resolved itself into the pure question of fact of whether or not the plaintiff did attempt to board the westbound tramcar. What is the evidence with regard to that? The driver of the Nimtala car said quite distinctly that he was watching the plaintiff for a comparatively lengthy period of time—I say "comparatively" because the whole thing happened within the space of a minute or so and that he saw the course taken by the plaintiff. He saw him come from the footpath, cross in front of the Dharamtala car, get into the inter-track space, and then proceed down the side of the Dharamtala car, and thereupon attempt to mount on the trailer of the Dharamtala car. That is a perfectly connected and consistent story. Whether I ought to accept it or not is of course another matter because it is said on behalf of the plaintiff that the story which was put forward by the defendants is in the nature of an after-thought, and is to all intents and purposes an invention on the part of the defendants' witnesses. The story of the tramway driver Misser, however, is corroborated by the evidence of the two conductors. There was the conductor who was on the trailer of the Dharamtala car who, I am bound to say was not an altogether satisfactory witness; at any rate he was a very stupid witness. Incidentally I might point out that all three of these eyewitnesses called by the defendants are no longer in the employment of the defendant company. (The judgment having discussed the evidence of the conductors of the tramcars observed): The observation which I make with regard to the whole of the evidence of defendants' witnesses is this, that the whole story is so strange and even fantastic that I do not think it possible that these men could have invented it of their own accord, and, therefore, unless it is more or less a truthful account of the matter it can only be that some one has suggested to them that what really happened was that the plaintiff tried to board the trailer of the Dharamtala car and did not succeed. I cannot however take the view that there was any dishonesty on the part of the tramway company in regard to the presentation of this case. Now, as against that version of the matter, there is the plaintiff's own story to which I have already referred and in support of it he has

called two witnesses whose evidence was secured as the result of an advertisement in the newspapers. (The judgment observed that in the circumstances of this case it was not improper to advertise for witnesses and discussed the evidence of Mr. Scott, one of the witnesses, who responded to the aforesaid advertisements and remarked that his evidence could not be accepted word for word and proceeded to discuss the evidence of Mr. Banerjee, the plaintiff's other witness, who also responded to the aforesaid advertisements.) All the evidence given by Mr. Banerjee resolves itself to this: that the Nimtala car was going at such a rapid pace that he thought something might happen and he was so frightened that he stepped away, but I think this evidence does throw some light in the matter.

Having carefully considered the whole of the evidence in the case I came to the conclusion that the real explanation of the accident is this: This plaintiff was for some reason anxious to get away to Sealdah station. Why he should have been so stupid as not to have waited at the corner of Dalhousie Square it is difficult to imagine, because by no possibility could he have saved time by going to meet his tram car. However, he does not wait at the "stop," but goes forward and then sees a car coming towards him, which is or ought to be his car, and then he discovers or thinks he has discovered (wrongly as it proved) that the openings were not on the near side as he anticipated, and in a fit of rashness and thoughtlessness he dashes off the path and goes across in front of the Dharamtala car. It is true he holds up his hand to the on-coming car, but I think he did very little more than glance very perfunctorily to his left, even if he did that much, and what in effect happened was that it was a matter of chance whether the plaintiff got on to the Dharamtala car or at any rate to a place of safety before he was overtaken by the Nimtala car. In other words the plaintiff took the risk of going into the roadway and putting himself into a dangerous position, thinking he had time to get round and get on board the Dharamtala car with safety. It is admitted by him however and indeed it is part of his case, that his intention in going in front of the Dharamtala car was to board it from the offside, and whether in a desperate attempt to get on the car he tried to mount on the projection which undoubtedly there is in front of the trailer or what is far more likely, he suddenly realized that the Nimtala car was upon him, and he practically made a clutch at the trailer, it is impossible to say, but I am quite satisfied, and I find as a fact upon the evidence, that he did make some attempt to get on to the Dharamtala trailer: a manoeuvre which resulted in his being carried nearer the Nimtala car, and had the effect of throwing out all the calculations of the Dharamtala driver as to what the plaintiff was going to do. In the circumstances, I think there was no opportunity to the driver of the Nimtala car to stop his car in time. Had the plaintiff not to put his hand upon the Dharamtala trailer at all then of course there would have been no excuse for the driver of the Nimtala car not stopping before he actually reached the plaintiff. Finding as I do, that the plaintiff clutched, if not actually boarded, the Dharamtala car, I think in the circumstances his negligence was such as disentitles him to succeed in this suit. It may be that there was—indeed I think there was—negligence on the part of the tramway driver in not stopping his car dead at the outset, but undoubtedly there was negligence on the part of the plaintiff and I think it was the negligence of the plaintiff which was the real cause of the accident, or in any case it was of such a character that there was no last opportunity to the defendants' servant to take other steps in the circumstances such as might have saved the situation. I find as a fact that it was the plaintiffs' own negligence which was the effective cause of the accident. The plaintiffs' claim fails accordingly and the suit is dismissed.

S.N./R.K. *Suit dismissed.*

A. I. R. 1930 Calcutta 610

MUKERJI AND GUHA, JJ.

Dharendra Krishna Deb and *others*—Plaintiffs—Appellants.

v.

Surendra Krishna Nandi and *others*—Defendants—Respondents.

Appeal No. 466 of 1928, Decided on 18th December 1929.

Civil P. C., O. 40, R. 1—Court should not appoint receiver simply because it is convenient—But it should make such appointment for protection of rights or prevention of injury according to legal principles.

The words "just and convenient" do not mean that the Court is to appoint a receiver simply because the Court thinks it convenient, but they mean that the Court should make the appointment for the protection of rights or prevention of injury according to legal principles. A simple contract creditor who has no specified charge or no right to be paid out of a specified sum cannot in general ask for the appointment of a receiver. [P 611 C 2]

Where, therefore, in a suit for recovery of arrears of rent and cesses based on an ijara patta with a prayer for ejectment under S. 66 (2), Ben. Ten. Act, the plaintiff applies for the appointment of a receiver but is unable to make out a sufficient case for such appointment, the appointment should not be made: 30 *Mad.* 255 and *Owen* v. *Heman*, (1853) 4 *H. L. C.* 997, *Ref.* [P 612 C 1]

N. N. Sircar, *Rupendra Kumar Mitter*, *Kapilendra Krishna Deb* and *Bijan Behary Mitter*—for Appellants.

S. N. Banerji, *Atul Chandra Gupta*, *Bepin Chandra Bose* and *Jatindra Nath Sanyal*—for Respondents.

Judgment.— This appeal has been preferred from an order refusing to appoint a receiver.

The suit in connexion with which the application for appointment of a receiver was made was one for recovery of arrears of rent and cesses with a prayer for ejectment under S. 66, Cl. (2), Ben. Ten. Act. The claim was for the years 1333 and 1334 B. S., on the basis of an ijara patta granted to defendant 1 in July 1927 for a period of six years from 1333 to 1338 B. S. The rent stipulated for in the ijara patta was Rs. 29,000 odd. The suit was instituted on 14th May 1928. The claim was laid at Rs. 50,000 odd after giving the defendants credit for Rs. 20,000 which they had paid.

Defendant 1 alleged that he was not liable for the entire amount as he was hampered in making collections on account of the fact that the plaintiffs themselves had not got their patta from the Official Receiver before 3rd January 1928 and within a few months thereof they instituted the suit. In opposing the application for appointment of receiver he further alleged that he had hypothecated as security for the ijara rent properties to the value of Rs. 45,000 and shares in zamindaris to the value of Rs. 5,000.

The value of the security is disputed on the side of the plaintiffs-appellants and they rely a good deal upon the fact which they alleged and was not controverted on the side of the defendants that the latter had made collections to the extent of Rs. 3,400 and had kept the money to themselves. The plaintiffs further say that rents for subsequent years have also remained unpaid and that they themselves have got to pay a very large sum of money to the Official Receiver every year.

Now there is an initial difficulty in the appellants' way. There is some doubt as to whether S. 66, Cl. (2), Ben. Ten. Act, will be applicable to the case. But then assuming that it would have applied their pleader appears to have stated in the Court below that the prayer for khas possession was not being pressed by them. We have been asked to read this admission as being limited to the forfeiture clause in the lease and not to the prayer for khas possession under S. 66, Cl. (2), Ben. Ten. Act, made in the plaint. But as the admission referred to the first ground in the plaintiffs' affidavit filed on 8th May 1928, we are extremely doubtful as to whether this limited meaning can be given to the admission. If there is still a prayer under S. 66, Cl. (2), Ben. Ten. Act, the Court would be competent to entertain an application for the appointment of a receiver on the analogy of the decision in the case of *Kartic Nath Panday* v. *Padmanund Singh* (1). If however that prayer has really been given up an application for a receiver will scarcely lie. The words "just and convenient" have been taken from the Judicature Act, 1873 where the words are "just or convenient." The latter expression has been held to mean "just and convenient" and it has been held that they do not mean that the Court is to appoint a receiver simply because the Court thinks it convenient, but that they mean that the Court should make the appointment for protection of rights or prevention or injury according to legal principles. A simple contract creditor who has no specified charge or no right to be paid out of a specified fund cannot in general ask for the appointment of a re-

(1) [1885] 11 Cal. 496.

ceiver. In *Owen* v. *Heman* (2), at p. 1036, the Lord Chancellor observed :

" The plaintiffs here do not claim as specific appointees of any part of the defendants' separate estate. They are merely in the nature of general creditors seeking to obtain payment by a sort of equitable action of assumpsit or debt. In such a case it is a strong exercise of authority to deprive the defendant, on motion, of property on which the plaintiffs have no specific claim in order that if they establish their claim as creditors there may be assets wherewith to satisfy them."

It has been also said :

" that slowness or inadequacy of the legal remedies open to general creditors who have no lien on the defendants' property are not considerations that can move a Court of equity, in the absence of statutory authority, to intervene in their behalf, with the instrumentality of a receiver, to preserve the debtors' property : Pomeroy's Equity Jurisprudence, Vol. 4, para. 1533."

There is thus a preponderance of authority so far as decisions of English and American Courts are concerned in support of the view that in the absence of statutory provisions to the contrary a general contract creditor before judgment is not entitled to a receiver against his debtor upon whose property he has acquired no lien. Under O. 40, R. 1, Civil P. C., also the same view appears to have been taken, and it was only when an appointment was validly made on the ground that the property was the subject-matter of the suit that it was allowed by the appellate Court to continue as a means of realizing the amount decreed against the judgment-debtor personally : *Ramasami Naik* v. *Ramasami Chetty* (3).

We have also considered the merits and we find ourselves in agreement with the Court below in its view that a proper case for the appointment of a receiver has not been made out, the more especially as the defence to the claim does not appear to be so frivolous as to require no investigation and as the default of the defendant for the period subsequent to the suit has no very great bearing on the question. On the materials before us, we are not satisfied that circumstances exist in this case creating an equity on which alone the jurisdiction to appoint a receiver arises. The appeal is dismissed with costs three gold mohurs. The application is dismissed.

R.M./R.K. *Appeal dismissed.*

(2) [1853] 4 H. L. C. 997.
(3) [1907) 30 Mad. 255=17 M. L. J. 201.

A. I. R. 1930 Calcutta 612

MUKERJI AND MITTER, JJ.

Atab Sunarri—Plaintiff—Appellant.

v.

Talib Husain Mia and *others*—Defendants—Respondents.

Appeal No. 1363 of 1927, Decided on 7th May 1929, from appellate decree of Second Sub-Judge, Sylhet, D/- 20th January 1927.

(a) Limitation Act, Art. 47—Undivided share in property covered by order under S. 145, Criminal P. C, is not different property—Criminal P. C., S. 145.

An undivided share of the property with regard to which there is an order under S. 145, Criminal P. C., cannot for the purposes of Art. 47, be regarded as a different property. [P 614 C 1]

(b) Limitation Act, Art. 47—Suit for partition of share in property title to which is extinguished for failure to sue within three years of order under S. 145 is suit for possession.

A suit for partition which seeks for partition of property or to have a share in it, the title to which has already been extinguished by reason of no suit having been instituted to recover possession within three years of the order under S. 145, Criminal P. C., and by virtue of Art. 145 of the Schedule and of S. 28 of the Act, is another name for a suit for recovery of possession and a mere device to evade the provisions of the statute : *A. I. R.* 1921 *All.* 92 ; 15 *Bom.* 299, *Ref.* [P 614 C 1]

Birendra Kumar De—for Appellant.

Broja Lal Chakrabarti and *Priya Nath Dutt*—for Respondents.

Judgment.—The appeal and cross-objection have arisen out of a suit for declaration of title and recovery of khas possession.

The plaintiff's claim shortly put was as follows : There were two brothers Wahedulla and Basiruddi each owning an eight annas share in the properties. By an amicable arrangement Basiruddi alone possessed the properties and sold them to the plaintiffs in 1320 B. S. In 1321 B. S. the plaintiff grew paddy on the lands but was not allowed to gather the crops and was dispossessed by the defendants acting in collusion with each other. He then instituted this suit on 15th May 1924.

Defendant 1 is the son of Wahedulla and defendant 2 is the purchaser of the properties from defendant 1. They claimed that defendant 1 had received the properties as gift from Wahedulla and Basiruddi. One of the defences taken was the plea of limitation, it being urged that there was an order under S. 145, Criminal P. C., on 11th February

1915 in favour of defendant 1 in respect of the properties and so the suit is barred in view of the provisions of Art. 47 of the Schedule to the Limitation Act which provides for a limitation for three years for a suit to recover possession of such property.

The plaintiff subsequently amended his claim restricting it to a 11 annas 2 gandas 2 karas 2 krantis which Basiruddi obtained by succession after Wahedulla's death.

The Courts below have upheld the plea of limitation and have given the plaintiff a decree only for an 8 gandas 3 karas 2 krantis share to which the plaintiff acquired title after the order under S. 145, Criminal P. C.

The question involved in the appeal is the question of limitation. It has been urged that Art. 47 has no application to the suit as what forms the subject-matter of the claim is not the exclusive possession of the entire property covered by the order under S. 145, Criminal P. C., but joint possession of only a share of it. The question, we may say at once, is not one altogether free from difficulty. The case relied on most strongly on behalf of the plaintiff-appellant is that of *Parashram Jethmal* v. *Rakhma* (1). The facts of the case were as follows : In 1864 *A* sued his cosharer *B* in the Mamalatdar's Court for possession of certain land and obtained a decree. In 1874 *B* got possession of the land by inducing the tenants to attorn to him. In 1880 *A* conveyed the land to *C* who in 1886 sued *B* to obtain possession. Two propositions were laid down in the decision of that case. One was that on the expiry of three years (under Cl. 7, S. 1, Lim. Act 14, 1859) *B* could not have sued to assert his title to the land comprised in the Mamlatdar's order but nevertheless *B's* title to the land was not thereby extinguished. As regards this proposition, as is well known, the view of this Court has not been quite the same as that of the Bombay High Court, so far as the effect of Act 14, 1859, is concerned ; but with this we are not concerned in the present case. The other proposition was

" that a suit for the partition of property comprised in the Mamlatdar's order is not properly designated as a suit to recover such property ; and whether that property is the only one of which a partition is claimed, or whether it is only one of such properties is not a material question in this connexion."

This case is a clear authority in the appellants' favour and the question before us is whether we should follow it. This decision purported to approve of two earlier decisions of the same Court—*Bhaguji* v. *Aniaba* (2) and *Shivram* v. *Narayan* (3). In the first of these cases it is not clear what the exact nature of the order of the Mamlatdar was ; in the second case it was an order rejecting the plaintiff's claim to separate possession on the ground that there was a partition. What however is clear is that Westropp, C.J., who was one of the Judges in both the cases observed roundly in the second case that :

" following the decision in *Bhaguji* v. *Aniaba* (2) we hold that Art. 46, Sch. 2, Act 9, 1871 (corresponding to Art. 47 of the present Limitation Act) is not applicable to a suit for partition."

The decision in *Jethmal* v. *Rakhma* (1) is therefore strictly supported by these earlier two decisions. The observations as regards the property being the sole one or one of several was necessitated by an argument which sought to distinguish the earlier decisions from the one then before the Court, but these observations need not detain us. The principle enunciated in these cases, and in the earliest of these cases specifically came in a later case before the Bombay High Court, namely that of *Bhimappa* v. *Irappa* (4) in which Art. 11, Lim. Act, 1877, fell to be construed. Chandravarkar, J., while he was able to distinguish the case before him as one to which the principle should not apply, spoke approvingly of it in these words :

" But a suit for partition, in which the property comprised in the Mamlatdar's decree is brought into the hotchpot, is not a suit for the recovery of that property. It is a suit for the recovery of such share as the plaintiff may get on partition. The mere fact that the property comprised in the Mamlatdar's decree is included in the subsequent suit for partition does not make the properties in both identical. In the eye of the law the property of which exclusive possession was sought in the Mamlatdar's Court is different from the property of which a share is claimed on the ground of joint title, and it is only an accident that the plaintiff in the partition suit may get the former property allotted to his share'.'

(1) [1890] 15 Bom. 299.

(2) [1880] 5 Bom. 25.
(3) [1880] 5 Bom. 27.
(4) [1902] 26 Bom. 146=3 Bom. L. R. 594.

The learned Judge evidently was not shown the decision in *Jethmal* v. *Rakhma* (1) in which Telang, J., had already held that the question whether it was the sole property or only one of a number was of no importance. Be that as it may, the authorities to which we have referred are clear and it is no use trying to distinguish them or explaining them with words that are not to be found therein.

We are however of opinion that to hold that an undivided share of the property is for the purposes of the article to be regarded as a different property however catching the argument may be will lead to immense complications to which similar considerations not only in the construction of this but also of other articles of the Act would apply. We are also of opinion that a suit for partition, which seeks for partition of property or to have a share in it, the title to which has already been extinguished by reason of no suit having been instituted to recover possession within three years of the order under S. 145, Criminal P. C. and by virtue of Art. 47 of the Schedule and of S. 28 of the Act, is another name for a suit for recovery of possession and a mere device to evade the provisions of the statute. The principle that the greater includes the less has been adopted in construing articles pari materia with Art. 47, e. g., Art. 11-A : *Ganpat Rai* v. *Hussaini Begam* (5). We are accordingly unable to follow the proposition enunciated in the Bombay cases cited above.

As regards the cross-objection we are not impressed with the argument that S. 43, T. P. Act, has no application.

We affirm the decision of the Courts below and dismiss the appeal and the cross-objection but with no order as to costs.

V.B./R.K. *Appeal dismissed.*

(5) A. I. R. 1921 All. 92=60 I. C. 905.

A. I. R. 1930 Calcutta 614

MUKERJI AND GUHA, JJ.

Sailendra Nath Ghose and *others*—Decree-holders—Appellants.

v.

Surendra Nath De and *another*—Judgment-debtor—Respondents.

Appeal No. 354 of 1928, Decided on 3rd December 1929.

(a) Civil P. C., O. 21, R. 16—Legal representatives of deceased decree-holder are transferees by operation of law—Application by them for execution lies only to Court passing decree.

The legal representatives of a deceased decree-holder are transferees of the decree by operation of law within the meaning of O. 21, R. 16 and as such an application by them for execution lies only to the Court which passed the decree : 16 *Cal.* 355 and *A. I. R.* 1924 *Cal.* 661, *Ref.* [P 615 C 1]

(b) Civil P. C., O. 21, R. 16—Death of decree-holder after transfer of decree for execution—Legal representatives may apply to Court passing decree for fresh execution or may apply to executing Court carrying on proceeding, subsequently producing necessary order under O. 21, R. 16—Failure to produce order does not vitiate application—Irregularity may be acquiesced in or waived by judgment-debtor.

Where a decree-holder dies after the transfer of his decree to another Court for execution, his legal representatives may either apply to the Court which passed the decree for fresh execution after bringing their names on record or may apply to the executing Court for carrying on the proceedings, subsequently producing from the Court which passed the decree, the necessary order under O. 21, R. 16. Failure or omission to produce such an order does not vitiate the application to the executing Court. The irregularity may be acquiesced in and waived by the judgment-debtor.

The executing Court on an application by the representatives of a decree-holder, substituted their names in spite of objection by the judgment-debtors that only the Court passing the decree had power to do so. No appeal was taken from that order by a person who acquired an interest in the judgment-debtor's property before the date of substitution and he took the same objection again in an application under S. 47.

Held : that the order of substitution must be taken to have concluded the matter and was final : 27 *Cal.* 488 ; *A. I. R.* 1928 *P. C.* 162 and 1 *I. C.* 57, *Rel. on.* [P 616 C 1]

Bejoy Kumar Bhattacharjee and *Debendra Nath Bhattacharjee*—for Appellants.

Amarendra Nath Bose and *Hemanta Kumar Bose*—for Respondents.

Judgment.—This appeal was filed by one Lakshmi Mani Dasi, as decree-holder appellant against the judgment-debtor and a claimant one Surendra Nath De as respondents. The application for execution was filed by the original decree-holder. The decree was one for money passed by the High Court on its original side on 19th January 1925. It was transferred for execution to the Court of the District Judge of Howrah, to which a certificate of non-satisfaction was sent by the High Court, original side. The execution petition was registered in the Court of the Additional Dis-

trict Judge on 23rd August 1926. Under O. 21, R. 22, Civil P. C., notices were issued, and then notices under O. 21, R. 56, Civil P. C. In January 1927 the original decree-holder died. On 14th February 1927 the legal representatives of the deceased decree-holder being his three sons, all minors, represented by their mother Lakshmi Mani Dasi, entered appearance and prayed to be substituted in the place of the said deceased. On 8th March 1928 the substitution was ordered in the presence of the judgment-debtor. On 2nd April 1928 one Surendra Nath Dey filed objection under S. 47, Civil P. C., alleging that he had a claim. An objection formulated in the following way namely that the decree-holder having died the heirs could not be substituted in the execution case, was urged, and the learned Judge, holding in view of O. 22, R. 12 the contention to be sound, ordered that the decree-holder's heirs must file a new application for execution and dismissed the execution case by an order dated 3rd May 1928. From this order the present appeal was taken. As already stated Lakshmi Mani who was not personally interested in the decree, but was only the guardian of her sons in the proceedings, filed the appeal on her own behalf. This was due to a bona fide mistake on the part of her legal adviser who was misled by certain certified copies that were placed before him. The appeal as originally filed is incompetent. It is dismissed. But in view of the exceptional circumstances of the case we allow the heirs of the decree-holders to file a proper appeal now and the memorandum of that appeal being before us, and all the parties being represented therein, we have heard them.

Order 22, R. 12, Civil P. C., lays down that the provisions as to abatement of a suit or appeal in consequence of death or insolvency of a party do not apply to execution proceedings. It follows therefore that the provision is for the benefit of a decree-holder or his heirs and that the heirs need not take steps for substitution. This is clear from the decision of the Judicial Committee in the case of *Kedar Nath Goenka* v. *Ananta Prasad Singh* (1). There are two courses either of which may be availed of by the heirs, that is to say, that they may apply immediately for carrying on the proceedings in execution of the decree, or they may apply for fresh execution under O. 21, R. 16, Civil P. C.: *Akhoy Kumar Talukdar* v. *Surendra Lal Pal* (2). The contention that upon the death of an applicant for execution of decree that his legal representatives are not entitled to carry on the proceedings, and that their only remedy is to initiate a fresh proceeding, and that in the latter event they may be successfully met by the plea of limitation, was overruled in the case of *Manmatha Nath Mitter* v. *Rakhal Chandra Tewary* (3) (at p. 753 *of* 14 *C. W. N.*).

The present case is however complicated by the fact that it was the decree of another Court, namely the High Court on its original side, that was being executed by the Howrah Court. In these circumstances it has been contended on behalf of the judgment-debtors-respondents, that the appellants were bound to apply to the Court which passed the decree, namely the original side of the High Court, under O. 21, R. 16, Civil P. C. The appellants contend that this rule has no application in this case as it is not a case of transfer by operation of law, but this contention cannot be upheld as transferee by operation of law includes the legal representatives of a deceased decree-holder. *Gour Sundar* v. *Hem* (4), *Midnapore Zemindary Co. Ltd.* v. *Bhasaram Mandal* (5) (at p. 708 *of* 51 *Cal.*). It has been held by this Court in a well-reasoned judgment by Bannerjee, J., Stevens, J, concurring, that an application by the transferee of a decree for execution after substitution of his name can be entertained only by the Court which passed the decree, and the Court to which the decree has been sent for execution has no jurisdiction to entertain it : *Amar Chandra* v. *Guru Prasanna* (6). This decision has been approved by the Judicial Committee in the case of *Kunwar Jang Bahadur* v. *Bank of Upper India Ltd.* (7), in which however their Lordships pointed out

(1) A. I. R. 1925 P. C. 117=88 I. C. 482=52 I. A. 188=4 Pat. 507.

(2) A. I. R. 1926 Cal. 957=96 I. C. 378.
(3) [1910] 3 I. C. 324.
(4) [1889] 16 Cal. 355.
(5) A.I.R. 1924 Cal. 661=80 I. C. 881=39 Cr. L.J. 873=51 Cal. 703.
(6) [1900] 27 Cal. 488.
(7) A. I. R. 1928 P. C. 162=109 I. C. 417=55 I. A. 227=3 Luck. 314.

that when subtitution is made by the executing Court of the legal representatives of a judgment-debtor deceased since the transfer of a decree it is an irregularity, but the irregularity may be waived by acquiescence, and when it has been waived, the party acquiescing cannot turn round and question the jurisdiction of the executing Court. In a case where a decree-holder dies before the decree is transferred, the legal representatives have to apply not really for substitution but to have their names brought on the record and to have the decree transferred for execution, a procedure that appears to have been followed in the case of *Jogendra Chandra Roy* v. *Sham Das* (8). In a case where after the decree has already been transferred the death takes place the same procedure may be followed or the legal representatives may apply to the executing Court for carrying on the proceedings, and may subsequently produce from the Court which passed the decree the necessary order under O. 21, R. 16, Civil P. C., and as has been held in the case of *Monorath Das* v. *Ambika Kanta Bose* (9), the failure or omission of the legal representatives to produce such an order from the Court which passed the decree at the moment of his application to the executing Court does not entirely vitiate his application to the executing Court.

To consider whether the irregularity that has occurred should be treated as fatal in the present case, we must bear in mind that the judgment-debtors took this precise objection on 10th February 1927, and thereafter on 8th March 1928 the executing Court made the order for substitution. The claimant Surendra Nath Dey purporting to have purchased the property on 12th February 1928 took no appeal from this order and put forward the same objection in the same Court. In the circumstances the order of 8th March 1928 must be taken to conclude the matter.

The appeal is allowed, but the appellants must pay the respondents' costs for the infructuous appeal that was at first filed, hearing-fee being assessed at 5 gold mohurs.

R.M./R.K. *Appeal allowed.*

(8) [1909] 36 Cal. 543=1 I. C. 168.
(9) [1909] 1 I. C. 57.

A. I. R. 1930 Calcutta 616

S. K. GHOSE, J.

Mohit Krishna Kundu—Plaintiff—Appellant.

v.

Pranab Chandra Ghose and *others*—Defendants—Respondents.

Appeal No. 275 of 1928, Decided on 13th May 1930, from appellate decree of Addl. Dist. Judge, 24-Perganas, D/- 10th May 1928.

(a) Partition Act (6 of 1893), S. 2—Application—Persons owning moities of zamindari and particular tenancy right can partition—Persons representing tenant's interests only cannot get order for sale under S. 2 without zamindar's consent.

Shareholders of different grades may sue for partition, because the right of partition exists when two persons are in joint possession of land under permanent titles although those titles may not be identical. A shareholder however small may sue for partition of the entire property. But an application under S. 2 of the Act contemplates a somewhat different set of circumstances. There may be partition as between persons possessing one moiety of the property in zamindari right and other persons possessing the other moiety in permanent tenancy right. But if there is an application by the tenants representing only the tenants' interest, it would be anomalous if that would give them a right to have a direction from the Court for the sale of the entire property, even though the zamindars were not willing: 37 *Cal.* 918 (*P. C.*) and 24 *Cal.* 575 (*F. B.*), *Ref.* [P 618 C 1]

(b) Civil P. C., S. 100—Question of law.

A new point of law may be raised for the first time in second appeal. [P 618 C 1]

(c) Partition Act (6 of 1893), Ss. 2 and 6—Property incapable of partition—Request for sale to highest cosharer bidder—Property should be given to highest bidder above price fixed by Court.

In the plaint the plaintiff made a prayer that the commissioner might be empowered to award compensation to the parties making their respective shares equal. In a later petition the plaintiff prayed that the defendants' share might be sold to him. This was supplemented by a verbal prayer from the plaintiff's pleader who asked that the property might be sold to that cosharer who should offer to pay the highest price. It was found that the subject matter of partition was incapable of partition.

Held: that the Court should direct the sale to be held among the plaintiff and the defendants and the property should be given to that party who offers the highest price above the valuation of the Court: 7 *I. C.* 884 and *A. I. R.* 1929 *All.* 443, *Rel. on.* [P 619 C 1]

Hira Lal Chakravarty and *Ramendra Mohan Mazumdar*—for Appellant.

Kali Kinkar Chakravarty, *Rajendra Chandra Guha* and *Promode Kumar Ghose*—for Respondents.

Judgment.—The plaintiff sues for partition in respect of a tank and some

lakheraj land. The contest is only with regard to the tank. It appears that a two annas share of the tank is at present held by defendant 1, and the remaining 14 as by the pro forma defendant 7. The plaintiff has obtained a permanent lease of 14 annas from defendant 7, and is building a house on the bank of the tank. In the plaint the plaintiff made an alternative prayer that if the division of the property cannot conveniently be made a direction might be given to the commissioner to compensate the party who might get less than what was due to his share. In his defence the defendant made a prayer that he should be allowed to purchase the share of the plaintiff in the tank. On 8th August 1927, when the suit was being heard, the plaintiff filed a petition offering to purchase the defendants' share.

It also appears from the judgment of the trial Court that, in moving the petition, the plaintiff's pleader asked that, if the prayer be not granted, the Court might direct that the tank might be sold to that cosharer who should offer the highest price above the valuation made by the Court. Both the Courts below agreed in holding in favour of the defence and gave a direction that, on defendant 1's depositing the value of the 14 annas share as made by the Court within a certain time he would be entitled to obtain a conveyance from the plaintiff. There was however some difference as between the two Courts regarding the money value of that share. The present second appeal is preferred by the plaintiff. The amount of the money value as fixed by the lower appellate Court of the 14 annas share is not now in dispute. But the appeal is pressed against the direction that defendant 1 will get a conveyance from the plaintiff on his depositing the amount of the value of 14 annas share.

In coming to the above decision the Courts below have had recourse to the provisions of the Partition Act, 1893. The learned Additional Judge has further held that, even apart from the Partition Act, the defendants would be liable to a decision in their favour having regard to general principles. It appears that the plaintiff sought to rely on the case of *Debendra Nath* v. *Haridas Bhattacharjee* (1). But the learned Judge had distinguished that case by remarking that it stands on a different footing. That was a case in which the property in suit could not be conveniently divided. I may remark that in the present case there is no dispute that the tank in question cannot be conveniently divided.

In the reported case it was held as follows:

"The proper course therefore to follow is to direct a sale of the property among the cosharers; and it should be given to that share-holder who offers to pay the highest price above the valuation by the Court. The defendant cannot in our opinion be compelled to transfer his share at a valuation to the plaintiff merely because the latter happened to have possession of the property at the time when they commenced the present action."

In that case it appears that the plaintiff did not choose to follow the procedure laid down in the Partition Act of 1893 and therefore the case was decided on general principles. I do not think that the learned Subordinate Judge was correct in holding that the reported case stood on a different footing. The learned advocate on the other side has drawn my attention to the case of *Basant Kumar Ghose* v. *Moti Lal Ghosh* (2). There it is held that when it is inconvenient to divide a property it must be left in the possession of the person in occupation, and the other person who cannot conveniently get actual passession should be compensated. In the present case no doubt the learned Subordinate Judge has found that the defendants have their homestead very close to the tank. But he does not refer to the fact that the defendants are only small cosharers, whereas the plaintiff is now entitled to by far the greater part of it. His case that he is building a house on the bank of the tank also has not been negatived. Therefore even on the equity of the case it does not seem to me that the defendants are entitled to decision in their favour on the alleged ground that they, and not the plaintiff, are in possession of the tank.

The next question, whether the Courts below were right in applying the provisions of the Partition Act, it is con-

(1) [1911 7 I. C. 844.
(2) [1907] 6 C. L. J. 8 n.

tended on behalf of the appellant that S. 2, Partition Act, 4, 1893 does not apply to the present case because the plaintiff is not a cosharer of the same grade as the contesting defendants and therefore he is not interested in the share of the property to the same extent as the defendants. S. 2, Partition Act, provides for a special procedure by which in place of partition of the property to which a cosharer is ordinarily entitled, there may be a sale of the property and rateable distribution of the proceeds, and the condition that is laid lown is that there must be a request by the shareholders interested to the extent of one moiety at least. It seems to me that the moiety here means moiety of the entire property vis a vis the other shareholders. No doubt shareholders of different grades may sue for partition, because the right of partition exists when two persons are in joint possession of land under permanent titles although those titles may not be identical: see the cases of *Lala Bhagwat Sahai* v. *Bepin Behary Mitter* (3) and *Himudri Nath* v. *Khana Kamini Kanta Ray* (4) a shareholder however small may sue for partition of the entire property. But an application under S. 2 Partition Act contemplates a somewhat different set of circumstances. There may be partition as between persons possessing one moiety of the property in zamindari right and other persons possessing the other moiety in permanent tenancy right. But if there is an application by the tenants representing only the tenants' interest, it would be anomalous if that would give them a right to have a direction from the Court for the sale of the entire property even though the zamindars were not willing. In the present case the plaintiff's lessor has been made a party as proforma defendant 7, but he has not joined in the application for the sale of the property. The learned advocate for the respondent has contended that this is a new point raised for the first time in the second appeal. The point however is one of law : but in any case the applicability .of the Partititon Act has been discussed in the judgments of the Courts below. In the view that I take it seems to me that there was not a request by the cosharers interested to the extent of one moiety or upwards vis a vis the contesting defendant 1 is not entitled to ask that the property be sold to him.

Conceding that the Partition Act applies to the present case, the next question is whether there was a request by the plaintiff as contemplated in S. 2 of the Act. In the plaint no doubt the plaintiff made a prayer that the commissioner might be empowered to award compensation to the parties making their respective shares equal. In his petition which was filed on 8th August 1927 the plaintiff prayed that the defendants' share might be sold to him. This was supplemented by a verbal prayer from the plaintiff's pleader who asked that the property might be sold to that cosharer who should offer to pay the highest price. It is pointed out that this was not a request for a public sale of the property which is provided for by S. 2 read with S. 6, Partition Act. The Courts below have relied upon the case of *Atul Chandra Kundu* v. *Bhusan Chandra Kundu* (5). The facts of that case are no doubt in some respects similar, but it seems that there is a distinction on a vital point, and that is that the plaintiff in that case made an alternative prayer that the property should be sold to the highest bidder, that is to say, that there should be a sale under S. 6, Partition Act. The learned advocate for the appellant has drawn my attention to the recent case of *Ram Prasad* v. *Mukundi* (6). In that case a house, which was the subject-matter of partition was found to be incapable of partition. The plaintiff asked the Court that the sale might be confined amongst the shareholders and the cosharer who offered the highest price might be given the house. It was held that where the nature of the property is such that a division thereof amongst all the shareholders cannot reasonably or conveniently be made and the parties are agreed that no division could be made, the Court should direct the sale to be held among the plaintiff and the defendants and the property should be given to that party who offers the highest price above the valuation of the Court. This isalso the decision in the case in

(3) [1910] 37 Cal. 918=7 I. C. 549=37 I. A. 198 (P. C.)
(4) [1897] 24 Cal. 575=1 C. W' N. 406 (F. B.).
(5) A. I. R. 1926 Cal. 1190=97 I. C. 690.
(6) A. I. R. 1929 All. 443—116 I. C. 851.

Debendra Nath v. *Haridas Bhattacnarji* (1) referred to above. In these circumstances it seems to me that the Courts below were not right in deciding the case in the way they have done. As mentioned already, even on the equity of the case, it seems to me that the plaintiff is entitled to a decision in his favour and I think that the present case should be decided in accordance with the decision in *Debendra Nath* v. *Haridas Bhattacharji* (1) and *Ram Prasad* v. *Mukundi* (6).

I therefore reverse the judgment of the lower Court of appeal and remand the case to the trial Court and direct that the valuation which has already been arrived at in respect of the 14 annas share of the plaintiff must be taken as conclusive and that the Court should value the 16 annas of the property in proportion to the valuation of the 14 annas share as already arrived at. The Court will then hold a sale of the tank amongst the plaintiff and the defendants and deliver the property to the party who should offer the highest price above the valuation of the Court. The appeal is allowed accordingly, but in the circumstances of the case the parties will bear their own costs in this Court. Future costs will abide the result. I do not think that this is a fit case for further appeal under the Letters Patent.

M.N./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 619

SUHRAWARDY AND COSTELLO, JJ.

Jasodha Kumar Dey — Defendant—Appellant.

v.

Kali Kumar Dey and *others*—Plaintiffs—Respondents.

Appeal No. 2193 of 1927, Decided on 12th February 1930, against appellate decree of 2nd Additional Sub-Judge., Noakhali, D/- 2nd August 1927.

Mortgage—Rights of mortgagee purchasing portion of mortgaged property.

Where the mortgagee purchases a portion of the mortgaged property the determination of the question whether the whole of the mortgage debt is chargeable on the remaining property mortgaged depends on whether the mortgagee purchased only the equity of redemption or the entire interest of the mortgagor and in the latter case no portion of the mortgage debt is extinguished: 22 *All.* 284 (*F. B.*); 22 *Bom.* 304 (*F. B.*); 8 *C. L. J.* 92; 6 *I. C.* 842; 28 *All.* 593 and 32 *All.* 612 (*P. C.*), *Ref.*

[P 620 C 2, P 621 C 1]

Ramdayal Dey and *Mahendra Kumar Ghose*—for Appellant.

Satindra Nath Roy Choudhuri—for Respondents.

Suhrawardy, J.—In this appeal the only question canvassed is whether the plaintiff mortgagee is entitled to sue for the entire mortgage-debt. The facts are that the defendant-appellant mortgaged five properties with the plaintiff in Falgun 1327. In Chaitra following the defendant sold one of the mortgaged properties to the plaintiff for Rs. 200 and the plaintiff on the same day conveyed a piece of land belonging to him to the defendant for the sum of Rs. 200. The present suit is brought by the plaintiff for recovery of the entire mortgage debt from the remaining properties. The defendants contend that the plaintiff is not entitled to sue for the entire mortgage-debt but is bound to allow proportionate reduction by the amount of the debt chargeable on the land which he has purchased from the defendant. Both the Courts below have overruled this objection.

Now the principle of law which should govern a case like the present is firmly established by innumerable authorities. It is not necessary to refer to all of them except to the leading cases on the point. The point was carefully considered in the Full Bench decision of the Allahabad High Court in the case of *Bisheswar Dayal* v. *Ram Swarup* (1), which followed the Full Bench decision of the Bombay High Court in *Lakhmidas Ramdas* v. *Jhumnadas Shankar Lal* (2). In that case the mortgagee had purchased one of the mortgaged properties in an auction sale in execution of a decree. It was contended there on behalf of the mortgagor that the mortgagee should not throw the entire burden of the mortgage debt upon the remaining property but was bound to allow proportionate reduction from the mortgage debt. It was held that if the mortgagee purchased the equity of redemption he must allow proportionate reduction of the value of the property purchased by him; but where the circumstances under which the purchase was made show that it was purchased

(1) [1900] 22 All. 284=(1900) A. W. N. 69 (F.B.).

(2) [1898] 22 Bom. 304 (F. B.).

free from all encumbrances, the plaintiff can enforce his entire security against the remaining property. The Court further held that it was not necessary to say in that case whether the same result would ensue if the purchase by the mortgagee was made under a private contract with the mortgagor and not at auction. In *Mutty Lal Pal* v. *Nanda Lal Neogy* (3), the learned Chief Justice observed that no reason existed for making any distinction between the purchase at an auction sale and the purchase at a private sale. This question and the allied questions were fully discussed in *Mir Eusuff Ali* v. *Panchanan Chatterji* (4). The following principles seem to have been laid down in that case on a consideration of all the authorities on the subject: (1) that there is no distinction on principle between a private sale and an execution sale; (2) the real distinction as to the application of the law exists between a purchase of the equity of redemption and a purchase of the entire interest in the property; (3) if the circumstances show that the purchase by the mortgagee was purchase of the entire interest free from all encumbrances, the mortgage debt will not be extinguished to the extent of the original charge borne by the property purchased. At p. 805 (*of* 15 *C. W. N.*) Mookerjee, J. lays down the law in these words:

"It is firmly settled doctrine that as between the original parties the release of a part of the premises does not affect the lien of the mortgagee upon the residue which is bound for the whole debt."

As that learned Judge was of opinion in the case before him that it was clear from the conveyance executed by the mortgagor in favour of the mortgagee that the property purchased was the entire interest in it and not merely the equity of redemption, the mortgagee was allowed to claim the entire debt from the rest of the properties. As the point has been fully discussed in that case it is not necessary to refer to all the authorities on the subject; but reference may be made to a case which went to the Judicial Committee where this point was also raised and discussed. In *Bhora Thakur Das* v. *Collector of Aligarh* (5) the point was directly raised. There a property was mortgaged under the first mortgage and that property along with another was mortgaged under the second mortgage. The mortgagee brought a suit on the first mortgage and purchased the first property. He claimed the entire debt from the other property and it was contended by the mortgagor that he could not claim the entire debt from the second property; but his mortgage debt was extinguished in proportion to the value of the property purchased by him under the first mortgage. It was held that the mortgagee was entitled to claim the entire debt from the second property. The case was taken on appeal to the Privy Council and the decision of the Judicial Committee is reported under the same name in *Bohra Thakurdas* v. *Collector of Aligarh* (6). This question was raised before the Privy Council but was not pressed. But their Lordships observed at p. 617:

"In the present case the appellant seeks to redeem 'agrana' (the second property) upon payment of a proportionate share of the Rs. 5,000; their contention being that as Nund Kishore purchased one of the properties on which the mortgage debt was secured it was pro tanto satisfied and 'agrana' was only liable for the share legitimately chargeable on it. As "Kachaura" (the first property) was sold and purchased by Nund Kishore in execution and part satisfaction of the decree obtained on the prior mortgage of 1886, the Court in India properly overruled the appellants' contention which has not been pressed before this Board."

Their Lordships of the Judicial Committee were of opinion that the judgment of the High Court in India had properly overruled the contention of the appellant in these circumstances.

The question therefore resolves itself to this whether the purchase by the mortgagee of one of the five properties mortgaged to him was purchase of the equity of redemption or of the entire interest of the mortgagor in the property. The deed of sale of the property has been placed before us and we find nothing in it to show that the mortgagee purchased only the equity of redemption. The property sold was 5 gandas 10 kags and it was sold for Rs. 200 which seems to be a proper value of the land. The mortgagee sold to the mortgagor on the same date a piece of land measuring about 11½ gandas for Rs. 200. That property was not sub-

(3) [1908] 8 C. L. J. 92=12 C. W. N. 745.
(4) [1911] 6 I. C. 842.
(5) [1906] 28 All. 593=(1906) A. W. N. 150.
(6) [1910] 32 All. 612=7 I. C. 732=37 I. A. 182 (P. C.).

ject to any encumbrance, and if the price of the entire interest in the land measuring 11½ gandas was Rs. 200 there is no reason to suppose that only the equity of redemption of the property purchased by the mortgagee would be worth the same amount. I have carefully gone through the documentary evidence in the case and I agree with the view taken by the Munsif that with the consent of both the parties the entire interest of the mortgagor was sold to the mortgagee. The mortgagor by his conduct impliedly agreed by receiving the full value of the property that no portion of the mortgage debt would be extinguished by virtue of the purchase by the mortgagee. That being so the mortgagor is not entitled to claim in this suit that a portion of the mortgage debt should be held to be pro tanto extinguished by the purchase of one of the properties by the mortgagee.

The appeal fails and is dismissed with costs.

Costello, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 621

SUHRAWARDY AND COSTELLO, JJ.

Ananta Lal Sarkhel—Defendant 1—Appellant.

v.

Soudamini Guha and *others*—Respondents.

Appeal No. 2084 of 1927, Decided on 20th March 1930, from appellate decree of Addl. Dist. Judge, Backerganj, D/- 16th July 1927.

(a) Civil P. C., O. 6, R. 4—If party fails to ask for particulars at the proper time, he cannot afterwards be heard to say that he was taken by surprise.

Where a general allegation of fraud is made which the defendant is not in a position to meet, he ought to demand further particulars from the plaintiff. If he did not do so he cannot be heard to say afterwards that under the general allegation of fraud evidence was given of a nature which took the defence by surprise. [P 621 C 2, P 622 C 1]

(b) Bengal Revenue Sale Law (Act 11 of 1859), S. 33—Section applies to suits by defaulting purchasers.

Section 33 has reference to suits which are brought by the defaulting purchaser or by persons claiming through the defaulting purchaser. A person who has a substantial interest which is liable to be affected by the sale is not debarred from bringing a suit by anything which appears in S. 33, Act 11, 1859 : 7 *C. W. N.* 377, *Ref.* [P 622 C 2, P 623 C 1]

(c) Fraud—Fraud will vitiate any transaction—Bengal Revenue sale S. 33.

If a suit for annulment of a revenue sale is based on a definite allegation of fraud, that of itself is sufficient to entitle the plaintiffs to the relief provided that the plaintiffs prove that fraud has been committed and that the plaintiffs' right of residing in the lands has been adversely affected. [P 623 C 1]

Brojolal Chakraburty, *Jyotis Chandra Guha* and *Rakhal Chandra Bose*—for Appellant.

Sarat Chandra Roy Chaudhury and *Prokash Chandra Majumdar*—for Respondents.

Costello, J.—The suit out of which this appeal arises was brought by a lady named Soudamini Guha and her sons to set aside the sale of a certain property which had taken place under the provisions of the Revenue Sale Law (Act 11, 1859). The plaintiffs claimed a decree for setting aside the revenue sale and in the alternative for a declaration that the plaintiffs' right with regard to the land in question had not been affected by the sale. The defendants were four in number and defendant 4 was plaintiff's stepmother in that she was one of the wives of the plaintiff's father. The allegation made on behalf of the plaintiffs was that this defendant who possessed the property in question as a widow of the plaintiff's father and therefore had a life interest in it, in order to defeat the future right of plaintiff 1 and her family to succeed to that property had fraudulently conspired with the other defendants to bring about the sale of the land by making default in the payment of the revenue charged upon it. The plaintiffs also sought to set aside the sale on the ground that certain provisions contained in S. 6, Act 11, 1859, had not been complied with in that the property had not been actually advertised for sale and the notice of the sale had been suppressed, or at any rate had not come to the knowledge of the plaintiffs. The defendants pleaded that the allegations of fraud and collusion made in the plaint were not very definitely specified and certainly did not contain such particulars as allegations of fraud ought to contain. The learned advocate who appears for defendant 1 made some complaint on that point but I indicated to him in the course of the argument that where a general allegation of fraud is

made which the defendant is not in a position to meet he ought to demand further particulars from the plaintiff. If he did not do so he cannot he heard to say afterwards that under the general allegation of fraud evidence was given of a nature which took the defence by surprise. In this particular case it is quite clear from the plaint that the plaintiff's real allegation was that these defendants conspired together with the object of bringing about a sale of this land in such a way that it could be purchased either by the lady who was a life-tenant or by somebody who was her benamidar or or nominee. It is clear that the allegation made against the defendants in substance was that the whole transaction was a fraudulent scheme for defeating the reversioners and enabling the life-tenant to re-acquire the property either in her own name or in the name of somebody else in absolute ownership and thus to deprive the plaintiffs of their contingent interest in the property. The Court of first instance came to the conclusion from the evidence in the case and in the circumstances that there was no room for doubt that :

"the sale had been brought about by the collusion and fraud of the defendants with a view to defeat the plaintiffs of their just claim;"

and that Court further came to the conclusion that the fraud consisted in the deliberate suppression of the notice of sale proclamation and the subsequent purchase in the name of defendant 1. The Court found that in fact the surplus sale proceeds were taken back by defendant 4 who in collusion with dedendants 2 and 3 had purchased the property herself though the ostensible purchaser was defendant 2; and the Court said that it follows from that that the purchase was really a purchase by the defaulting proprietor. The Court found accordingly that the sale was not binding as against the plaintiffs and declared that the revenue sale of the land in question which was estate No. 905 of the Barisal Collectorate should be set aside and made a further declaration that the plaintiffs' interest had not been affected by that sale. These conclusions were upheld by the lower appellate Court which dismissed the defendant's appeal. The lower appellate Court in the course of its judgment said inter alia that it was clear from the acts of defendant 4 that her object was anyhow to prevent this property from passing into the hands of the reversioners and the Court came to the conclusion that there was a conspiracy on the part of defendants 4 to bring about a sale of the property. We are of course bound by the findings of fact of the lower appellate Court and therefore this case must be dealt with on the footing that this sale was in fact brought about by fraud and conspiracy on the part of defendants 4. It is not necessary for me to emphasize the proposition that fraud will vitiate any transaction. No authority is needed for that proposition. It has been laid down repeatedly by Courts in England and in this country as well. Therefore the plaintiffs are entitled on that ground to succeed in the suit which they have brought. We accordingly do not think it necessary to discuss in detail the question whether or not there was in this particular case such a non-compliance with the provisions of S. 6 as would give rise to a right under the provisions of S. 33, Act 11, 1859, to have the sale annulled. That section provides that no sale for arrears of revenue or other demand realizable made after the passing of this Act shall be annulled by a Court of justice except upon the ground of it having been contrary to the provisions of this Act, and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of; and no such sale shall be annulled upon such ground unless such ground shall have been declared and specified in an appeal made to the Commissioner under S. 25 of this Act. A suggestion was thrown out in the course of the argument before us that some at any rate of the grounds on which it is sought to have the sale set aside were not specified in the appeal which in fact was made to the Commissioner. We may point out that S. 33 only has reference to suits which are brought by the defaulting purchaser or by persons claiming through the defaulting purchaser. It does not appear upon the authority that a person who has a substantial interest which is liable to be

affected by the sale is debarred from bringing a suit by anything which appears in S. 33, Act 11, 1859; and in that connexion I would refer to the case of *Jahnnovi Chaudhuri* v. *Secretary of State* (1). We are of opinion however that the question whether or not it can be said that the plaintiffs who are reversioners to this land have sufficiently substantial interest in the property in suit under the terms of S. 33 is in the circumstances of this case immaterial, for the suit is based on a definite allegation of fraud and that of itself is sufficient to entitle the plaintiffs to the relief, provided that the plaintiffs prove that fraud has been committed and that the plaintiffs' right residing in them has been adversely affected. It is manifest that if this revenue sale were allowed to stand and the property sold to remain in the hands of the alleged purchaser then there was nothing further to be done. The rights of the plaintiffs as reversioners will be adversely affected because their right to the succession will be entirely cut off. We are doubtful therefore that where in effect a suit is not one under S. 33 but is one founded on fraud as this suit in substance is, it is competent to the Court to annul the sale in its entirety. All that we are concerned with is to ensure that the defendants' fraud shall not adversely affect any right residing in the plaintiffs. Without therefore definitely deciding whether in suits outside the scope of S. 33, Act 11, a revenue sale can be set aside, we are of opinion that for the purpose of this case to safeguard the plaintiffs' right and to give them all necessary reliefs it is sufficient if we uphold the decision of the lower appellate Court to the extent that it confirms that part of the decision of the Court of first instance declaring that the plaintiffs' interest has not been affected by the revenue sale.

We accordingly allow this appeal in part by setting aside so much of the decision of the two lower Courts as have the effect of setting aside the revenue sale of Estate No. 905 of the Barisal Collectorate. We accordingly direct that it be declared that the interests of the plaintiffs in that estate has not been affected by the revenue sale in question. Having regard to the circumstances of this case and seeing that the plaintiff respondents in this appeal have maintained only the material part of the original decree of the Court of first instance declaring that their interest in the property has not been affected by the sale, we think that the appellants ought to pay to the respondents their costs of this appeal and of the Courts below.

Suhrawardy, J.—I agree.

K.N./R.K. *Order accordingly.*

(1) [1903] 7 C. W. N. 377.

A. I. R. 1930 Calcutta 623

RANKIN, C. J. AND C. C. GHOSE, J.

(*Mahant*) *Murlidas*—Plaintiff—Appellant.

v.

Baijnath Das-Ramnath Das—Defendant—Respondent.

Appeal No. 30 of 1929, Decided on 9th July 1929, from original order in Execution Case No. 68 of 1928.

(a) Civil P. C., S. 73—Money paid to the Sheriff in garnishee proceedings — Money becomes "assets in the hands of Court."

Once money is paid to the Sheriff in garnishee proceedings, it becomes money paid into Court and forms "assets in the hands of the Court" within the meaning of S. 73. It is not any the less so because due to subsequent proceedings the Sheriff is debarred from paying the amount in the Accountant-General's account with the bank. [P 624 C 2]

(b) Letters Patent (Calcutta), Cl. 15 — "Judgment," meaning explained.

The right of the appeal to the High Court depends upon Cl. 15 and whether or not the decision of the learned Judge appealed from is a judgment, depends upon whether or not so far as he is concerned he finally decided the rights of the parties as regards the question on which the appeal is based.

H. D. Bose and *J. N. Mujumdar*—for Appellant.

S. C. Roy—for Respondents.

Rankin, C. J.—In this case, it appears that the present appellant obtained judgment against his judgment-debtors in 1925 for a certain sum of money. Thereupon, he proceeded to take garnishee proceedings in respect of a sum belonging to the judgment-debtors with the Allahabad bank. In August 1928, the bank was ordered to pay that sum of money into Court, and on 20th August, the bank deposited that money with the Sheriff. Thereupon, certain proceedings were started by the judgment-debtors to restrain the plaintiff from executing his decree. The

judgment-debtors set up that it was a fraudulent decree and, for some reason which I do not appreciate, obtained an order stopping the execution proceedings for a period of two months, the money being ordered to remain in the hands of the Sheriff. Within the two months, the judgment-debtors were ordered to institute proceedings to have the fraudulent decree set aside. As a matter of fact, they never instituted any such proceedings. Then, on 24th August, some days after the money had been received by the Sheriff, the respondent before us brought a suit on three promissory notes and made an application for attachment before judgment of this money in the hands of the Sheriff. He got an order for attachment before judgment on 30th August and on 13th September, he appears to have obtained an ex parte decree. On this, he proceeded to levy execution, getting an order for execution on 27th November. On 29th November the plaintiff applied in his suit and got an order for payment out to him of the money in the hands of the Sheriff. Thereupon, the present respondent applied to the learned Judge, attacking that order, and the learned Judge set aside that previous order and made the order which is now under appeal before us.

The learned Judge may or may not have intended to decide the question as to the respondent's right to rateable distribution; but the order which he made merely set aside the ex parte order previously made by him in favour of the plaintiff and directed that the Official Referee should hold an enquiry and report as to who, under the provisions of S. 73 of the Code, were entitled to share in the same fund and in what proportion; so that the actual order pronounced by the learned Judge in no way decided finally or otherwise the rights of the respondent and the appellant inter se. The minute of the proceedings before the learned Judge is to this effect: "Order for rateable distribution. Counsel certified. Previous for payment out set aside."

It appears to me that, whether or not the learned Judge was of opinion that the present respondent was likely to succeed before the Official Referee in establishing his claim to rateable distribution he did not finally decide that point. As the matter however is a complicated one and has been argued before us, I propose to state my opinion on the question. As the matter will have to be decided by the Official Referee, it is just as well to give him what assistance we can.

It is quite clear that this money was received by the Sheriff on 20th August. Under the provisions of the garnishee order, it is clear that the person, who is indebted to the judgment-debtor, is required to show to the Court why he should not pay or deliver into Court the debt due from or the property deliverable by him to such judgment-debtor and if he does not do that and is adjudged to be liable so to do, then an order is made upon which execution can be taken. I have no doubt that when this money was paid on 20th August to the Sheriff, that money was paid into Court and was "assets held by the Court" within the meaning of S. 73 of the Code. Now, a contention has been raised before us to this effect: that although there was no application for execution of the respondent's decree before 27th November, nevertheless, under S. 73, the respondent is in time within the meaning of the words : "before the receipt of such assets made application to the Court for execution."

It has been contended before us that as the judgment-debtor's procedure resulted in the Sheriff being debarred from paying the money to the Account and General's account with the bank the Court never received the money and consequently, from the point of view of this case, you have assets held by the Court before the Court has received the money. In my opinion that is a plain misconstruction of S. 73 which contemplates the Court receiving certain assets and then proceeding to hold them. In my judgment the Court received these assets when the assets were paid to the Sheriff on 20th August. That being so it is manifest that no attachment before judgment that could be obtained after that date in a proceeding between the respondent and the judgment-debtors could take away from the execution creditor the rights that he had under S. 73 of the Code or otherwise. In this case it would appear that apart from the respondent there was no other person, who had applied for execution of any decree withi

twelve years of the material date. Therefore, it is perfectly plain in my judgment, that in the end the respondent has got no case at all for interfering with the execution that has been taken out by the present appellant.

Having given that opinion upon the facts, as they are before us, I have now to consider the proper form of the order. It is reasonably clear that the right of appeal to us depends upon Cl. 15, Letters Patent and whether or not the decision of the learned Judge is a judgment depends upon whether or not, so far as he is concerned, he finally decided the rights of the appellant and the respondent as regards this question of rateable distribution. In my judgment, having regard to the form of the order which is drawn up it is not possible for us to say that he finally decided their rights.

This appeal must, I think, be formally dismissed, both on the ground that it is incompetent and also, apart from that, on the ground that the appellant is not able to make out any grievance against the order so as to show that it is wrong. In the circumstances, however, there will be no order as to the costs of this appeal.

C. C. Ghose, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 625
Full Bench

RANKIN, C. J., AND C. C. GHOSE AND BUCKLAND, JJ.

In the matter of *N. S. Mundy.*

Civil Ref. No. 12 of 1929, Decided on 27th January 1930, made by Commr. of Income-tax, Assam.

Income-tax Act, S. 4—Person's claim for share in capital given up for consideration—Consideration is not income.

If a man claims an interest in the capital of a business and in the end receives a sum in satisfaction of all claims he may have in the capital of the business, that income is not liable to income-tax. The sum of money is not "income, profits or gains" within the meaning of S. 4 at all: *A. I. R.* 1929 *Cal.* 212, *Dist.* [P 626 C 2]

Bagram and *Stuart Smith*—for Petitioner.

Satindra Nath Mukerjee — for the Crown.

Rankin, C. J.—This is a reference by the Commissioner of Income-tax, Assam, and the question arises whether or not a certain sum amounting to Rs. 55,000 paid in April 1926 by a Mr. Trotman to the assessee is liable to income-tax.

It appears that Mr. Trotman in 1924 was the owner of a business which he carried on under the style of John Smeal & Co. Mr. Mundy, the assessee, was engaged by Trotman as an assistant in the business. It may be that the word "assistant" is not a quite sufficient description and that Mr. Mundy might be described as manager; but Mr. Mundy began as a servant of Mr. Trotman and he had to begin with no interest save that of an employee in his master's business. It appears that by 21st May 1924 Mr. Mundy had been serving his employer so well that for a good many years past it had been understood between them that, although there was no formal partnership, he had the position which Mr. Trotman described as "virtually that of a quarter shareholder in the business." The reason of this was that Mr. Mundy was being remunerated, it would seem by 25 per cent of the profits, and Mr. Trotman held out to Mr. Mundy that he was going to make a will, that he wished to convert the business into a limited liability company and to give Mr. Mundy a share. As to his intention to give Mr. Mundy this interest in this way there is evidence of a letter of 21st May 1924 Trotman saying that he is putting his intention into writing so that Mundy might have a tangible guarantee of his position. Later on, it appears that Mr. Mundy was taking up the position that he had been given a right to a quarter interest in the capital of this business, that he was a partner or at the worst was a person who had an enforcible agreement with Trotman to give him the interest of a partner to the extent of one-fourth share. Trotman was taking up the attitude:

"You are not a partner in fact. It is true that I did promise that I was going to convert the business into a limited company and give you a quarter of the shares. That has not been done and you Mundy are not desirous any longer that I should do so."

Mundy was maintaining that he had an even higher right, namely a right to a quarter interest in the business

apart from any question of a limited company. In that position Mundy made an offer to Trotman that he was willing to take Rs. 70,000 for his quarter share of the business and there is no doubt, on the terms of the letter, that he was claiming it not as an ex gratia payment but as a sum of money which he would take in lieu of what he alleged to be his right. Now Trotman in reply did not admit that Mundy had the right he claimed, but he said that just as he was willing to convert the business into a limited company and give Mundy one quarter of the shares, so in lieu of that he was willing to let Mundy have Rs. 60,000, i. e., to give in cash what he had expressed willingness to give in kind. This offer was accepted in a letter in which Mundy said:

"I am willing to accept your offer of Rs. 60,000 in payment of my quarter share of the business."

Now, the Commissioner of Income-tax, Assam, was, in the first instance, the authority to find upon all necessary questions of fact. It is quite true that he has found that Mr. Trotman's letters only amounted to an agreement that, if the business was converted into a limited company, Mundy would have a quarter of the shares. He says the agreement might have been enforcible, but as Mundy did not in the end accept the offer of a quarter share in the company that matter ended there. "Accordingly" says the Income-tax Commissioner "there is no partnership proved." We are thrown back on the letter in which Trotman speaks of Mundy as having the position virtually of a quarter shareholder in the business. Thereupon, the Income-tax Commissioner goes on to say:

"In my opinion, this does not constitute a saleable interest; and the payment by Mr. Trotman was an ex gratia payment to Mr. Mundy in consideration of the facts that the latter had served him long and well."

Now, in my judgment, the Income-tax Commissioner misdirected himself in law in holding that, upon these findings of fact, this payment was for tax purposes to be regarded solely as an ex gratia payment to Mr. Mundy in consideration of the fact that the latter had served him long and well. It may be quite true that Mr. Mundy had no right of a partner; but he certainly was claiming to have that right and he was claiming upon grounds which, as far as I can see, may well have had some foundation. The letter accepting Rs. 60,000 was a letter accepting it "in payment of my quarter share of the business." We have to look at this sum and determine the nature and character of the receipt from Mr. Mundy's point of view. He, not Mr. Trotman, is the assessee. How and for what did Mundy receive or acquire the money? He got it by pressing and then compromising a claim to a partnership which claim was no doubt fairly formidable or the sum of Rs. 60,000 would not have been given in exchange therefor. It seems to me that the Income-tax Commissioner thought himself obliged on the correspondence to hold this to be an ex gratia payment in consideration of the fact that Mr. Mundy had served Mr. Trotman long and well, merely because he could not find that, in point of fact, there was a right of a partner in Mr. Mundy. In so doing I think the Income-tax Commissioner has misdirected himself and I am clear that, on this correspondence alone, Mr. Mundy took this money in satisfaction of his claim to be entitled to a quarter share in the business. It seems that there was a suit between the parties in which an issue was framed:

"Did the plaintiff Mundy become partner with the defendant from April 1924."

Now, this payment of Rs. 60,000 was in settlement of Mundy's claim. That being so, it appears to me that we have to consider whether such a payment is "income, profits, or gains" at all within the meaning of the Income-tax Act. If a man claims an interest in the capital of a business and in the end receives Rs. 60,000 in satisfaction of all claims he may have in the capital of the business, is that income liable to income-tax? In my opinion it is not liable to income-tax and for the same reason that withdrawal of capital from a firm would not be liable to income-tax. We have not had the matter argued by learned counsel for the assessee at any length; but I may say that, if the assessee's case had depended upon his showing that the payment was within Cl. (7), sub-S. (3), S. 4, as at present advised, I should have thought that the payment being one arising out of business that clause did not apply. I am of opinion that the sum of money

here concerned is not "income, profits, or gains" within the meaning of S. 4 at all.

A recent case, *In re Turner Morrison & Co. Ltd.* (1) has been cited to us on behalf of the Commissioner of Income-tax. That case appears to have been decided under Cl. (7), sub-S. (3), S. 4, and other arguments appear to have been addressed to the Court upon the question whether the sum of money there fell within S. 10, or S. 12, Income-tax Act. I do not observe that the case was argued upon the footing that the payment in that case was of a character such as would prevent it from being "income, profits or gains" at all within the meaning of the Income-tax Act. I think the special circumstances of that case probably account for the fact that this aspect of the question was not dealt with in the judgment. It appears from the terms of the Articles of Association of the company that the managing agents had to take whatever remuneration the company would agree to in its annual meeting. In the course of a year the company went into voluntary liquidation and, in these circumstances, assuming that there was no other reason why the managing agents should not make a claim for wrongful dismissal, it is obvious that they would have some difficulty in recovering much by way of damages for wrongful dismissal if their remuneration after doing the work was entirely in the hands of their employers. It would seem that as the company was being wound up, a large sum of money was paid to the managing agents, a sum considerably in excess even of the remuneration which had been paid for a whole year in either of the preceding years; and, in these circumstances, it is perhaps not altogether to be wondered at that the sum of money in that case was dealt with as a question of ex gratia payment made to the managing agents in consideration of the fact that they were losing their expectation of continuing to do business as the managing agents of the company. In any case that matter is not on all fours with the question with which we are here concerned. If I am right in thinking, upon the correspondence in the present case that Rs. 60,000 was paid and received in satisfaction of a bona fide claim on the part of the assessee to be entitled to an interest in the capital of a certain business, it does not seem to me that that is liable to income-tax.

(1) A. I. R. 1929 Cal. 212=117 I. C. 689=56 Cal. 211 (F. B.).

Accordingly the question propounded to us should in my opinion be answered in favour of the assessee. The question is not perhaps very happily worded:

"Was the Income-tax Officer correct in holding that the applicant's interest in the business did not amount to a partnership or to such an interest as would entitle the Income-tax Department to regard money received in exchange for it as a capital receipt and not income."

In my judgment, as to the latter part of that question, the Income-tax Officer was not correct. Whether Mr. Mundy had or had not a right to a quarter interest in this business, if he received the Rs. 60,000 in satisfaction of a bona fide claim that he was entitled to a quarter interest in the capital the money so received is not taxable. The assessee will have his costs of this reference.

C. C. Ghose, J.—I agree.

Buckland, J.—I agree.

M.N./R.K. *Reference answered.*

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* A. I. R. 1930 Calcutta 627
Full Bench

RANKIN, C. J., AND C. C. GHOSE AND BUCKLAND, JJ.

In re *Satyendra Mohon Roy Chowdhury* and *others*.

Civil Reference under S. 66 (2), Income-tax Act, Decided on 5th May 1930, made by Commissioner of Income-tax, Calcutta.

(a) Income-tax Act, S. 34—Assessee has no right to reopen assessment before becoming liable to further tax—Court cannot consider injustice or administrative inconvenience—Interpretation of statute—Duty of Court.

Section 34 does not point to an intention to give to the assessee a right to reopen the whole assessment before being rendered liable to further tax. It is not for the Court to determine whether the administrative inconvenience entailed by such a right would be much or little, or whether it would afford any sufficient reason for refusing to the assessee a right to reopen the whole matter. Nor is it for the Court to consider whether there is any real injustice or inconvenience in refusing this right to an assessee who has failed to make a return.

[P 630 C 1]

*** (b) Income-tax Act, S. 34—Assessee can show that income has not escaped—Income assessed under wrong head is not ne-**

cessarily escaped assessment—Other income highly assessed is no defence.

It is always open under S. 34 to an assessee to show in any way he can that the income, profits or gains alleged to have escaped assessment have not in truth and in fact escaped assessment, and for this purpose it is not true that income, profits or gains have necessarily escaped assessment because they have not been assessed under the right head. But if it is once shown that income has escaped assessment, the assessee cannot under S. 34 resist proceedings to assess it merely by showing that other income, profits or gains have been assessed at too high a figure. [P 630 C 2]

Atul Chandra Gupta and *Bimal Chandra Das Gupta*—for Assessees.

Advocate-General and *Radha Binode Pal*—for Commissioner of Income-tax.

Rankin, C. J.—The assessees are a Hindu undivided family and for the year 1926-1927 an assessment to income-tax was made upon them under S. 23, Cl. (4), upon the footing that they had made default in rendering a return of income and submitting accounts. The Income-tax Officer making the assessment to the best of his judgment, assessed upon a total income of Rs. 17,950, under the following heads: Money-lending business, Rs. 11,155; property, Rupees 1,795; other sources, Rs. 5,000; making in all Rs. 17,950. In connexion with the assessment for the next year, namely, 1927-1928 the assessees produced certain accounts from which the Income-tax Officer was of opinion that in the previous year income under the heads business and property had partially escaped assessment. Accordingly, under S. 34 of the Act, he issued a notice stating that he had reason to believe that their income from money-lending and house property, chargeable to income-tax in the year ending 31st March 1927, had partially escaped assessment and that he proposed to assess the income that had escaped assessment and requiring the assessees to deliver a return of their income from all sources chargeable to income-tax during the said year. In compliance with this demand, the assessees filed a return showing that their income chargeable in the said year was: (a) from money-lending business, Rs. 28,287-11-0; (b) from house property, Rs. 1,365, (c) from other sources, Rs. 281; making a total of Rs. 29,933-11-0. Upon the basis of this return, and after an examination of the accounts, the Income-tax Officer reassessed the petitioners as follows: business, Rs. 28,787; property, Rs. 3,071; other sources, Rs. 5,000, as originally assessed; making a total of Rs. 36,858. It will be seen that as regards money-lending business the Income-tax Officer has raised the assessment from Rupees 11,155, to Rs. 28,787; and as regards property from Rs. 1,795 to Rs. 3,071.

Upon the present reference the decision of the Income-tax Officer is not challenged as regards these items. What is contended by the assessees is that the Income-tax Officer was wrong in thinking himself entitled to repeat the original assessment under the heading "other sources" at the figure 5,000. The contention which they seek to raise is that the Income-tax Officer, acting originally to the best of his judgment under S. 23, Cl. (4), assessed them under the head "other sources" at a figure which was much too high, that he had wrongly assumed that a certain portion of their collections from their zemindaries was chargeable to income-tax, whereas in fact a much smaller portion was so chargeable, a great bulk of this revenue being agricultural.

The income-tax authorities have held that this contention cannot be raised in the present proceedings under S. 34; that these proceedings were for the purpose of assessing income from money-lending business and house property which had partially escaped assessment; that the question whether the assessees' collections from their zemindaries are or are not, to the extent claimed, agricultural income, has nothing to do with the question whether the original assessment was too low in respect of their money-lending business or their property, i.e., buildings or lands appurtenant thereto: cf. S. 9.

The question which has been referred to us is stated as follows:

"When an assessment made under S. 23 (4) of the Act, is reopened under S. 34 by reason of the income from certain specified heads having been assessed at too low a figure, and proceedings are taken for the purpose of increasing the assessment, is it open to the assessee to show that his income under other heads had been assessed at the original assessment at too high a figure and that such assessment was unwarranted by law?"

The Commissioner of Income-tax is of opinion that S. 34 provides for the assessment to income-tax of profits or

gains which have escaped assessment in any year or which have been assessed at too low a rate; that it gives no general powers of revision to the Income-tax Officer and that the Income-tax Officer cannot reopen the assessment of the income, profits or gains on an assessee from any source in respect of which he has no reason to believe that the assessee has been under-assessed. In his view, it appears to be the intention of the Act that general powers of revision should only be exercised by the Commissioner acting under S. 33 and that the powers of the Income-tax Officer under Ss. 34 and 35 are strictly limited by the terms of the sections themselves.

Mr. Gupta, for the assessees, has contended that S. 34 says nothing about heads of income or sources of income. Accordingly, he contends, that one has to look at the total assessment before one can decide whether any income has escaped assessment, while not disputing that steps taken under S. 34 cannot give rise to a right in the assessee to make a claim for a refund, and that the income-tax authorities may at any time abandon the proceedings under this section, he contends that such proceedings entitle the assessee to show that while income under one head may have escaped assessment, income under another head had been over-assessed; in other words, that the whole assessment may be reopened at the option of the assessee who may show what the real truth as to his total income is.

This controversy must be determined, if possible, upon the words of the section which are as follows:

"If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-S. (2), S. 22, and may proceed to assess or reassess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that subsection:

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be."

The section begins by contemplating a case in which income, profits or gains has escaped assessment and it says that the Income-tax Officer may serve a notice upon the person liable to pay tax on such income. The notice may contain all or any of the requirements which may be included in a notice under S. 22 (2). The ultimate step is that the Income-tax Officer may proceed to assess such income. The words which have reference to a case in which income has been assessed at too low a rate may, for the present purposes, be disregarded as they refer to a separate type of case. Broadly speaking, as the section is expressed, it deals with income which has escaped assessment and it provides how the Income-tax Officer may proceed to assess it. In the present case the assessee's income from their business is found to have been Rs. 28,787 of which all but Rs. 11,155 has escaped assessment; and their income from property is found to have been Rs. 3,071 of which the excess over Rs. 1,795 has escaped assessment. I do not think that it can be said in such a case as this that the sums which represent the difference, i.e., Rs. 17,632 and Rs. 1,276, are not income which has escaped assessment because the assessees have been charged too much in respect of the zemindari collections.

If the question of the zemindari collections was in any way intermixed with the question of the profits in the money-lending business, or the question of the assessee's property within the meaning of S. 9 of the Act, the mere circumstance that it falls under a different head or is to be regarded as a different source would not in my opinion, exclude it from consideration. It is not always clear whether a particular income should be entered under one head or another. I know of no limits which can be laid down so as to prejudice the question whether any particular receipts have or have not escaped assessment, and I am not prepared to say that it is never open to an assessee to show, for this purpose, that his income under one head must be reduced if his income under another head is to be enhanced. In the case before us however it appears to be clear enough that the extent to which the zemindari collections are exempt from income-tax as being agricultural income is not affected by, and has no bearing

upon the question of the profits of the business of money-lending or the question of the annual value of the assessee's buildings and land appurtenant thereto of which they are the owners. In any event, the question which has been referred to us and argued before us assumes this.

On this footing I am unable to say that the language of S. 34 points to an intention to give to the assessee a right to reopen the whole assessment before being rendered liable to further tax. It is not for the Court to determine whether the administrative inconvenience entailed by such a right would be much or little, or whether it would afford any sufficient reason for refusing to the assessee a right to reopen the whole matter. Nor is it for the Court to consider whether there is any real injustice or inconvenience in refusing this right to an assessee who has failed to make a return. Such considerations are questions of policy and debatable as such. As a matter of the true construction of this section it appears to me that if the legislature had meant to say that if in any case it appears to the Income-tax Officer that an assessee has been assessed upon too low a figure or at too low a rate, the Income-tax Officer may issue a fresh notice under S. 22 (2) and may proceed to reassess such assessee afresh, the language employed would have been noticeably different from that which we find in the present section.

It is clear that the initial duty of the Income-tax Officer is merely to assess the income which has escaped. If this be right then I think that it would require express words to confer on the assessee a right to reopen other and unconnected matters. It is true that there is no express reference in the section to sources or heads of income. But these will usually come into the question in favour of the assessee since the assessment order will usually assess him at a lump sum under each head, and in any case in which such an assessment has been made in default of a return of income or of production of accounts the assessee will thus be able to contest the whole assessment made under that head if it is afterwards said to be insufficient.

It appears to me therefore that the question which has been referred to us must be answered against the assessees. But I am not altogether satisfied with the form in which it is expressed. In my opinion it is always open under S. 34 to an assessee to show in any way he can that the income, profits or gains alleged to have escaped assessment have not in truth and in fact escaped assessment, and for this purpose it is not true that income, profits or gains have necessarily escaped assessment because they have not been assessed under the right head. But if it is once shown that income has escaped assessment, the assessee cannot under S. 34 resist proceedings to assess it merely by showing that other income, profits or gains have been assessed at too high a figure.

The assessees must pay the cost of this reference.

C. C. Ghose, J.—I agree.

Buckland, J.—I agree.

M.N./R.K. *Reference answered.*

** A. I. R. 1930 Calcutta 630

Full Bench

RANKIN, C. J. AND C. C. GHOSE AND PATTERSON, JJ.

Barisal Rindan Samiti—Plaintiff.

v.

Sital Chandra Mukhopadhya and *another*—Defendants.

Civil Reference No. 3 of 1930, Decided on 16th June 1930, made by Munsif, Barisal.

**** Stamp Act (1899), S. 23—S. 23 does not cease to apply by reason merely of fact that interest is compound interest.**

Interest is interest, howsoever the amount be computed or calculated. Compound interest is just as much interest as simple interest and is just as much entitled to any benefit that S. 23 gives to the subject. Therefore a stipulation in an instrument to pay compound interest need not be separately stamped as a separate agreement. [P 631 C 1]

Brojendra Nath Chatterjee and *Sarish Chunder Dutta*—for Plaintiff.

Sarat Chunder Basak and *Nasim Ali*—for the Crown.

Rankin, C. J.—In this case the learned Munsif of the Central Court of Barisal has through the District Judge made a reference to this Court under S. 60, Stamp Act, 1899.

The plaintiff company instituted two suits on two promissory notes as they are called payable on demand for amounts below Rs. 250 in each case and each of the documents sued upon was stamped with a stamp of one anna. The

documents contain a stipulation in each case to pay interest at the rate of Re. 1-8-0 per cent per mensem and, at the end of the Bengali year, according to the rules of compound interest, that is to say, to pay interest at Re. 1-8-0 per cent per mensem with yearly rests. The view taken by the learned Munsif was that the provisions of S. 23, Stamp Act, did not apply to compound interest. The provisions of S. 23 are that, where interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable had no mention of interest been made therein. The point taken by the learned Munsif is that, while that is all very well as regards simple interest, compound interest is a different matter altogether and that the stipulation to pay compound interest should be separately stamped as a separate agreement not included within the provisions of S. 23. In my view that opinion is entirely erroneous. Interest is interest, however the amount be computed or calculated. Compound interest is just as much interest as simple interest and is just as much entitled to any benefit that S. 23, Stamp Act, gives to the subject. On this point therefore the reference must be answered in favour of the plaintiff and against the view which the Munsif has adopted.

Looking at the instruments in question however it appears that each of them is attested by one witness. It further appears that, while the document creates an obligation to pay money, it is not in either case so expressed as to make the money payable to bearer or order. Accordingly the document, though in common parlance it may be called a hand-note or a promissory note, may be said for the purpose of the Stamp Act to be within the definition of "bond." That question will perhaps require to be considered by the Munsif. We refer him to such decisions as will be found in *Venku* v. *Sitaram* (1), *Reference under Stamp Act, S.* 49 (2) and *Reference under Stamp Act, S.* 46 (3). We however have not this question before us nor have we the materials for deciding it. It is enough for us to answer the question proposed to us by saying that S. 23, Stamp Act, does not cease to apply by reason merely of the fact that the interest is compound interest.

There will be no order as to costs.

C. C. Ghose, J.—I agree.

Patterson, J.—I agree.

B.V./R.K. *Reference answered.*

(1) [1905] 29 Bom. 82=6 Bom. L. R. 841.
(2) [1907] 18 Mad. 147.
(3) [1895] 8 Mad. 87 (F.B.).

A. I. R. 1930 Calcutta 631

S. K. GHOSE, AND BOSE, JJ.

Satyakripal Banerji—Petitioner.

v.

Satyabikash Banerji—Opposite Party.

Civil Revn. No. 315 of 1929, Decided on 25th June 1929, from order of Addl. Sub-Judge, 24-Parganas, D/- 18th February 1929.

(a) Court-fees Act (1870), S. 15 — Court-fee is payable on entire claim in suit and not only on relief sought in review.

The court-fees on the petition for review is leviable on the value of the entire claim in suit, and not on the value of the relief sought for in the review proceedings. [P 632 C 2]

(b) Court-fees Act (1870), S. 15 and Sch. 1, Arts. 1 and 4—Plaint means plaint actually filed and resulting in judgment to be reviewed.

The words "the plaint" in column 3 mean nothing else than the plaint which was actually filed and which has resulted in the judgment which is sought to be reviewed. They do not mean an imaginary plaint which might be filed at the time of the application for review and asking for the same relief as in that application. Similarly, in the case of a memorandum of appeal a reference to Art. 1 would not support any other construction : 3 *C. W. N.* 293 ; *A. I. R.* 1924 *Cal.* 881 and 31 *All.* 294, *Ref.* ; 7 *Mad. H. C. R. App.* 1 ; *A. I. R.* 1927 *Mad.* 360 and 4 *Bom.* 26, *Diss. from.* [P 632 C 1]

(c) Court-fees Act, Sch. 1, Arts. 1 and 4—Policy of legislature.

The policy of the legislature was to put a clog on possible mala fide applications for review. [P 632 C 2]

Brajalal Chakravarti and *Hiralal Chakravarti*—for Petitioner.

Rupendrakumar Mitra and *Shyamaprasanna Mukerji*—for Opposite Party.

S.K.Ghose, J.—This rule arises out of the following circumstances: As far back as 1907, Title Suit No. 41 of 1907 was instituted in the First Court of the Subordinate Judge at Alipur, the reliefs claimed being partition and accounts and the value of the suit being Rs. 5 lakhs odd. The present petitioner was defendant 1 in that suit. The suit was preliminarily decreed by the learned

Subordinate Judge on 24th July 1908 and by the High Court in appeal on 17th August 1909. Thereafter two commissioners were appointed in succession to take accounts. One of the claims of the plaintiff was with regard to Government promissory notes of the face value of Rs. 20,000. The defence was that certain notes had been sold by the plaintiff. The matter was duly investigated and the suit was finally decreed on 3rd April 1928, 21 years after its commencement. The defendants were held liable for Rs. 19,500 in respect of the aforesaid G. P. notes. The final decree was for Rs. 95,000. The petitioner's case is that since then he has discovered new evidence which was not within his knowledge before. Thereupon he filed an application for a review of judgment before the Subordinate Judge under O. 41, R. 1, and S. 151 of the Code with regard to the petitioner's share of the said liability for Rs. 19,500, valuing the petition at Rs. 10,000 and paying court-fees of the value of Rs. 750 thereon. There was a preliminary objection to this application. The learned Subordinate Judge, after hearing the parties, held that the court-fees on the petition were leviable on the value of the entire claim in suit, and not on the value of the relief sought for in the review proceedings, and he directed the petitioner to pay the full court-fees as on the original plaint within a certain time. The petitioner at first sought for extension of time. But ultimately he was unable to pay and his application for review was rejected. Hence this present application in revision.

It is now contended that the learned Subordinate Judge was in error in construing Art. 4, Sch. 1, Court-fees Act, Act 7 of 1870. The whole thing turns upon the meaning of the words "the plaint" in column 3. To my mind they can mean nothing else than the plaint which was actually filed and which has resulted in the judgment which is sought to be reviewed. They do not mean an imaginary plaint which might be filed at the time of the application for review and asking for the same relief as in that application. Similarly, in the case of a memorandum of appeal a reference to Art. 1 would not support any other construction. I am confirmed in this view by the reported decisions of the Calcutta and Allahabad High Courts : *Nobin Chundra Chuckerbutty* v. *Mohamed Uzir Ali Sarkar* (1), *Nandi Ram* v. *Jogendra Chandra Dutta* (2) and *In the matter of Sheikh Maqbul Ahmad* (3), though the other view has been taken in Madras and Bombay, *Anon* in Reference from Civil Judge of Tanjore (4) *In re Punya Nahako* (5), and *In re Manohar G. Tambekar* (6). In *In re Punya Nahako* (5), which is the last case on the point. The Calcutta view was dissented from on the ground that it would entail hardship in cases where, as here, the review application related to only a small portion of the relief asked for in the plaint. But this point was not overlooked in the decisions of the Calcutta and the Allahabad High Courts. As pointed out in *In the matter of Sheikh Maqbul Ahmad* (3) the hardship is almost entirely mitigated in deserving cases by the provisions in S. 15 of the Act. The policy of the legislature is also referred to in the case of *Nandi Ram* v. *Jogendra Chandra Dutta* (2). It was pointed out that

> "for the purpose of ascertainment of the court-fee payable on the application for review the application relates back to the plaint or memorandum of appeal as the case may be : the amount is levied in a fixed proportion, independent of the scope of the application for review."

It seems to me that the policy of the legislature was to put a clog on possible mala fide applications for review. I hold therefore that the order complained against was correctly passed and the present application must fail.

The rule is discharged with costs to all the contesting opposite parties. Hearing fee three gold mohurs.

Bose, J.—I agree.

V.B./R.K. *Rule discharged.*

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(1) [1898] 3 C. W. N. 292.
(2) A. I. R. 1924 Cal. 881=82 I. C. 297.
(3) [1909] 31 All. 294=1 I. C. 209.
(4) [1872] 7 M. H. C. R. App. 1.
(5) A. I. R. 1927 Mad. 360 = 100 I. C. 72=50 Mad. 488.
(6) [1879] 4 Bom. 25.

A. I. R. 1930 Calcutta 633

RANKIN, C. J. AND C. C. GHOSE, J.

Emperor

v.

Kutub Bux—Accused.

Jury Ref. No. 11 of 1929, Decided on 2nd May 1929, made by Sess. Judge, Rajshahi and Malda.

(a) Evidence Act, S. 24—Co-villager exercising no influence or authority is not "person in authority."

It would be doing violence to the terms of S. 24, to hold that a co-villager who does not exercise any influence or authority in the village is a person in authority, although the accused might have thought him to be such a person: *A. I. R.* 1923 *Cal.* 458; 11 *C. W. N.* 904 and *A. I. R.* 1922 *Lah.* 263, *Rel. on.*

[P 635 C 1]

(b) Evidence Act, S. 24—Prisoner may be convicted on his own confession without any corroborative evidence and even when confession is retracted he may be convicted if jury believe that confession contains true account of prisoner's connexion with crime.

It is a rule of practice not to rely on a retracted confession unless it is corroborated by some evidence to show that the confession is true. As a matter of law it cannot be laid down that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence, and a prisoner may be convicted on his own confession without any corroborative evidence and even when a confession has been retracted, if the jury believe that the confession contains a true account of the prisoner's connexion with the crime.

[P 635 C 1]

Khundkar—for the Crown.

Mrityunjay Chattopadhyay and *Sukumar Hazra*—for Accused.

C. C. Ghose, J.—This is a reference by the learned Sessions Judge of Rajshahi and Malda under S. 307, Criminal P. C., arising out of a case, in which the accused Bandhu and Kutub were charged with having committed an offence punishable under S. 302, I. P. C. The jury brought in a unanimous verdict of not guilty against both the accused. The learned Judge disagreed with the verdict of the jury and, being of opinion that, in the ends of justice, it was necessary that the entire case should be laid before this Court, has made this present reference.

The case for the prosecution, shortly stated, is as follows: On 1st January 1928, which was a Sunday, the deceased Paltu left his home, after taking his meals in the evening, to look after his kalai in a field, which was at a little distance off to the west of his house. There was a hut in the kalai field. It appears that three persons, named Chhota Uniad, Makbul and Kutub, went later in the evening to the house of Paltu and made enquiries about him. Salikhan Bewa, the mother, told them that he had gone to the field. They called Bandhu, brother of the deceased Paltu, and persuaded him to accompany them. The next morning, Bandhu returned home alone. The mother, Salikhan Bewa, asked him what had happened to Patlu. Bandhu replied that Paltu had gone to Panchananpur. Paltu did not however return on the next day, namely Tuesday, and Salikhan Bewa, feeling worried went to two co-villagers, Paigambar and Hamid. She told them that Paltu had been absent since Sunday night. Paigambar thereupon questioned Bandhu and the latter promised to go and enquire at Panchananpur. As a matter of fact, Bandhu did not go to Panchananpur. In the evening, at about 10 p. m., Hamid, on his return home from Paigambar's house, heard voices in the adjacent house. He heard Bandhu and Chhota Uniad talking. Chhota Uniad was saying that "the dead body must be removed or else there will be great trouble." Hamid overheard this and went over at once to Paigambar's house and told him what he had heard. Barha Unaid was then present at Paigambar's house and the three went together to Chota Unaid's house. They saw Bandhu come out and Paigambar caught him and brought him to his house. Bandhu asked Paigambar to save him. Paigambar promised to do so; Bandhu said that he, Makbul, Chhota Unaid and Kutub had killed Paltu and had kept his body concealed in the Kalindri river.

A number of villagers were then called and, in the presence of them all, Bandhu repeated what he had already said to Paigambar. Kutub, who is a servant of Paigambar, was present at the time at the house of Paigambar and was immediately arrested by the villagers. The chaukidar was informed and both the accused were kept under the custody of the chaukidar during the night. Next morning, Bandhu showed the villagers the spot where the dead body had been concealed. The barley field, where Paltu had been killed, was pointed out by Bandhu. The villagers

went to the barley field mentioned by Bandhu and found that the barley plants were damaged, that there were marks of struggle and also marks of blood on the ground. Information was then lodged at the thana; investigation followed and, after the necessary enquiries, Bandhu and Kutub were committed to take their trial in the Sessions Court on a charge of murder. Makbul and Chhota Unaid could not be traced and it is said that they are still absconding.

We have been taken through the entire record by the learned Deputy Legal Remembrancer and by Mr. Chatterji and it would appear that the evidence of Paigambar, Hamid, Hazrat, Gahar, Aujal and Jagir, if believed, would tend to show that Bandhu made a confession before them on the night of Tuesday, implicating himself and Kutub and two other persons. It is not necessary to go through the evidence in detail of these witnesses; it will be sufficient if a few extracts from the evidence of Paigambar are set out herein. Paigambar stated as follows:

"At about 9 or 10 p. m,, Hamid and other persons left for home. I was about to go to my inner apartments, when Barha Unaid came. We had talk about missing Paltu. Soon after this, Hamid returned. I asked him why he returned. Hamid told me that he sat down to pass water on the outer yard, when he heard Chhota Unaid speaking to Bandhu "the dead body will have to be removed, otherwise there will be great danger."

"Then I, Barha Unaid and Hamid went to the house of Chhota Unaid. Just when we arrived at the house of Chhota Unaid, Bandhu was coming out of Chhota Unaid's house. I at once caught hold of Bandhu and brought him to my house. At my house, I questioned, as to what he was talking to Chhota Unaid, and why he did not go to Panchananpur to search for Paltu. At first he kept quiet. I then asked him to tell the truth and that I would help him in saving him. He fell into my feet and stated that he, Chhota Unaid, Makbul and Kutub—these four persons—had killed Paltu.

"When Bandhu made this statement, Barha Unaid and Bandhu were also present. Barha Unaid then cried out very loudly."

"Barha Unaid is cousin of Paltu. Barha Unaid is dead. On hearing Barha Unaid's cry Nasiruddin, brother of Barha Unaid, came. I, sent Nasuruddin to call Hasrath Mandal, Gahar Ali, Mir Waresali, Asgar Mandal and others. They all came. I then made over Bandhu to Hasrath, as he is the pradhan of the village and asked him to question Bandhu about Paltu. Hasrath questioned Bandhu about Paltu. Bandhu stated to him also that he, Kutub, Makbul and Chhota Uniad killed Paltu."

"Hasrath asked Bandhu, as to wherefrom he was called away. He stated that he, Chhota Uniad and Makbul were lying in wait at the jala (low land) to the west of Sangu's mango garden; and Kutub went and called Paltu from his kuria (hut). After Paltu came, Chhota Uniad and Kutub knocked him down and sat on his chest, Bandhu caught hold of his legs and Makbul cut his throat with a knife. Hasrath then asked him, 'Where have you kept the dead body?' He replied, 'The dead body has been concealed in the Patia jungle in the Hilsamari dhab.'"

"Hilsamari is about three miles from our village. We did not believe that the dead body was carried so far. We then pressed Bandhu to tell the truth about it. Then Bandhu said: 'The dead body has been kept under water in the Kalindri river near the Usir. The body has been tied to a post.'"

The evidence of the other witnesses is, as indicated above, on the same lines, and there can be no doubt whatsoever that Bandhu did make a confession before these villagers on Tuesday night. That the confession was of a voluntary character and was true, there cannot be much doubt. The learned Sessions Judge points out in his charge to the jury and, in his letter of reference, that the confession of Bandhu has been amply corroborated in various material particulars. On this point, I accept the statement of facts, as set out by the learned Sessions Judge, and will not, therefore, repeat the same here. It has, however, been strenuously argued before us that the confession of Bandhu is inadmissible in evidence, having regard to the provisions of S. 24, Evidence Act. It is said that Paigambar was a person in authority within the meaning of S. 24 and that he held out an inducement to Bandhu before he made the confession and that such inducement was sufficient to give Bandhu grounds which would appear to him reasonable for supposing that, by making the confession, he was going to gain an advantage or avoid evil. Therefore, the real point for determination is whether Paigambar was a "person in authority." The mere fact that the accused Bandhu thought that Paigambar was a person in authority is clearly not sufficient: *Emperor* v. *Ganesh Chandra Goldar* (1). It has no doubt been held from time to time that too restricted a meaning should not be given to the expression, but the test has always been: Had the person authority to interfere

(1) A. I. R. 1923 Cal. 458=74 I. C. 264=24 Cr. L. J. 760=50 Cal. 127.

with the matter ? ; and any concern or interest in it would appear to be held sufficient to give him that authority : see for an illustrative case *Regina* v. *Warringham* (2). Now, Paigambar was not a panchayat as in *Emperor* v. *Jasha Bewa* (3), nor a lambardar as in *Mahammad Yar* v. *Emperor* (4), nor a pradhan or village matbar. It does not appear from the evidence on record that Paigambar was a person who exercised any influence or authority in the village. In other words, the evidence does not show that he can be described as being a person whose word was accepted by the villagers. In these circumstances, in my opinion, it would be doing violence to the terms of S. 24, Evidence Act, if I were to hold that Paigambar was a person in authority within the meaning of that section. I am, therefore, of opinion that S. 24, Evidence Act, has no application and that the confession of Bandhu was admissible in evidence.

I am not unmindful of the fact that the confession was retracted. It is a rule of practice not to rely on a retracted confession unless it is corroborated by some evidence to show that the confession is true. As a matter of law it cannot be laid down that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence ; and a prisoner may be convicted, on his own confession, without any corroborative evidence and even when a confession has been retracted, if the jury believe that the confession contains a true account of the prisoner's connexion with the crime. As referred to above, the confession, in this case, has been corroborated by reliable evidence to a material extent and in material particulars. Therefore, in my opinion, so far as Bandhu is concerned, the evidence on record is such that the conclusion may safely be drawn therefrom that Bandhu was guilty of murder.

I have not gone into the question of motive. The motive alleged, in this case, is that Paltu objected to the marriage of Bandhu with the daughter of one Guruji. There is some evidence on this point, but, after all, the guilt or otherwise of Bandhu must be determined upon the circumstances related by the witnesses.

The case against Kutub stands on a different footing. The main evidence against him is the retracted confession of the co-accused. The learned Sessions Judge is of opinion that the confession of Bandhu, so far as Kutub is concerned is also true. It is said that the confession of Bandhu, as against Kutub, derives corroboration from the fact that blood-stains were found on the vest that he was wearing and that several injuries were found on his right hand, namely, three scratch marks, one cut and one abrasion. On behalf of Kutub, it was sought to be suggested that the injuries referred to above were caused by a fall with a tin canister. No doubt, the Imperial Serologist is of opinion that the blood that was detected in the stains on the vest was human blood, but it is by no means clear, on the evidence on record, that the vest in question had not been stained with blood due to the fact that Kutub had several injuries on his person. At any rate, after examining the entire record, I am unable to say that the case against Kutub is of such a clear character that I have no other alternative but to come to a conclusion adverse to him. In my view Kutub should be given the benefit of the doubt and forthwith discharged.

The result is that I find Bandhu guilty under S. 302, I. P. C. I have examined the record carefully to find out if there are any circumstances present, which would justify me in inflicting the lesser penalty indicated in S. 302. Bandhu is aged 18 or 19 : see p. 44 of the paper book. It is clear from the record that Paltu objected and strenuously objected to his marrying the daughter of Guruji. This is spoken to by several witnesses. It is, therefore, possible that he was led to commit the crime in question, because of the opposition of Paltu to his marriage. In these circumstances, I think the ends of justice will be sufficiently met if, instead of passing the extreme penalty of the law on Bandhu, I direct that he do undergo transportation for life. I order accordingly.

Rankin, C. J.—I agree.

S.N./R.K. *Order accordingly.*

(2) [1851] 2 Den. C. C. 447*n*.
(3) [1907] 11 C. W. N. 904=6 Cr. L. J. 154.
(4) A. I. R. 1922 Lah. 263=81 I. C. 555=25 Cr. L. J. 939.

A. I. R. 1930 Calcutta 636

CUMING, J.

Kalipada Das Karmarkar—Accused—Petitioner.

v.

Sashi Bhusan Majhi—Complainant—Opposite Party.

Criminal Revn. No. 184 of 1930, Decided on 25th March 1930.

Evidence Act, S. 35—Entry in death register may be rejected when used to prove or disprove death on particular day, if register is prepared in casual way.

If the fact of the death of a person on a particular day is sought to be proved or disproved by the aid of a death register, it is open to the Court to place no reliance on it, if it comes to the conclusion that, that register was prepared in a somewhat casual way. [P 636 C 2]

Debabrata Mukherji and *Mrityunjoy Chatterji*—for Petitioner.

Jnan Chandra Roy— for Opposite Party.

Judgment.— In the case out of which this Rule has arisen the petitioner has been convicted of theft and also of being a member of an unlawful assembly. The case for the prosecution was that the complainant was in possession of a certain piece of land and that the present petitioner with a large number of persons trespassed upon the complainant's land and dug up potatoes which he had grown on the land. The defence was that it was the petitioner who owned the land and who had grown the potatoes and removed them. Both Courts below have found that it was the complainant who was in possession and had grown the potatoes and hence the petitioner was convicted and fined.

The first ground on which the Rule has been granted is that the judgment of the Court of appeal below does not indicate the defence evidence in the case and contains no independent discussion of the same. It is perfectly clear from a perusal of the judgment what the defence evidence was, namely the testimony of certain persons who stated that they saw the petitioner cultivating the land and growing potatoes. The learned Court of appeal below has discussed this evidence and has come to the conclusion that he prefers on this question of possession the evidence of the complainant's witness. Anyone familiar with cases of this nature realizes that the evidence which was given in this case was of persons who said that they saw the complainant or they saw the accused person cultivating the land and growing potatoes. There is no substance whatever in this ground. The next ground on which the Rule has been granted is that on the findings of the Court of appeal below the conviction of the petitioner under S. 379, I. P. C., is not sustainable. It is somewhat difficult to realize how the petitioner has obtained the Rule on this ground for is it perfectly clear from a perusal of the judgment of the lower appellate Court that that Court finds that it was the complainant who was in possession of the land and who grew the potatoes and the petitioner removed the potatoes from the land. Clearly therefore on the facts found the conviction of the petitioner under S. 379 was right.

The last ground on which the Rule has been obtained is that the Court of appeal below ought to have held that the complainant's vendor had no right to convey the property to him on the day he did in view of the only evidence in the case, viz. the death register which the said Court of appeal below was not justified in rejecting on mere suspicion. The question before the Court apparently was whether a certain person was or was not dead on a certain date when the sale deed was executed. The lower apppellate Court came to the conclusion that he could not place any reliance on the death register which would apparently show that on the date when this sale deed was executed the father of the person executing the deed was not dead. It was obviously open to the Court to reject or accept any piece of evidence. In the present case the Magistrate was not prepared to place any reliance on the death register in view of the somewhat casual way in which the death register was prepared and it is impossible to say that the lower appellate Court was wrong in so dealing with the death register. There is no substance in this ground either. The Rule is therefore discharged.

V.B./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 637

RANKIN, C. J.

Thakurdas Mundra and *others* — Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 670 of 1929, Decided on 3rd January 1930, from order of Chief Presy. Magistrate, Calcutta, D/- 30th April 1929.

Calcutta Police Act (Bengal Act 4 of 1866), S. 44—Members of association alleged to carry on business for purchase and sale of jute for future delivery — No delivery intended—Accused are guilty under S. 44.

Certain persons were members of an association called the Bengal Jute Association which carried on business at particular premises in respect of transactions for purchase and sale of jute for future delivery. It was found that there was no intention between the parties either to take or give delivery.

Held: that the accused were guilty under S. 44 their intention being to gamble and not to deal in jute. [P 638 C 2]

Narendra Kumar Basu, K. C. Gupta and *Satindra Nath Mukerjee*—for Petitioners.

Probodh Chandra Chatterjee for *Dibendra Narain Bhattacharjee* — for the Crown.

Rankin, C. J.—In this case the Chief Presidency Magistrate has found 25 men guilty of an offence under S. 44, Calcutta Police Act (Bengal Act 4, 1866), that is, of the offence of keeping a certain house, room or place, to wit 2/1 Royal Exchange Place, as a common gaming house. It appears that the police raided the premises 2/1 Royal Exchange Place on 27th February 1929, and out of a large number of persons then and there arrested, the present accused were prosecuted. The accused are all modis or members of a limited company called the Bengal Jute Association Limited which carried on business at the address mentioned, and the sole question in the case is whether or not the transactions which were entered into or arranged by members of the association were wagering transactions or were in truth, as they purported to be in form transactions for the purchase and sale of jute for future delivery. This question is one of fact and it is for the prosecution to show that in these transactions the intention of the parties was in no circumstances either to take or give delivery. If it be shown that the intention of both parties to each contract was merely that according as the prices of jute should rise or fall payment of differences should be made, then it is proved that the true intention of the parties was to gamble and not to deal in jute. The Court has to arrive at the true intention of the parties upon a consideration of all the facts. I know of no special rules of proof or presumption which affect this question. If however it be first found that the transactions entered into at this place were transactions by way of wager or gaming, then no doubt the books and contract forms which were kept upon the premises must be regarded as instruments of gaming and, in the circumstances of this case, the accused have no defence to a charge under S. 44.

It appears that the Bengal Jute Association Limited was registered under the Companies Act in October 1928. The case of the accused is that this association was incorporated for the purpose of dealings in "futures," that is to say, dealings in jute for delivery in certain specified months of the year namely, September, December and March and that in February 1929, when the business was brought to an end by the police raid, only one delivery month, namely December 1928, had elapsed and the dealings then taking place were dealings for delivery in March. It appears from the evidence that these dealings were of two classes according as they were made by and between modis who were members of the association, that is between modi and modi, or were made by the agency of modis between third parties or beparis. A printed form was kept for each class of contract. The form for use between modi and modi is a very short one and purports merely to record a sale subject to the bye-laws of the Bengal Jute Association. The contract form for the latter class of contract is more elaborate and has all the appearance in many of its clauses of a real sale of jute. It provides that the sellers between the 1st and 20th of the delivery month shall tender a delivery instruction form and that the buyers within three days thereafter are to send shipping instructions. It contains however, certain remarkable terms, in particular the terms providing for the periodical payment of margin namely that a party shall pay to or receive

from the other the difference between the contract rate and the market rate on Saturday as quoted by the association. It provides that interest on all margin will be calculated at the rate of 6 per cent per annum from the date of payment on the due date of the contract, but that any failure to pay margin is to entitle the other party to terminate the contract and to claim difference on the basis of the rate prevailing on the date of default. The contract also provides that no contractual privity is established with the persons with whom a corresponding contract is entered into; that is to say that while the modi acts in form as a broker he is in reality alone responsible to his principal for the performance of the contract.

The contention of the accused is that the provision for payment of margins was intended to minimize the chance of loss by reason of failure on the part of the buyer or seller to make payment or to give delivery as the case may be. It is further contended that although the accused or the persons with whom they dealt were not possessed of any stock of jute, or godowns for the storage thereof, delivery could be and was intended to be effected by means of delivery orders which enabled the holder to obtain delivery from jute balers or other persons who were possessed of stocks of jute. They further contend that several deliveries had in fact been made in this manner; that owing to the cornering of jute by a certain dealer many transactions had to be settled in December by the payment of differences; but that there is no proof, or no sufficient proof, that the transactions which were for delivery in March would not have been completed in some cases at least by delivery.

The Chief Presidency Magistrate is in my judgment right in saying that the only question in the case is as to the real nature of the business done. On this question it is quite true that the defence have done nothing to prove the genuineness of such business. They have not produced their books or customers to speak to any particular transactions and give evidence of their genuine character. They are entitled however to say that it is for the prosecution to prove the offence. In the first place it is clear, both from the contract itself and from the evidence, that the business was to be done according to certain clearing house procedure: the delivery order for example, by Cl. 23 of the contract between modi and bepari was to be obtained by the modi from the clearing house. Now the association kept a delivery book as under this system it would have to do. In spite of evidence which shows that a very large volume of business—the exact amount is of small importance—was being transacted by members of the association, the records of the association disclose, as the Magistrate has conclusively shown in his judgment, that delivery orders for 250 bales from each of three jute balers represent the only cases in which there can have been any question of delivery. In no single one of these cases was delivery ever given in fact. It appears that two orders were paid for by the secretary of the association. They were sold and then resold to the sellers who got them back with a substantial profit in a few days. One of the balers from whom a delivery order was obtained is shown to have been in liquidation and to have had no godowns for months, and there is no evidence of money having been paid for this delivery order. There is no evidence of any delivery order having been taken or given in connexion with any transaction conducted at this place. The conclusion of the Magistrate is that these delivery orders are not genuine but were a mere "blind," the possession of them being intended to conceal the fact that delivery was not intended at all.

Upon a careful consideration of the evidence I am of opinion that the Magistrate was right in thinking that the case against the accused was proved and in my judgment the rule must be discharged.

R.M./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 638

CUMING, J.

Kusum Baistami and *others* — Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1453 of 1929, Decided on 21st January 1930, from an order of Sub-Divl. Mag., Pabna, D/-24th April 1929.

Eastern Bengal and Assam Disorderly Houses Act (2 of 1907), Ss. 2 and 3—Order to discontinue use of house as disorderly house and not to vacate it can be made—Order imposing fine on non-compliance of order vacating house is ultra vires.

Under the Eastern Bengal and Assam Disorderly Houses Act the owner or occupier of disorderly houses may be ordered to discontinue the use of a house as a disorderly house but not to vacate it. An order imposing daily fine on prostitutes for non-compliance with an order to vacate their houses is therefore not competent under Ss. 2 and 3 andis ultra vires. [P 639 C 2]

Surajit Chandra Lahiri — for Petitioner.

Dinesh Chandra Roy—for the Crown.

Order.—This is an application by four persons who have been sentenced to pay a daily fine of Rs. 2 a day each for not carrying out the orders passed against them under S. 3, Eastern Bengal and Assam Disorderly Houses Act of 1907. The grounds on which the rule has been issued are : first, that the notices upon which the present order is based being ultra vires and without jurisdiction the order itself is not maintainable; and secondly, that the judgment is not in accordance with law since the cases of the individual accused have not been separately considered. As far as I can see, the ground stated first is well founded. These persons were ordered to vacate the houses. S. 2 of the Act provides that a Magistrate may summon the owner, tenant, manager or occupier of the house to appear before him to show cause why the use of such house should not be discontinued for any of the purposes or in any of the ways described in the section. Admittedly notices on these persons were to show cause why they should not vacate the house, an order which could not obviously be passed under the section. Apparently some order was passed on 9th October 1928 which directed the petitioners not to use the houses as brothels and allowed them eight weeks' time to discontinue such use. Against this order an application was made to the District Judge which was rejected on 28th March 1929. On 4th April 1929 the following order was passed :

"The Judge has rejected their motion on 28th March 1929. Prostitutes have not vacated the quarters up to this time. They had sufficient time to vacate the houses used by them as brothels. They are directed to carry out the orders under S. 3, Act 2 of 1907, within seven days."

Apparently therefore at that time the order was to vacate the house. On 24th April 1929 the Magistrate passed the following order :

"Prostitutes are still occupying the houses and they are still using the same as brothels. Thus it will appear that they have not carried out orders passed on them under S. 2 (b), Act 2 of 1907 on 9th October 1928 and upheld by District Judge. They were given six weeks' time by this Court and after the Judge's confirmation of the order on 28th March 1929 owners and prostitutes were given further time from 4th April 1929 to 24th April 1929 to close down the brothels, but neither the owners of the houses nor the prostitutes living in the brothels have taken any notice of the said order."

For these reasons he imposed the fine which is now the subject of the rule. It seems to me, as far as I can understand these somewhat contradictory orders of the Magistrate, that he directed that the prostitutes were to vacate the houses, and as they did not vacate the houses they were fined Rs. 2 per diem until they carried out the order. That order was obviously ultra vires. The Act does not provide that they should be ordered to vacate the houses but merely they should discontinue the use of the houses as brothels. The order of the Magistrate therefore seems to be ultra vires. The order inflicting fines in the present case is accordingly set aside.

It will be open of course to the Magistrate to take proper proceedings against the petitioners under the Act if he thinks necessary.

The fines if paid must be refunded.

R.M./R.K. *Order set aside.*

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* A. I. R. 1930 Calcutta 639

SUHRAWARDY AND COSTELLO, JJ.

Rash Behary Ray and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 22 of 1929, Decided on 19th May 1930.

*** Civil P. C., S. 115, and O. 8, R. 2—Something put in written statement which is not true and something omitted which ought to have been there—Court holding that such action constituted offence under S. 193, Penal Code—Order is so misconceived that High Court is bound in revision to set it aside.**

In many cases persons in verifying the pleadings, defendants their written statements, or plaintiffs their plaints, are often found to say something which is not strictly true ; for example a defendant may deny the making of a contract or deny that a certain transac-

tion took place in order to force the plaintiff to give evidence and be subjected to cross-examination in the matter or to put the matter raised in issue. But by such action he does not render himself liable for prosecution for perjury for making false statement. Where the Judge so misconceives the operation and function of a written statement as to imagine that because something is put in in a written statement which is in a sense not true and something is omitted from the written statement, that of itsslf constitutes offence under S. 193, Penal Code, the High Court is not only justified in exercising but is bound to exercise its power in revision to set aside the order. [P640 C 1, 2]

Debendra Nath Bhattacharjee and *Bikash Chandra Ghose*—for Petitioners.

Narendra Kumar Basu and *Jatindra Nath Mitter*—for the Crown.

Costello, J.—The only possible point which could be taken is that this is not a matter which can properly be said to fall within the provisions of S. 115, Civil P. C. But in this particular case the learned Judge has taken such a fantastic view of the law and has made an order in circumstances where it is quite impossible for this Court to make any order than that we feel not only justified in exercising but bound to exercise our power in revision to set this order aside. We can only express astonishment that a Judge of the experience of the learned Judge should have so misconceived the operation and function of a written statement as to imagine that because something is put in in a written statement which in a sense is not true, and something is omitted from the written statement that of itself constitutes an offence under S. 193, I. P. C. It is obvious that written statement in a civil suit corresponds to the pleading which in England is called the defence, and that being so it is competent to the defendants to a suit to raise such pleas in their written statements as they think fit or to abstain from raising things which appear to the defendants not to be of advantage to them. In the present instance the matter, as I have said, is so fantastic as to be utterly ridiculous because these persons were charged, not with having made statements in their written statement which are not true but simply with omitting to say something which the learned Judge, by reason of the terms of O. 8, R. 2, Civil P. C., thought that they ought to have included. O. 8, R. 2 which corresponds to O. 9, R. 15, of the English rules provides that the defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the oppcsite party by surprise or would raise issues of fact not arising out of the plaint, as for instance fraud, humiliation, release, payment, performance or facts showing illegality. Of course all matters of the nature of those mentioned in that rule, if the defendant desires to take advantage of them, must be mentioned or raised in his written statement as otherwise he would be debarred from raising those matters at the trial. The word "must" means such an obligation, that if he fails to do so he would be restrained from raising those matters later except under R. 9 of that order. The learned Judge has wholly misunderstood the purpose and intent of the rule to which he has referred. It is perhaps a little unfortunate that by reason of the provisions of the Code pleadings, such as written statements, have to be verified because in many cases persons in verifying their pleadings, defendants their written statements or plaintiffs their plaints, are often found to say something which is not strictly true; for example, a defendant may deny the making of a contract or deny that a certain transaction took place, in order to force that plaintiff to give evidence and be subjected to cross-examination in the matter or to put the matters raised in issue. But I do not think that he renders himself liable for prosecution for perjury for making false statements. It is obvious that there is no justification for the order passed by the learned Judge in this case, which must be set aside. The rule is therefore made absolute.

Suhrawardy, J.—I agree.

P.N./R.K. *Rule made absolute.*

** A. I. R. 1930 Calcutta 641
Full Bench

RANKIN, C. J., AND C. C. GHOSE AND BUCKLAND, JJ.

In re *Bijay Singh Dudhuria*—Assessee.

Income-tax Reference Decided on 12th August 1929, made by Income-tax Commr., Bengal, on 2nd February 1927.

**** (a) Income-tax Act (1922), Ss. 3, 7, 9 (1), 10, 12, 14 (3), 33, 40 and 43—Annuity to Hindu stepmother by way of maintenance—Stepson is not exempt from being assessed for amount so paid—Resort can be had to corpus in case of default is immaterial.**

A Hindu stepson belonging to the Mitakshara School of Hindu law, paying annuity to his stepmother by way of maintenance, is not entitled to claim an exemption from being assessed with respect to the amount of annuity paid by him; and further the fact that the lady can in case of default resort to the corpus of the property does not make any difference with respect to this assessability : *London County Council* v. *Attorney-General*, 4 *Tax Cases* 265 ; 26 *Cal.* 411 and 9 *Bom.* 279, *Ref.* [P 644 C 2]

(b) Interpretation of Statutes—Income-tax Act—Court cannot adopt law according to its own notions of fairness.

If the Crown, seeking to recover tax, cannot bring the subject within the letter of the law, the subject is free. But the Court cannot undertake, out of its own notions of what is fair, to adapt or rearrange the machinery of the Act upon a matter of such character and importance as maintenance allowance : *Partington* v. *Attorney-General*, (1869) 4 *H. L.* 100, *Rel. on.* [P 644 C 1]

H. D. Bose and *Amulyacharan Sen*—for Assessee.

N. N. Sircar and *Radhabinode Pal*—for Commr. of Income-tax.

Rankin, C. J.—The question in this case arises out of the assessment to income-tax made upon Raja Bijay Singh Dudhuria of Azimganj in the year 1924-25 and the year of account is 1923-24.

The assessee submitted a return of his income, in the ordinary way as an individual and the Income-tax Officer, on 16th March 1925, assessed him at a figure of Rs. 1,12,005 after allowing him a deduction of Rs. 9,900 in respect of the fact that he had paid a sum of Rs. 1,100 per month to Sreemati Sugankumari Bibi, his stepmother. This sum of Rs. 9,900 represented the proportion of the amount so paid by the Raja, attributable to his assessable income, as distinct from his agricultural income, which is not liable to income-tax. The deduction was attributed to several heads of assessable income as follows :

	Total income.	Deductions.	Net income.
	Rs.	Rs.	Rs.
Interest on securities.	8,040	633	7,407
Property ...	35,110	2,070	33,140
Dividends ...	9,317	728	8,589
Business ...	66,611	5,420	61,191
Other sources ...	1,827	149	1,678
Total ...	1,21,905	9,900	1,12,005

The Raja made no objection to this assessment, but in January 1926 the Commissioner of Income-tax, Bengal, reviewed the assessment under S. 33, Income tax Act, and, after notice to the Raja, and after hearing him, came to the conclusion that the deduction of Rs. 9,900 which had been allowed should be disallowed and directed that he be assessed on a total income of Rs. 1,21,905. The occasion for this review of the original assessment was an objection by Sreemati Sugankumari Bibi to an assessment made upon her in respect of the maintenance allowance of Rs. 1,100 per month before mentioned. It would appear that the lady lives at Bikanir, but that the Income-tax Officer at Murshidabad purported to assess her through the Raja, as her agent, and had made an assessment upon the monthly sum of Rs. 1,100 on the footing that it was an annuity taxable as salary under sub-S. 1, S. 7 of the Act. The lady very naturally objected that the Raja was not her employer and the Commissioner very properly accepted this contention. Apart from this however the lady maintained that she was not liable to be assessed at all and the Commissioner of Income-tax, in accordance with a contention pressed upon him on behalf of the lady, held that the Raja and she were both members of an undivided Hindu family of which the Raja was the manager. Accordingly, he cancelled the assessment on the lady and added to the Raja's assessment the sum of Rs. 9,900.

The Raja took divers exceptions to the Commissioner's order. Some of these exceptions had reference to questions of procedure ; others were on the merits. The Raja contended that he was liable to be assessed as an individual and that he and the lady were not members of an undivided Hindu family. He maintained that the deduction originally made by the Income-tax Officer was a deduction to which he was entitled.

In February 1927 the Commissioner of Income-tax made a reference to this Court upon two questions of procedure and gave reasons why the other questions which he had been asked by the Raja to refer were not, in his opinion, proper to be referred by him. Upon this reference coming before the Court the Court exercised its power under Cl. (4), S. 66 of the Act and, by consent of counsel on behalf of the assessee and on behalf of the Crown, sent the case back to the Commissioner, directing him to find the necessary facts to enable the Court to decide :

> "whether it should have been held that the Raja was entitled to the exemption claimed by him."

in other words to decide the merits of the matter. Accordingly, the Commissioner, in November 1928, has stated the facts and given his opinion upon this question.

According to the case stated, the Raja is by caste a Jain and is governed by the Mitakshara School of Hindu law. His father, Ray Bishen Singh Dudhuria Bahadur, died in 1894, leaving him surviving his only son (the Raja) and a widow, Sreemati Sugankumari Bibi, who is the stepmother of the Raja. At the time with which we are concerned the Raja had no son, though a son has since been born to him. Ray Bishen Singh Dudhuria Bahadur appears to have died intestate. He left considerable properties, and, some time after his death, the widow brought a suit in this Court against the Raja, claiming maintenance and suitable accommodation for her residence, out of the properties which had belonged to her deceased husband. This suit was compromised and, by the consent decree, the Raja was directed to make over to her a certain house for her residence and to pay out of the estate the sum of Rs. 1,100 per month for maintenance together with certain arrears of maintenance. The Raja has been regularly paying the monthly allowance as decreed and, in the year of account with which we are concerned, he paid in all for this purpose Rs. 13,200. It is agreed that Rs. 9,900 represents the same proportion of Rs. 13,200, as the assessed income of the Raja bears to his total income, including agricultural income. In these circumstances the Commissioner is of opinion that the Raja and the lady are members of an undivided Hindu family and that the total income of the family is assessable in the hands of the Raja as manager thereof, no deduction being permissible in respect of the maintenance paid to one of the members. Further, and in the alternative, he is of opinion that the maintenance paid to the widow is on the same footing as the maintenance provided by the assessee for his wives and daughters and is a personal expense of the assessee and cannot be held to be a charge upon his estate for the purposes of assessment to income tax.

At the hearing before us the learned Advocate-General abandoned the contention which found favour with the two Commissioners of Income-tax, who have dealt with the case, that the Raja and the widow were members of an undivided Hindu family. He accepted the position that the Raja was liable to be assessed as an individual and in no other manner. He contended however that on this footing there is no provision in the Act by which he can claim to deduct a sum of Rs. 9,900 on the ground that it had been paid by him to his stepmother for her maintenance.

The decree of the High Court in the suit by the widow against the Raja has not been included in, or made part of, the case stated by the Commissioner or of the additional statement of facts made by him. In the Raja's petition to the Commissioner of Income-tax it is stated that :

> "by the said decree the payment of the said sum was made a charge on your petitioner's estate,"

but this very important fact has been omitted from the case stated. Before us however it was not disputed that the lady's maintenance was a legal liability of the Raja arising by reason of the fact that the Raja is in possession of his ancestral estate, that it is payable out of such estate and that this Court had declared that the maintenance was a charge thereon in the hands of the Raja. The general Hindu law upon this subject has been laid down in the case of *Bai Daya* v. *Natha Govindlal* (1). The position therefore is and the case must in my judgment be dealt with on the footing, that the lady has a charge which extends not only to the

(1) [1885] 9 Bom. 279.

zamindari property of the Raja, but covers each of the five heads of property between which it was allocated in the original order of assessment, dated 16th March 1925.

In these circumstances, I am not of opinion that anything turns upon the fact that the person entitled to the benefit of the charge is the Raja's stepmother. It has been suggested in argument, and the suggestion finds place in the Commissioner's observations in the case stated, that substantially speaking, and upon the question of merits, the Raja's liability to provide maintenance for his stepmother is of the same kind as his liability to provide for his wives and daughters. This contention is, I think, unsound. We are proceeding on the footing that the Raja is to be assessed as an individual. Whether this be right or wrong, it is the common case of the parties before us, and on that footing the Raja's position is, I think, the same, as if he had received his various properties, securities and businesses under a bequest from his father upon the terms that these assets were charged with an annuity for the maintenance of the widow. We are not dealing here with a charge created by the Raja for the payment of debts, which he has voluntarily incurred. The Raja is, by virtue of an exceptional and peculiarly extensive charge, an owner of incumbered property and the question before us requires us to ascertain the law applicable to a case, where the income from property, securties business, etc., is subject to a charge for an annual sum. In the present case, it would doubtless have been open to the Court, had circumstances required it to raise and set apart out of the estate a capital sum to answer the right of the widow to her annual maintenance: see *Hemanginee Dassee* v. *Kumode Chander Dass* (2) and in any case should default be made in paying the annual sum, it would be open to the Court in a suit to enforce the charge, to appoint a receiver of the properties and give him directions, if necessary, for sale of a sufficient portion thereof. I do not think, however, that the present question is complicated by the fact that the lady's charge is not confined to the income of the estate, but extends to the corpus. Where the income is sufficient it is clearly the usual business course to meet this claim out of the income. A similar question was raised and dealt with by Lord Macnaghten in his speech in the House of Lords in *London County Council* v. *Attorney-General* (3). The cases are not absolutely on all fours, but in this case it seems to me that it would be paradoxical, merely because the lady can in case of default resort to the corpus of the property to say that it is right and proper, before default and merely for the purpose of computing income-tax, to treat her annuity as payable rateably out of the capital and the different branches of the income.

What then is the provision made by the Income-tax Act (11 of 1922), as regards the liability to tax of a person whose income is incumbered in this way with the payment of an annuity? Cl. 4, Sub-S. (1), S. 9 deals with a similar matter but the scheme of the Act with reference to cases of this type, is, by no means, easy to discover. In the speech of Lord Macnaghten in the case to which I have already referred, there is a short account of the manner in which this question has been treated by the English Income-tax Acts. From this it would appear that the English Acts have always dealt with this question in express terms. Before 1803, there was a provision for deduction of such payments. After 1803, such deductions were prohibited and the tax-payer, liable to an annual payment, was authorized to deduct and retain the tax upon the payment which he was bound to make. It seems to be clear that, in England, the principle of taxation at the source would be employed. In a case like this, the tax-payer liable to pay the annuity would pay upon the whole of his income, without deduction therefor, but would be entitled to pass on the incidence of the tax, by deducting the amount thereof, when he made payment to the annuitant. Under the Indian Act, taxation at the source is not unknown. Firms are taxed and the partner is not charged again upon his share of income; companies are taxed and the shareholder is

(2) [1898] 26 Cal. 441=8 C. W. N. 131.

(3) [1900] 4 Tax. Cas. 265=(1901) A. C. 26=70 L. J. K. B. 77=49 W. R. 686=17 T. L. R. 131=65 J. P. 227.

not charged again upon his dividend; Hindu undivided families are taxed and the individual member is not charged again upon his share. Again, deduction of tax at the source, is provided for by S. 18, in the case of salaries and interest on securities, the payer being authorized and required to deduct the tax and himself to make payment to Government of what he has deducted. The present case is wholly untouched by any of these provisions. Accordingly, a good many considerations have to be weighed, before it can be decided whether the owner of property or business or securities subject to a charge for an annuity can get any allowance in respect of his liability. Assuming, for the present purpose, and contrary to the contention of Sreemati Sugankumari Bibi, that we are not here dealing with the case of an undivided Hindu family, and assuming further, without deciding, that the lady, although a resident of Bikaner is chargeable under the Act, her case would seem to come within the provisions of S. 19 and tax on her income to be payable by herself direct. No doubt machinery is provided by Ss. 40 to 43, whereby the assessment might be made upon a trustee in British India; but even if the Raja can be deemed her agent or trustee, the basis of any such assessment would be that the lady's income was being assessed in effect upon herself. We are solely concerned with the Raja's own liability to be assessed upon the sum in question, as part of his own income:

"If the Crown, seeking to recover tax, cannot bring the subject within the letter of the law the subject is free: Per Lord Cairns in *Partingtonv* v. *Attorney General* (4).

But the Court cannot undertake, out of its own notions of what is fair, to adapt or rearrange the machinery of the Act upon a matter of this character and importance.

If each head of income, in this case, be taken separately and the annuity regarded as a charge upon each, the case would stand as follows:

As to interest on securities, under S. 8, the question is whether the whole amount brought to charge is "interest receivable by him." I cannot see that there is any provision which would enable the assessee to make a deduction in respect of this annuity.

As to dividends, the charge falls upon "any sum which he receives by way of dividend" [S. 14 (2)]. The same reasoning applies to this.

As income-tax is deducted at the source or taxed at the source in these cases, the assessee, if he established a right to treat any part of the income as belonging to the lady and not received or receivable by himself, would gain no advantage except for super-tax purposes or unless it made a difference to the rate of charge.

As regards property, under S. 9, the first question is whether the Raja is the owner of the property. If he be the owner, as he certainly is, then the charge is to be upon him, on the basis of the bona fide annual value, less certain deductions specifically provided for. Cl. 4 says:

"where the property is subject to a mortgage or charge or to a ground rent, the amount of any interest on such mortgage or charge or of any such ground rent"

may be deducted. These words cannot, in my opinion, be stretched to include the present case. The departure from the language of the English Acts is very noticeable here The object of the legislature in making this provision may have been any one of many different things. It may, for example, be a recognition of the fact that it is common to buy property with borrowed money raised on security of the property so bought.

Under S. 10 the first question is whether the Raja is a person who carries on a business. If so he is liable, according to the section, and, in my opinion, it is clearly impossible to make room for a deduction on the ground that he has to pay this annuity out of the profits. Prima facie the destination of profit is irrelevant.

Under S.12, as regards "other sources," the language employed by the legislature is less precise. The provision for deduction gives a right to the assessee to "an allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee."

This annuity cannot, in my opinion, be regarded as a personal expenditure of the assessee, treating him as an

(4) [1869] 4 H. L. 100=38 L. J. Ex. 205=21 L. T. 370.

individual, whose property is subject to a charge for this annuity. But the payment does not otherwise come within the exception. It may be said that the income, profits and gains mentioned in sub-S. (1) means, when read with S. 3 of the Act "income, profits and gains of the "individual," namely of the assessee, and that, under this section, a deduction might be made upon the general principle that money payable to the lady is not income of the Raja. It happens that the total income of the Raja under this head is small, namely Rs. 1,678. I do not think however that, on this ground, the deduction can be allowed either under S. 12 or under any other section. In *Attorney-General* v. *London County Council* (3), Lord Davey, with reference to Ss. 60 and 102, Income-tax Act, 1842, said:

"It is not open to doubt, and was not disputed, that Ss. 60 and 102 alike mean that the person paying the yearly interest may deduct and retain the amount of the tax for his own benefit, and the scheme of the Act is so far clear, and is in favour of the tax-payer. It was, no doubt, considered that the real income of an owner of encumbered property, or of property charged (say) with an annuity under a will, is the annual income of the property less the interest on the incumbrance or the annuity; and the mortgagee or annuitant and the owner of the property are, in a sense, entitled between them to the income."

Lord Davey, in this passage, is giving expression to a principle which he finds applied in the sections which he is construing. He is not saying that this is a principle to which Income-tax Acts are to be made to bend or even a presumption that is to be imported into them, where this is not impossible. In the case stated there is no information as to the nature of the "other source" the income of which is assessed at Rs. 1,678. The assessee has made no specific case upon this head and it would, I think, be wrong to apply Lord Davey's language blindly or in the dark to this head of income. Cases under this head may be of almost any kind. Suppose, for example, the income in question comes from the letting out of leasehold property upon agreements made with the assessee for a monthly rent to be paid to him by the sub-tenants; could it be said of the net rents so produced that in part or in whole they are not "income, profits or gains" to him, because his father's widow has a charge for her annuity upon all the assessees' property? I think not. It may, in a sense, be true that income is not "real income," unless the individual in question is able to control it for his own purposes or to absorb for himself the whole of the benefit thereof. But I do not see that the Court can, in interpreting this Act, engage to give it the result required by this line of argument. Nor that the annuitant in a case like this can be regarded as joint owner of the income in a legal sense consistently with the machinery and purposes of the Act.

Into the questions which might arise, if an attempt were made by the Income-tax authorities to recover tax a second time from the lady, we are not required to enter. As this decision is being given upon a footing to which the parties before us have agreed, but from which, as I understand, the lady dissents, it is inadvisable, upon this aspect of the matter, to say anything here.

In my opinion the question, whether it should have been held that the assessee was entitled to the exemption claimed by him, should be answered in the negative, but having regard to the position taken at different times by the Income-tax authorities I am of opinion that the assessee is entitled to the costs of this case stated.

C. C. Ghose, J.—I agree.

Buckland, J.—I agree.

V.B./R.K. *Reference answered.*

A. I. R. 1930 Calcutta 645

CUMING, J.

Haripado Baidya and *others*—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1534 of 1929, Decided on 31st January 1930.

(a) Criminal Trial—Evidence.

It is open to a Magistrate to rely on the evidence of any particular person, be he interested or disinterested. [P 646 C 1]

(b) Penal Code. S. 500—Person not committing act—Still excommunicated by its imputation—Imputation is defamatory.

An imputation which leads to the excommunication of a person from his caste is defamatory to him if he had not been guilty of committing the act. [P 646 C 1, 2]

(c) Penal Code, S. 499, Exception 10—Exception 10 does not refer to case where one man says of another that he married woman who was married before.

Exception 10, S. 499, deals with cases, for instance, where one man warns another

against employing a third person in his service saying that he is a dishonest person and does not refer to the case where one man says of another that he married a woman who had been married before, [P 646 C 2]

(d) Criminal P. C., S. 439—Findings of facts are not generally interfered with.

The High Court does not as a rule interfere in revision with findings of facts unless it can be said that these findings are based on no evidence or are obviously incorrect. [P 646 C 2]

Sures Chandra Talukdar and *Bhupendra Nath Dutt Roy*—for Petitioners.

Prasantabhusan Gupta—for Opposite Party.

Judgment.—In the case out of which this rule has arisen the complainant brought a case against the three petitioners of having defamed him. The facts alleged were that at a certain meeting of the caste the petitioners were alleged to have stated that one Kamini, the complainant's wife had been married before to one Jogendra. The defence apparently was that the statement was true. Both the Courts found that the three petitioners had made the statement alleged and it was not true and found them guilty under S. 500, I. P. C., and sentenced them to pay a fine of Rs. 100 each and in default each to suffer rigorous imprisonment for four months.

The petitioners moved this Court and obtained what is described an open rule. The grounds that have been urged are grounds 3, 4 and 8 of the petition to this Court. Ground 3 is that the learned trial Magistrate's order was bad in law in so far as he relied solely on the evidence of interested persons unsupported by the testimony of independent witnesses. Certainly it was open to the Magistrate to rely on the evidence of any particular person, be he interested or distinterested.

The next point urged is that the order of conviction is bad in law in so far as the allegations do not disclose any offence under S. 500, I. P. C. It is quite clear to my mind that the allegations certainly do disclose an offence under S. 500, I. P. C. To say that the complainant married a woman who had been married before would obviously be to defame him, for it is admitted that one of the results of having done so would be the excommunication of the complainant from his caste. An imputation which leads to the excommunication of a person from his caste is certainly defamatory to him if he had not been guilty of committing the act. It has been suggested that the case comes within exception 10, S. 499, I. P. C. Exception 10 is as follows:

"It is not defamation to convey a caution, in good faith, to one person against another provided that such caution is intended for the good of the person to whom it is conveyed or of some person in whom that person is interested, or for the public good."

I admit I entirely fail to see how the present case comes within that exception. Now could Mr. Talukdar satisfactorily show how it comes within the exception? That exception I think deals with cases, for instance, where one man warns another against employing a third person in his service saying that he is a dishonest person. That is the class of cases which this exception might cover. I entirely fail to see how it covers the present case.

Mr. Talukdar then really argued on evidence and evidence only. The case has been considered by two Courts on the questions of fact and both of these Courts have come to the conclusion that the girl Kamini had not been married to Jogendra before. It cannot be said that the Courts did not deal with the evidence before them. The learned Additional Sessions Judge who heard the appeal went so far as to order further evidence to be taken. Therefore it is quite clear that both the Courts had their mind directed to this particular point, and I see no reason to differ from them on the findings of fact. Neither does this Court as a rule interfere in revision with the findings of fact unless it can be said that these findings are based on no evidence or are obviously incorrect. But that is not the case here.

The rule must therefore be discharged.

The petitioners must now pay the fines imposed upon them.

P.N./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 646

JACK, J.

Rafatulla Pramanik—Accused—Petitioner.

v.

Rajek Sardar and *another*—Opposite Party.

Criminal Revns. Nos. 448 and 449 of 1930, Decided on 5th June 1930.

Criminal P. C., S. 106—Unless offence necessarily involves breach of peace Court,s

finding to that effect is necessary for proceedings under S. 106.

Unless the offence is one which necessarily involves a breach of the peace there must be an express finding by the Court that the offence committed did in fact involve a breach of the peace for proceedings under S. 106.

[P 647 C 1]

Md. Nurul Huq Chaudhury — for Petitioner.

Biraj Mohan Roy—for Opposite Party.

Judgment. — In both these cases rules were issued to show cause why the order under S. 106, Criminal P. C., should not be set aside. It is urged for the petitioner that since the conviction was only under S. 379, I. P. C., in both the cases the orders under S. 106 are improper inasmuch as an offence under S. 479 does not involve any breach of the peace. There are a number of rulings as regards what amounts to an offenee involving a breach of the peace as referred to in S. 106, Criminal P. C. I do not think it necessary to go into details of these cases. It appears to me that the trend of these rulings shows that unless the offence is one which necessarily involves a breach of the peace there must be an express finding by the Court that the offence did in fact involve a a breach of the peace and I find that in both these cases there is such a finding.

In Case No. 448 the appellate Court found that the acoused formed an unlawful assembly no doubt as the number was 50 or 60 men although no charge was framed against the accused under this section. The offence committed was accompanied by force and it certainly involves a breach of the peace. In Case No 449 the finding of the appellate Court was also that the offence committed involved a breach of the peace and the learned District Magistrate remarked that as the appellant did not desist from the wrongful act, even after his conviction in the case, he considered it necessary that the accused should be bound down to keep the peace. In these circumstances, I think that the orders under S. 106, Criminal P. C., in both these cases are justified according to law. The rules are therefore discharged

M.N./R.K. *Rules discharged.*

A. I. R. 1930 Calcutta 647
Full Bench

RANKIN, C. J., AND C. C. GHOSE AND MALLIK, JJ.

Rakhal Chandra Das and *others*—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 284 of 1930, Decided on 18th August 1930, against decision of Special Tribunal.

(a) Penal Code, S. 120-B—That person known to be associate was trying to extricate himself from being accused of anything connected with offence is not enough for conviction,

Merely that a person was an associate of the persons who were party to a criminal conspiracy is not of itself sufficient for the foundation of the conviction of that person; nor can the fact that the person was endeavouring to extricate himself from being accused of anything connected with the conspiracy help the case against such person. [P 649 C 1, 2]

(b) Penal Code, S. 120-B—That immediately after occurrence person was anxious to escape observation and was doing his best to conceal his whereabouts is not enough to infer complicity.

That a person was anxious to escape observation or even was doing his best to conceal his whereabouts after the date of the occurrence connected with the criminal conspiracy is not enough to infer the complicity of the person by completing what is necessary. [P 650 C 2]

Mritunjoy Chatterji, Monindra Nath Banerji, Parimal Mukherji and *Debabrata Mukherji*—for Appellants.

B. M. Sen—for the Crown.

Rankin, C. J.—This is an appeal by three accused persons who have been tried before a Special Tribunal sitting under the powers conferred by the Bengal Criminal Law Amendment Act. The charges were in respect of an alleged dacoity or attempted dacoity upon a certain bus which on 11th September last was going from Rajshahye to Natore carrying passengers and also stopping at the post offices on the way in order to pick up the mails. The bus in question was being driven by witness 3 in the case Ramkrishna and there were certain employees of the Bus Company and there were also certain passengers who had got into the bus. In the driver's seat there was the driver, Satis the manager of the company and a certain other person. In the mail box or the middle part of the bus, there were witness 1 Ashutosh and witness Balavi (P. W. 17).

The witnesses Khitish, Sukumar and certain others were in the back portion which has been referred to as the body of the bus. What happened was that after the bus had reached Puthia motor stand which was about 19 miles from Rajshahye and about 9 miles from Natore, one of the passengers in the bus asked the driver to stop on the ground that his watch had been dropped. The driver was unwilling to do so but some of the other passengers apparently induced him to stop and he stopped the bus though the engine was left running. Thereupon, certain passengers inside the bus got out, raised the cry "hands up," one or more of them broke the headlights and punctured the front tyres and one or more stood over the driver threatening him with a dagger and threatening the people in the mail box to get down. The passenger who had been sitting in the front next to the manager got down and fired two shots with a revolver. He may have intended and probably did intend to hit the driver but he hit the manager Satis who was sitting next to him once in the arm and once in the chest. One of the dacoit passengers is said to have remained at the door of the bus with a dagger in order to prevent any of the other passengers in the bus from getting out. As the driver was not hit by the revolver he started the bus and in the end the bus got away and ultimately reached Natore. It appears according to the prosecution case that the accused Sushil who was at the back of the bus guarding the door was taken by surprise as the bus went off and he appears to have been thrown from the bus and to have sustained certain injuries in that way.

The commissioners in a very careful judgment have set out the whole narrative of the events which throw light upon this case. We find that certain persons went to the police station. We find what the people in the police station did, how they came along a part of the road, how they made a search list of what had been discovered and how they came ultimately to the police station of Natore. Curiously enough late in that evening the accused Sushil was brought to the police station, and it appears that he had been found in the field or premises of a certain agriculturist at a considerable distance to the south of the road along which the motor bus was going. The agriculturist called in his munib who advised him that the police should be given notice and Sushil was taken to the thana. There is evidence that he at first, at all events, gave a false name and said that he belonged to a place called Sherpur. It would appear from the medical evidence that he had sustained a certain amount of concussion because there was bleeding from his ear, which showed that this had happened, and it is probably true that he was in a semiconscious condition at the time when he was found and also even at the time when he was taken to the police station. Proceeding upon the suspicious feature of this discovery near about the spot where the attack upon the bus had taken place, of a young man suffering in this way the police appear to have commenced investigation as to the antecedents and past history of Sushil, and in that way they discovered that Sushil and his co-accused Dharani were students of the Rangpore College, and they further found that these two had come on the 2nd to a mess at Rajshahye and that they had afterwards returned there on the 4th and stayed in the room belonging to the accused Rakhal until the 11th, the date of the occurrence. It appears that on the 7th Rakhal joined them and there is evidence to show that at about 6-30 p. m. on that day Rakhal was seen in Rajshahye, so that he was not a person who could have taken part in the attack on the bus, if the prosecution evidence is to be believed. In the end the commissioners have given full and adequate reasons for their finding that there was this attack upon the bus as alleged by the prosecution. They have also given reasons and good reasons, for finding that more than five persons took part in the attack and they have further given reasons for finding that the object of this attack on the bus was to secure the mail, there being indeed no other object that could very well be served by this attack so far as the evidence discloses.

The case therefore comes back as regards each accused to the question whether it is shown that he was a party to the attack ; in other words whether the evidence of identification is sufficiently ample to justify the Court in hold

ing that each prisoner has been satisfactorily identified.

So far as Rakhal is concerned the prosecution in the end abandoned the case that he did take any part in the actual attack. So we have to deal, first of all, with the prisoner Sushil and then with the prisoner Dharani in considering whether it is proved that they took part.

As against Sushil I am of opinion that the evidence which has been very plainly and clearly marshalled in the judgment of the tribunal is amply sufficient to show that he was one of those who took part in the attack. To begin with, there was found on him at the time of his discovery a ticket which had been issued for this very bus for the journey with which we are concerned. The witnesses who identified him are P. W's 1, 16, 17, 18, 19 and 21, and they identified him as the one who remained inside the bus near the door to prevent other people from descending. Then we come to this: that curiously enough on this very evening, some time after this occurrence, Sushil is found not very far away in a wounded condition by the witness who speaks to having seen him there. There is further the fact which is clearly proved that when he was asked to give an account of himself after he had been taken to the thana he gave a false name and a false address. It appears also that a revolver and a dagger were found some 400 yards away from the place where Sushil was found. This last fact certainly by itself is no very secure foundation to identify the accused; but it certainly points to this: that whoever assisted Sushil to the place where he was found threw away these articles in the course of the journey. Having regard to the corroborative evidence and the direct evidence, I cannot think it possible that this Court should differ from the opinion of the members of the tribunal who found that Sushil's complicity in the dacoity was amply proved.

In the case of Dharani, the evidence is not quite so extensive. The evidence against Dharani consists, first of all, of the evidence of association with Sushil staying wtih him at a mess in Rajshahye both being students of the Rangpore College. I need not say that that of itself would be a highly insufficient foundation for conviction of Dharani merely upon evidence which implicated Sushil and certain others. There is also the fact that when Dharani was arrested he immediately denied that he had ever been in Rajshahye in his life. That may be some evidence that he was endeavouring to extricate himself from being accused of something connected with Rajshahye; but again that in itself is no evidence that Dharani was taking part in the dacoity.

The evidence to implicate Dharani is the evidence of P. W. 2 Satis, the manager who was shot and of P. W. 3 Ram Krishna, the driver; and the real question in this case is, having regard to a certain amount of antecedent corroboration in the evidence of association, whether these two witnesses' evidence is sufficient. Now, it appears that on 7th October a certain number of people, including some people who were present in the bus at the time of the occurrence, were brought to the jail to see if they could identify, among others, Dharani. None of the eyewitnesses identified him on 7th October, but neither the driver nor Satis was present at this identification. Another identification was held on 7th November and it is true that other persons as well as Dharani, who, were suspects, were put among the persons paraded. On this occasion Satis and the driver both identified Dharani as the person who took part in the attack going in front and threatening the driver, and they did not apparently identify certain other suspects who were shown to them.

The question is whether we can rely upon the evidence of these two witnesses. In my opinion, the evidence of the driver Ram Krishna is very definite and strong. To begin with, he says:

"I say that Dharani first stood over me with a dagger and broke the lights after. He was on my right. I saw him in the light of the headlights. If this had not been there I would not have recognized him. I mean that I could see him by the headlight when he was standing over me, but I could not have seen him in the lights if the headlights had not been on."

He says of Dharani:

"He was in the bus at the time. He it was also who punctured the tyres, broke the lights and stood over me with the dagger.."

Satis says:

At Rajshahye, I identified Dharani . . . . . At Baneswar he asked me the cause of the delay."

That was because the bus had to wait there for mails.

"He also was the man at Putia who broke the headlights and pierced the tyres."

And in cross-examination he says:

"I first noticed Dharani at Baneswar. I saw him get in behind at Baneswar. He did not sit beside me. I identified Dharani only. I made a statement to the police. I did say to the police that I recognized the man who sat by me but not the other dacoits well. The man who shot the revolver was the man who sat next to me,"

and so forth. In my judgment, the criticisms of the evidence of these two witnesses are not sufficient to induce one to think that there is any reasonable doubt about the identification of Dharani; and, in my opinion, the conviction of Dharani by the tribunal must be upheld.

I come last to the case of Rakhal. With regard to Rakhal, I am clearly of opinion that the evidence is entirely insufficient to bring home to him the charge of conspiracy under S. 120-B, I. P. C. Indeed, it is difficult to see that the evidence against Rakhal amounts to very much more than some circumstances of suspicion. It is said that his movements were peculiar and suspicious. He was employed, it seems, by an Insurance Company and his business no doubt was to get people who would take policies and arrange for agencies with other people who would extend the business of the company. It would seem that he was at Berhampore about the 4th of the month. It would seem that on the 7th he came to Rajshaye and stayed there till the 11th. It is true that his two co-accused were then putting up with his consent in his room in the mess. It seems that he left Rajshaye on the evening of the day of the occurrence, that next morning he was found at the Ranaghat station, that he spent the time from 11th to 13th again at Berhampore and that he was not finally arrested till some time after that at the house of a relative. All this is very well; but it has nothing in the world directly to do with the attack on the bus. It amounts merely to some evidence of association with Sushil and Dharani, and it shows that he was sufficiently friendly with them to be putting them up in the mess in Rajshahye where he was living. It does not seem to me that it is possible, by saying that when 11th October had passed he was anxious to escape observation or even was doing his best to conceal his whereabouts, that the prosecution can complete what is necessary in order to show that he was a person who concerted with others and agreed with them that this attack on the bus should be made. The commissioners said that, as he no longer did any business with the Insurance Company, he was thus prepared to sacrifice his employment and his pay rather than to give any clue as to his whereabouts. Be it that he was most anxious to escape observation. The commissioners inferred from this:

"We do think that the other points which we have mentioned above have established beyond reasonable doubt that Rakhal's friendship with the other two accused was not unconnected with the project of dacoity and we find it impossible to hold the facts proved to be consistent with his innocence."

I can only say that to my mind the facts proved are in no way conclusive of an agreement on the part of Rakhal that this attack on the bus should be made. No doubt it may be, for anything that I can say, that the absence of any further evidence against Rakhal is due entirely to the fact that he let the younger people do the work and undertake the peril of his scheme, but that must remain entirely in the region of hypothesis. Until we are first convinced by proper proof that Rakhal was a conspirator, no such consideration can arise. We have to be satisfied that he was agreeing and intending that this attack upon the bus should be made before we can find him guilty of a charge such as has been framed against him. In my opinion, the appeal of Rakhal must be allowed and he must be acquitted and released. As regards the other two accused Sushil and Dharani, nothing has been said upon the question of sentence. The tribunal have sentenced both of them to six years' rigorous imprisonment each. In my opinion, that is a very proper sentence and ought not to be interfered with. Their appeal is accordingly dismissed.

C. C. Ghose, J.—I agree.

Mallik, J.—I agree.

V.B./R.K. *Order accordingly*

A. I. R. 1930 Calcutta 651
Full Bench

RANKIN, C. J., AND C. C. GHOSE AND LORT-WILLIAMS, JJ.

Mt. Attormani Dasi and *another*—Plaintiffs—Appellants.

v.

Ramesh Chunder Bose—Respondent.

Appeals Nos. 101 and 102 of 1929, Decided on 22nd July 1930. against order of Panckridge, J., D/- 5th August 1929.

(a) Calcutta High Court Original Side Rules, Chap. 38, R. 59—Claims by way of set-off and damages by client cannot be agitated in summary proceedings under R. 59 on application by attorney.

Per *Panckridge, J* —It is not open to a Court to entertain, far less to decide, questions such set-offs and damages on an application for costs by an attorney under Chap. 38, R. 59. If such question is agitated at all it must be agitated in an ordinary suit. [P 652 C 1]

(b) Limitation Act (1908), Art. 84—Administration suit — Final decree is not "termination of suit."

Per *Panckridge, J.*—In many proceedings of which administration suits are an example, the so-called final decree is very far from being the termination of the suit. [P 655 C 2]

(c) Calcutta High Court Original Side Rules, Chap. 38, R. 59—Attorney's suit for taxed costs—Limitation.

Per *Panckridge, J.*—The period of limitation in an attorney's suit for taxed costs does not begin to run until at the earliest the issue of the allocatur: 36 *Cal.* 609 *Foll.*; *A. I. R.* 1921 *Cal.* 67 and 46 *Cal.* 249, *Ref* [P 652 C 2]

(d) Calcutta High Court Original Side Rules, Chap. 38, R. 59—Application by attorney entailing enquiry should not be dealt with under R. 59.

When an application by an attorney for realization of his costs under R. 59 entails an enquiry it should not ordinarily be dealt with in a summary manner.

Where an application by an attorney for realization of costs due to him under allocatur of taxed costs, evinced feature which could only be disentangled by oral evidence, although there were no merits in the attempts on the part of the clients to pay nothing to their attorney who was out of pocket for a large sum with respect to counsel's fees and other matters:

Held: (*Rankin C. J.*, and *Buckland J.*), that the Court could not grant relief claimed upon a mere summons in chamber. [P 655 C 1]

Per *C. C. Ghose, J.*—That as there was no shade of reality, and as the rule would work great hardship, the attorney could get the relief asked for, it being a special case. [P 661 C 2]

(e) Legal Practitioners Act (1879), S. 5—Liability of client to pay attorney's fees of counsel engaged by them explained.

Per *C. C. Ghose, J.*—Where an attorney has employed a counsel under the authority given to him by the party in the retainer filed in the Court he is bound to pay the fees paid to the counsel on taxation. It is only when the client has instructed the attorney not to brief a particular counsel that the client would be under no obligation to pay fees paid to that particular counsel: *Re Harrison* (1908) 1 *K. B.* 282, *Ref.* [P 659 C 1,2]

P. N. Chatterjee and *S. C. Roy*—for Appellants.

S. M. Bose and *N. C. Chatterjee*—for Respondent.

Panckridge, J.——This is an application on behalf of Ramesh Chunder Bose, an attorney of the Court, for an order under Chap. 38, R. 59 of the Rules of Court, that the plaintiffs, Mt. Attormoni Dasi and Ashutosh Dhur, do pay him a sum of Rs. 23,755-3-0 being the balance of his taxed costs in this suit. The history of the suit, which is one for the administration of the estate of Pitambar Dhur, deceased, is as follows:

Pitambar Dhur, the testator, died on 21st October 1897, leaving him surviving his two sons, the defendants Bepin Behary Dhur and Kali Charan Dhur, and four grandsons, the sons of his predeceased eldest son Narayan Chandra Dhur, the husband of the plaintiff, Mt. Attormani Dasi, viz. Nabin Chandra, Ashutosh, Purna and Shibnath. Ashutosh is one of the plaintiffs, Nabin Chandra, a defendant. Purna Chandra and Shibnath are dead. The former is represented by the defendant Mt. Sushila Sundari Dassi, his widow, and the latter by the female plaintiff, his mother. Pitambar's widow, Mt. Sarat Coomari Dassi, is also a defendant.

On 3rd December 1897 application was made for the probate of the testator's will. A caveat was entered and the matter set down as a contentious cause, being numbered 3 of 1898. In the initial stages of the testamentary suit the attorney for the plaintiff in this suit were the firm of Kally Nath Mitter and Sarvadhicary, but some time in 1901 there was a change from that firm to Romesh Chunder Basu, the applicant in this case. The testamentary suit was settled and a consent decree made therein on 30th May 1904, probate of the will being granted and an order made that costs of all parties do come out of the estate.

On 2nd December of the same year this suit for administration was instituted, the applicant again acting as attorney for the plaintiffs Ashutosh and Mt. Attormani.

It is unnecessary to set out in detail all the steps of this intricate litigation.

The preliminary decree was made on 23rd January 1906, and the final decree was made on 17th December 1912. Appeals were filed and further enquiries directed, and the final decree, as it now stands, was made on 8th May 1916. On 17th September 1921 the applicant's bill of costs was lodged in the Taxing Office, and on 26th June 1928 the bill was finally vouched, taxed and passed and an allocatur issued allowing Rupees 12,295-8-0 as between party and party, and Rs. 13,949-15-0 as between attorney and client. Both the plaintiffs oppose the present application, and maintain that the circumstances of the case are such that in the exercise of my discretion I should refuse to make the order asked for and refer the parties to a suit.

Now it is conceded that, with the exception of certain costs which the applicant has expressed his willingness to give up, I must either make the order for the payment of the sum mentioned or dismiss the application. It is not open to me, on this application, to entertain, far less to decide, questions such as set-off and damages. If these are to be agitated at all it must be in any ordinary suit.

With regard to limitation the position is this. Applications under R. 59 are not subject to either to Art. 84 or Art. 181, Lim. Act : see *Narendra Lal Khan* v. *Tarubala Dasi* (1) but the judgments both of Rankin, J., in that case, and of Chaudhuri, J. in *Lakhimani Dassi* v. *Dwijendra Nath Mukerjee* (2) indicate that in certain circumstances the Court, in the exercise of its discretion, should take into account the fact that if the attorney be referred to the remedy of a regular suit that suit must be dismissed as being time barred.

It appears to me, however that this is not an aspect of the matter with which I need concern myself since in my judgment it is clear that in a suit brought by the Attorney, Attormani and Ashutosh would not be in a position successfully to plead the provisions of the Limitation Act.

By Art. 84 of that Act the date from which the three years' period of limitation provided by the article begins to run is the date of the termination of the suit or business. I am asked to hold that the final decree of 8th May 1916 is the termination of this suit within the meaning of the article. To do so would, I think, be potently absurd ; in many proceedings of which administration suits are an example the so-called final decree is very far from being the termination of the suit. Moreover, *Atal Chunder Ghose* v. *Lakshman Chunder Sen* (3) appears to me an authority for the proposition that the period of limitation in an attorney's suit for taxed costs does not begin to run until at the earliest the issue of the allocatur.

It is also pointed out that a considerable time has elapsed between the making of the final decree and this application and it is suggested that this is a matter I should take into consideration. In my judgment I should not, in this case enquire whether the attorney was dilatory or expeditious at every stage. His claim for costs is a legal not an equitable claim and could only be defeated in a suit by lapse of time sufficient to bring it within the law of limitation.

Various other reasons are advanced why in this case the attorney should not be permitted to avail himself of the summary remedy provided by the rules, but should be referred to a suit.

The plaintiffs first submit that they are entitled to the trial of an issue whether or not at the time of the institution of the suit there was an oral agreement between the attorney and Attormani Dasi that he would not ask for any costs beyond those that the Court might order to be paid out of the estate of the testator. I am satisfied that there is nothing in the allegation. No affidavit is sworn by Attormani Dasi and her brother Narendra Nath Sen puts it forward as based on information the source of which he does not specify. There is no corroboration for it whatsoever, and it is denied on oath by the applicant.

Next it is said that the Taxing Officer has erred in that he has not followed the scheme of taxation provided by an award of Mr. B. C. Chatterjee accepted by all the parties. The award was made in the following circumstances.

On 31st July 1917 Chaudhuri, J. referred it to the Taxing Officer to report what sum was payable to the plaintiff's attor-

(1) A. I. R. 1921 Cal. 67=66 I. C. 209=48 Cal. 817.

(2) [1918] 46 Cal. 249=51 I. C. 941.

(3) [1909] 36 Cal. 609=2 I. C. 830.

ney as counsel's fees and the party subsequently agreed to refer the matter to the arbitration of Mr. Chatterjee who made his award on 30th January 1920. At first sight it certainly seems that the arbitrator's award goes considerably beyond the scope of the reference; for not only does it deal with the proportions in which the plaintiffs are to be liable inter se and the amount payable out of Pitambar's estate, but it gives direction as to the general costs of the suit quite apart from counsel's fees. This however, is not important as all the parties, including the attorney, signified their consent to the award, and the attorney expresses his willingness to be bound by it. The answer to this contention is I think given by the Advocate-General, viz. that it is now too late to call the Taxing Officer's decision in question. The taxation has become final and the only question before me is the method whereby the attorney is to enforce his claim not to the quantum of the claim tself.

I think he is also right when he contends that, in so far as the plaintiffs base their argument on the various directions that have been given for costs out of the estate, they display some misapprehension as to the meaning of that term. An attorney looks for remuneration to the client who has retained him, and when in administration matters an order is made for costs out of the estate it seems that the client, may reimburse himself from the estate and it no way limits the rights of the attorney to get his taxed costs direct from the client.

The final objection is one of more substance. It is said that the parties should be referred to a suit because it would thereby be possible for the plaintiffs to set off against the attorney's bill of costs, a time-barred claim for unliquidated damages occasioned by the attorney's negligence. The negligence relied on concerns the proceedings before the Assistant Referee pursuant to an order made on appeal on 3rd December 1914. On 18th August 1915 the Assistant Referee gave the following directions :

"All parties should lodge with the Taxing Office their bill of costs, i. e., of the Testamentary Suit No. 8 of 1898, before the Court closes for the long vacation. If they do not produce their allocaturs before I close the reference I shall treat the payments made to the attorneys by Mr. Belchambers as personal drawings by the parties, and they would not get the benefit of the provisions in the appeal Court decree as to equal contribution to the costs."

The plaintiffs allege that by failing to get his bills taxed or produce his allocatur, the attorney has deprived them of the benefit of the provisions as to costs in the testamentary suit with the result that their shares have been debited with large sums by way of personal drawings and interest, and a legacy of Rs. 9,000 given to Narain Chandra's branch of the family has been swallowed up in this fashion. The attorney's answer is that he did all he could in his clients' interest, but that he was obstructed at every turn. The brothers, he says, kept the cause papers and briefs in their own possession and to this fact and the brothers' quarrels the delays were due.

Now, I assume as against the attorneys (1) that in a suit it would be possible for the plaintiffs to plead a time-barred claim for unliquidated damages by way of equitable set-off ; and (2) that the position is unaffected by the fact that all parties accepted Mr. Chatterjee's award in 1920 though on both points I entertain some doubts.

Nevertheless after giving the matter my consideration I have come to the conclusion that the circumstances would not justify me in compelling the applicant to resort to the remedy of a suit entailing much expense, delay and inconvenience.

As the Advocate-General has pointed out, the attorney would have had no possible motive for suppressing the allocaturs or for not getting his own costs taxed. Indeed it was to his interest to expedite matters.

Again there is no evidence to show that any of the parties called upon the attorney to bestir himself. No doubt Attormani Dasi is a pardanashin lady for whom allowance must be made, but her brother has been looking after her interest and both he and Ashutosh must have fully appreciated the position.

On the materials before me, I cannot find that these charges were ever made prior to the affirmation of an affidavit by Nabin on 12th March 1924

nine years after the alleged default, and when its effects must long have been apparent. It is further significant that even to-day these charges do not appear in the affidavit used by Ashutosh in opposition. No affidavit is sworn by Attormani Dasi, and in Narendra's affidavit the charge is one of wilful misfeasance, a reckless and absurd suggestion doing little credit to the deponent who swore and in my opinion still less to the attorney who drafted the affidavit.

I, therefore, make the order asked for save and except that the sum mentioned in the summons will be reduced by two-thirds of the attorney's profit, costs as between attorney and client, which the attorney has expressed himself willing to give up. This I am told, is a sum of Rs 3,296-2-8, but if this is not agreed to the matter must be mentioned to me again and referred. The attorney is entitled to his costs of this application.

[On appeal to the Bench.]

Rankin, C. J.— In this case there was an application in Chambers for a summary order under R. 59, Chap. 38 of the Original Side Rules by an attorney against his clients for payment of the amounts due to him under certain allocaturs for taxed costs. The practice in this Court is that when an order is made for costs as between party and party at the hearing of a suit or an appeal, the taxation proceeds not only between party and party but also between the attorney and his client as regards attorney and client costs. The costs with which we are concerned are the costs of an administration suit which came to an end in the first instance, on 17th December 1912, and an appeal, on 3rd December 1914, and the taxation with which we are concerned has been held under these two decrees. The suit was a suit for the administration of the estate of one Pitambar who died in 1897. The conduct, both of the attorney and his clients, has been most extraordinary and the bills of costs now in question appears to have been lodged with the Taxing Officer in the year 1921. Ultimately the allocaturs were issued on 26th June 1928 and the present application was taken out shortly thereafter.

The clients contend that the sums claimed are not due to the attorney and the defences which they set up to the claim are as follows: First of all, they contend that the attorney was party to an agreement that a certain award made by Mr B. C. Chatterji should take effect in respect of costs, and they say that by this award a large part of the costs for which claim is now made is subject to an agreement by the attorney that he should look only to the estate of the deceased and should not look to either of his clients personally. With reference to this matter there is a great deal to consider. It is a question whether the award was a good award at all. Ultimately the award was incorporated in the report of the Registrar, which was presented to the Court and the Court refused to accept it and there can be no doubt at all that the claim on the part of the clients that this award now binds the attorney, gives rise to a good many matters for investigation. The second defence which is taken particularly by the lady Attormani is that the attorney was engaged throughout on the understanding that he would not look to her personally for his costs but would take his chance in getting his costs out of the estate in administration. This certainly is an exceptional contention and requires very strong proof before it can be accepted—particularly in the light of the subsequent events. The third defence put forward is that there is a heavy claim for damages for the attorney's negligence arising out of the fact that in the administration suit the attorney did not produce and get his bills taxed so as to enable his clients to get the benefit of an order which put the costs of all the parties upon Pitamber's estate. It does seem—though it is by no means clear—but it does seem to me to be the fact that certain bills of costs not being produced in time the Assistant Referee refused to permit them to be taken into account. On the other hand there is a mass of material upon the record tending to show that the default in lodging these bills of costs for taxation was not so much the fault of the attorney as the fault of his very cantankerous and extraordinary clients. But, at the same time, it cannot be said that the attorney has been able through letters written from time to time to establish this position. The clients further claim to set off certain sum of costs and dispute the credit that had been

given to them for certain small amounts that had been paid on account and they further raise the question that the order sought against them is barred by limitation.

I have been at considerable pains to endeavour to see whether R. 59, Chap. 38 of the Original Side Rules can fairly and defeasibly be applied to a case of this degree of complication. It appears to me that it cannot, and, though I have reached this result with great regret, I cannot say that I have any real doubt upon the matter. No doubt it is open to us to go through the mass of the record in this administration suit and the testamentary suit that was connected with it and to make up our minds, from what was said by the learned Judges from time to time and from the affidavits filed from time to time by the parties, which of these parties is likely to be in the right as regards their several contentions; but it does not seem to me that that would be a proper or reasonable way of dealing with such a case as this. In my judgment, there are features in this case which can only be disentangled by oral evidence and, though I have little doubt that there is small merit in the attempt on the part of the clients to pay nothing to their attorney who is out of pocket by a large sum with respect to counsel's fees and other matters, I feel entirely unable to give relief to the attorney upon a mere summons in Chambers such as is now before us. With the very greatest respect to the learned Judge who has made the order against the clients, I think that that order cannot stand. In my judgment, the appeals must be allowed and the order of the learned Judge must be discharged. No order as to costs.

C. C. Ghose, J.—In this case I have the misfortune to differ from my learned brothers; it is therefore incumbent upon me to set out at length the reasons which have compelled me to differ.

These two appeals have arisen out of an application made by the respondent Mr. Ramesh Chunder Bose who is an attorney of this Court for an order under Chap. 38, R. 59, of the rules of this Court on the original side (corresponding to R. 35 of the same chapter in the present edition of the rules) that the plaintiffs Mt. Attormani Dasi and Ashutosh Dhur do pay to him the sum of Rs. 23,755-3-0 being the balance of his taxed costs. The application came on for hearing before Panckridge, J., and he made an order in manner following:

"It is ordered that the said plaintiffs Mt. Attormani Dasi and Ashutosh Dhur do pay to the said Babu Ramesh Chunder Bose the sum of rupees twenty-three thousand seven hundred and fifty-five and annas three being the balance of the plaintiffs' taxed costs in this suit less the sum of rupees three thousand two hundred and ninety-six annas two and pies eight being the two-thirds of the in-pocket attorney and client costs and do also pay him his costs of and incidental to this application including the fee to counsel to be taxed by the Taxing Officer of this Court."

It may be noted in passing that though the attorney took out summons of this application as far back as 30th August 1928 the matter was not disposed of till 5th August 1929.

In Appeal No. 101 the appellant is Ashutosh Dhur and in Appeal No. 102 the appellant is Mt. Attormani Dasi; but the points which arise in the two appeals are the same and consequently the two appeals have been heard together by us.

The subject-matter of these two appeals is somewhat complicated and it may be desirable to set out the facts at some length.

One Pitambar Dhur died on 21st October 1897 leaving him surviving his two sons Bipin Behari Dhur and Kali Churn Dhur and four grandsons named Nobin Chunder Dhur, Ashutosh Dhur, Purna Chunder Dhur and Sib Chunder Dhur, being the sons of his predeceased eldest son Narayan Chunder Dhur, and Mt. Attormani Dasi, the widow of Narayan. Purna died leaving a widow named Sushila. Shib Chunder died unmarried leaving him surviving his mother Mt. Attormani Dasi as his heiress.

Pitambar Dhur died leaving a will, application for probate of which was made by the executor named therein, Bipin Behari Dhur, on 3rd December 1897. A caveat was lodged, with the result that the matter of the application for probate was set down to be heard as a contentious cause and was numbered as Suit No. 3 of 1898, Mt. Attormani appeared in those proceedings as guardian of her then infant sons Ashutosh and Shib Chunder and opposed the application and her attorneys were Messrs. Kali Nath Mitter and Sarvadhi-

kari. Mr. Belchambers, the then Registrar on the original side, was appointed receiver of the estate of Pitambar Dhur. Some time in 1901 there was a change of attorney from Messrs. Kali Nath Mitter and Sarvadhikari to Mr. Ramesh Chunder Bose. In October 1901, the parties came to a certain agreement. In 1904 there was a decree by consent in the said probate suit; probate of the will was granted to the executor and an order was made that the costs of all parties should come out of the estate. While this litigation was going on, it appears that Mr. Belchambers as receiver made certain payments from time to time to the attorneys engaged in the case.

Shortly after the termination of that litigation, an administration suit was started by the plaintiffs Mt. Attormani Dasi and Ashutosh Dhur in this Court being Suit No. 875 of 1904 at the instance of Nobin Chunder Dhur and these persons retained Mr. Ramesh Chunder Bose as their attorney in the said suit. Mr. Bose's costs which are the subject-matter of the present application are in connexion with the said administration suit and with various appeals arising therefrom. In the administration suit which was instituted at the instance of Nobin as found by this Court, a preliminary decree was made on 23rd January 1906, directing a reference to the Assistant Referee. There was an appeal against this preliminary decree; but the appeal was dismissed and the decree was confirmed by the Court of appeal. This was on 14th January 1907. The Assistant Referee made his report on 31st July 1909. Exceptions were taken thereto on every conceivable point by Nobin Chunder Dhur, among others, and the matter came on for hearing before Woodroffe J. The exceptions were discharged and the report of the Assistant Referee was confirmed on 17th December 1912 and a final decree was made.

It was directed by the final decree that the general costs of all parties in the said administration suit should be paid out of the estate, one-third from the share of each branch and that the general costs of all parties in the reference before the Assistant Referee should be paid out of the estate; one-third from the share of each branch except the costs occasioned by reason of a document which was marked Ex. D being put forward and in respect thereof it was directed that the plaintiffs should pay such costs. Now, against this final decree two appeals were lodged. On 3rd December 1914 the Court of appeal slightly varied the decree of 17th December 1912. It was ordered that the costs of the administration suit should be paid out of the estate except that the plaintiffs and Nobin Chunder Dhur should pay the costs occasioned by putting forward Ex. D. It was also directed that the costs of the testamentary proceedings covered by Cl. 3 of a certain agreement arrived at between the parties, being the agreement of 1st October 1900, should come out of the estate—one-third from the share of each branch. Certain directions were also given by the Court of appeal for further enquiries before the Assistant Referee. These enquiries came on before the Assistant Referee, and by his order dated 18th August 1915 he directed the parties to lodge with the Taxing Officer before the ensuing long vacation commenced their bills of costs of the testamentary suit and produce allocaturs before the reference before him was closed and, that, in default the payments made by Mr. Belchambers, as receiver to the attorneys concerned, would be treated as the personal drawings of the parties. It appears that this order was not carried out by any of the parties to the said suit. Be that as it may, the report of the Assistant Referee on the said further reference came on for confirmation before this Court on 8th May 1916 when the same was .confirmed and a final decree was passed in the said administration suit.

In the various proceedings referred to above Mr. Ramesh Chunder Bose acted as attorney of the plaintiffs, but it does not appear that he was paid his costs from time to time or indeed at any time by his clients — the plaintiffs Mt. Attormani Dasi and Ashucsh Dhur, except certain small sums. In July 1917 he was faced with this position: that there was due by him to various counsel employed by him on behalf of his clients in the said various proceedings a large sum of money amounting to about Rs. 40,000. Demands for pay-

ment had been made on his clients, but it appears that the attorney was put off on the ground of want of funds and on the ground that their properties were in the hands of the receiver of this Court. In these circumstances, Mt. Attormani Dasi made an application in the administration suit (No. 875 of 1904) some time in July 1917 before Chaudhuri, J., for an order that the receiver appointed in the said suit of the properties bequeathed to the heirs of Narayan Chunder Dhur deceased should raise and pay to Mr. Romesh Chunder Bose a sum of Rs. 40,000 by mortgage or sale of one undivided half-share of the said properties in his charge towards payment in part of Mr. Ramesh Chander Bose's bill of costs. Various other matters were covered by this application, but for present purposes it is unnecessary to refer to them.

Mr. Ramesh Chunder Bose made an affidavit in connexion with this application and he stated inter alia as follows :

"That during the prosecution of this suit and the appeals, the said Ashutosh Dhur used to take from my office the cause papers and the briefs of counsel—most of them have not been returned to me but were kept by the said Ashutosh Dhur—and he has not made them over to me. That about two years ago the said Ashutosh Dhur and Nabin Chunder Dhur quarrelled among themselves and Ashutosh Dhur alleges that the cause papers and briefs of counsel are with Nobin Chunder Dhur and the latter charges that when Ashutosh Dhur removed from his house he had taken them over with him and they were and are still with the said Ashutosh Dhur. That there is a large sum of money about Rs. 37,600 due to counsel for their fees and unless these are paid to counsel I cannot under the rules of Court lodge my bill of costs into the Taxing Office for taxation. Besides owing to non-production by Ashutosh Dhur of the cause papers and the briefs of various counsel who appeared on my clients' behalf at the various stages in this suit and in appeal I am unable to get my bill checked by the Taxing Office of this Hon'ble Court at the time of taxation of my bill of costs. That under the rules of this Hon'ble Court all bills of costs should be lodged for taxation along with the cause papers and briefs of counsel and upon payment to counsel of all their dues thereon. That I have got my bill of costs in this suit prepared from papers filed in Court and upon the cause papers and other papers in connexion with this suit, but I am unable to pay counsel their fees as the plaintiff did not pay them nor have they got their share of the properties, they being in the hands of a receiver appointed in his suit. That my bill of costs has been ready and it shows that the total amount of my bill of costs in this suit is about Rs. 53,368 of which the sum of Rs. 37,600 represents fees due to counsel."

Ashutosh Dhur also made an affidavit and he opposed Attormani's application. Ashutosh stated among others as follows:

"I state that whatever papers and briefs were taken it was done by the defendant Nabin Chunder Dhur who used to do everything in the case, and if any papers and briefs have not been returned the said Nabin Chunder Dhur is responsible for the same."

At this time it is quite clear from the materials before us that Ashutosh and Nabin had quarrelled among themselves and Ashutosh charged that the application of Mt. Attormani Dasi had really been inspired by Nabin Chunder Dhur in order that he (Ashutosh) might be made to pay the costs to Mr Ramesh Chunder Bose. Ashutosh's contention was that the administration suit itself was Nabin Chunder's suit, although he figured in the category of defendants and that Nabin ought to pay Mr Bose's costs.

Chaudhuri, J., made an order on 31st July 1917 on this application and it was as follows:

"And it is further ordered that it be and it is hereby referred to the Taxing Officer of this Court to enquire and report as to the amount of counsel's fees due to Babu Ramesh Chunder Bose, attorney for the plaintiffs in this suit. And it is further ordered that the said enquiry be held in the presence of the said Babu Ramesh Chunder Bose or his agent, and also in the presence of the said plaintiff Ashutosh Dhur or his attorney."

Ashutosh preferred an appeal but the appeal was dismissed; and Chaudhuri, J.s order was confirmed.

As I understand Chaudhuri, J.'s order and the order of the Court of appeal confirming the same, it was evidently intended at the time that after the amount of fees due to counsel had been ascertained provision for payment thereof would be subsequently made by the Court.

It appears that the matter went to Mr. Hechle, the then Taxing Officer, and the enquiry was proceeded with for some time, and during the course of the enquiry it was ascertained what fees were payable to counsel and to which counsel. The enquiry was not however concluded before Mr. Hechle as the parties agreed among themselves that Mr. B. C. Chatterji, a member of the Bar, should hold a sort of arbitration and in that manner finish the enquiry which was being held before Mr. Hechle.

Mr. Chatterji made an award or report on 30th January 1920 which is printed at pp. 11 to 15 of the paper book in Appeal No. 101 of 1929. The fees due to eight counsel had to be ascertained and this was done by Mr. Chatterji on the materials which had already been placed before Mr. Hechle. He then proceeded to indicate how much of the fees due to counsel was payable out of what he called the "estate," how much was payable by Mt. Attormani Dasi and how much was payable by Ashutosh Dhur. The award or report of Mr. Chatterji was agreed to in writing by Ramesh Chunder Bose, by Mt. Attormani Dasi, and by Ashutosh Dhur. The Taxing Officer incorporated Mr Chatterji's award or report in his report to the Court which was dated 12th March 1920.

On 16th March 1920 Ashutosh Dhur gave notice of an application for 26th March 1920 before Rankin J., as he then was, for an order that the report of the Taxing Officer dated 12th March 1920 should be confirmed and that the receiver appointed in the said Suit No. 875 of 1904 of the estate of the heir of Narayan Chunder Dhur be directed to pay Mr. Ramesh Chunder Bose the sum of Rs. 14,501 out of the funds in his hands to the extent the same was available and the balance by raising the same on mortgage of properties of sufficient value belonging to the estate of the heirs of Narayan Chunder Dhur deceased to enable Ramesh Chunder Bose to tax his bill of costs which were payable out of the estate of Pitambar Dhur deceased and debit one-third of the amount of taxed bills of Mr. Ramesh Chunder Bose against the amount to be advanced to him as aforesaid and realize one-third of the amount of the taxed bill from Kali Churn Dhur and one-third from Bipin Bihari Dhur and that after such realization the accounts between the heir of Narayan Chunder Dhur, as regards their liability for payment of costs be finally adjusted. In passing it may be noted that this was in substance the same application which Attormani had made before Chaudhuri,J.,and which Ashutosh had strenuously opposed at that time. Ashutosh's idea was that the attorney should be paid off first, and then the said receiver should be placed in a position to realize a portion of the said costs from Bipin and Kali and thus to recoup Narayan's estate to a certain extent. Ashutosh Dhur in his petition to this Court, stated, among others, as follows:

"That the said estate being in the hands of the Official Receiver, our petitioner and his mother were unable to pay a very large amount of costs payble to their attorney Babu Ramesh Chunder Bose so as to enable him to tax his bill and recover the same in the manner hereinbefore stated. That in order to get over this difficulty your petitioner's mother took out a Registrar's summons dated 18th July 1917 praying for an order that Mr. Jacob, the then receiver of the said estate, should raise and pay to the said Babu Ramesh Chunder Bose the sum of Rs. 40,000 by mortagage or sale of undivided half-share of the properties bequeathed to the heirs of Narayan Chunder Dhur. That your petitioner filed an affidavit in opposition to the said application affirmed on 23rd July 1917 setting out that Nabin Chunder Dhur undertook to pay the costs of the action, and further that the costs were payable out of the estate of Pitambar Dhur deceased in the manner hereinbefore stated, and raising various other objections to the same. That upon the said application it was inter alia ordered that it should be and was thereby referred to the Taxing Officer of this Honb'le Court to enquire and report as to the amount of counsel's fees due to Babu Ramesh Chunder Bose and it was further ordered that the said enquiry should be held in the presence of the said Ramesh Chunder Bose and your petitioner. That during the pendency of the said enquiry the defendant Bipin Bihari Dhur, having taxed some of his bills, applied for execution thereof against your petitioner, his mother and the defendant Nabin Chunder Dhur, and accordingly a notice was issued by this Hon'ble Court and dated 4th February 1919 on your petitioner, his mother and the defendant Nabin Chunder Dhur to show cause why the decree and orders for costs, which had been taxed as aforesaid, should not be executed. That your petitioner filed an affidavit affirmed on 31st March 1919 for the purpose of showing cause wherein your petitioner, after setting out the facts of the case pointed out that the estate of Narayan Chunder Dhur being in the hands of the Official Receiver counsel's fees payable to Babu Ramesh Chunder Bose could not be paid to enable him to tax his bills, and further that on such taxation not only the decrees and orders for costs including those under execution would be satisfied, but a large amount would be due to the estate belonging to the heirs of Narayan Chunder Dhur deceased."

Notice of this application was given to Mt. Attormani Dasi, Mr. Ramesh Chunder Bose, Nabin Chunder Dhur and his attorney Mr. H. C. Banerjee, Mt. Sushila Sundari Dasi and her attorneys Rutter & Co., and to Mr. Khagendra Nath De who was the attorney of Nobin Chunder Dhur for some time, but no notice was given to the other parties interested in the estate of Pitambar Dhur.

Rankin, J. by his order dated 26th July 1920 refused to confirm the Taxing Officer's report and in the course of his judgment observed as follows:

"In the course of this litigation there has been a testamentary suit and in the administration suit certain costs incurred in the testamentary suit have been dealt with; further complication arises owing to the fact that the costs were not taxed at the time and certain orders were made which fail to take effect regarding costs. It is evident that more than one of the parties are in this difficulty, that counsel's fees have amounted to a considerable sum and the solicitors are not desirous of paying such a large sum before carrying in the bills for taxation of those costs allowed out of Pitambar's estate. To that extent I am minded to help the parties on a proper application being made in the presence of all the parties. If such an application is made for leave to have those costs taxed first, and payment of counsel's fees vouched afterwards, I may be able to make an order giving the receiver liberty to pay counsel's fees, but will direct that the allocaturs are not to issue till the vouchers are produced before the Registrar that counsel have been paid. As regards any other costs payable out of Narain's share in that estate I cannot hold out any hopes that I will do more than make provision when the decree in the partition suit" (relating to the estate of Narain Chunder Dhur deceased) comes to be made: (i) giving the commissioner of partition liberty to set-off costs where there are cross-claim; (ii) giving him leave to sell or raise money upon the particular share of each person to pay the attorneys."

It should be stated here that Nabin, who had a passion for litigation, had in 1917 started a suit for partition of the properties belonging to Narain's heirs (Suit No. 563 of 1917). That suit came on for hearing before Rankin, J., on 2nd August 1920, when he made the usual partition decree and appointed Mr. Hechle, the then Registrar, commissioner of partition and receiver and discharged the Official Receiver who had been receiver of the said properties under an order which had been made in Suit No. 875 of 1904.

The position thereafter was that Attormani and Ashutosh would not pay Mr. Ramesh Chunder Bose any money and Mr. Ramesh Chunder Bose was unable to get his bill taxed as counsel employed by him had not been paid their fees. The attorney had employed the counsel concerned under the authority given to him by the plaintiffs in the retainer filed in Court, and he was bound to pay counsel, and the client would be bound to pay the fees paid to counsel on taxation. It is only when the client has instructed the attorney not to brief a particular counsel that the client would be under no obligation to pay fees paid to that particular counsel, should he have been employed by the attorney : see *Re Harrison* (4). In these circumstances he made an application to this Court some time in March 1924 for an order on notice to the parties and to the receiver appointed in Suit No. 563 of 1917 that the receiver of the estate of the heirs of Narayan Chunder Dhur deceased should raise and pay to Mr. Ramesh Chunder Bose a sum of Rs. 15,912 by mortgage or sale of one undivided half-share of the properties bequeathed to the heirs of Narayan Chunder Dhur towards payment in part of the plaintiff's bill of costs and that Ashutosh Dhur be ordered to produce cause papers and briefs of counsel before the Taxing Officer in order to enable Mr. Ramesh Chunder Bose to vouch his bill of costs. By this time Mr. Bose had lodged his bill with the Taxing Officer and it had been taxed in the sense that the officer had decided what he would allow.

Ashutosh opposed the application of Mr. Bose. The application came on before me sitting on the original side and it appeared manifest from the affidavits used : (see R. C. Bose's affidavit of 19th March 1924 and Ashutosh's affidavit of 31st March 1924), that Mr. Bose's complaint that the briefs and cause papers had been taken away from his office was literally true. I was further of opinion that the order prayed for was such as Rankin, J., had indicated in the concluding sentence of his judgment quoted above as being one which could be made. An order was made by me on the original side in April 1924 in terms prayed for by Mr. Ramesh Chunder Bose ; but this order was however set aside by the Court of appeal by its judgment dated 25th March 1925. The Court of appeal (Sanderson, C. J., and Rankin, J.) pointed out that the attorney had no cause of action against his clients for disbursements, such as counsel's fees, before he had actually paid them and that no case had been made out by the attorney for asking that the share of his clients should at that stage be mortgaged in order to put him in funds to pay his counsel's fees.

(4) [1903] 1 K. B. 282.

It may not be out of place here to quote the following observations from the judgment of the Court of appeal which was delivered by Rankin, J.:

"The position is, as I understand, that the bill of costs, which is referred to by the attorney in his affidavit has been lodged. It has been lodged without these vouchers from counsel. The bill itself has been taxed in the sense that the officer has decided what he will allow. The amount to be allowed for counsel's fees has also been decided and a certificate has been given. It appears, therefore, that this attorney has been allowed very great indulgence indeed. He has been allowed to bring in his bill without the vouchers and practically to have a complete taxation without the vouchers. I make no observation as to that, except that he has had exceptional indulgence. The bill itself appears to be a bill for a very much larger sum than Rs. 15,000; taking the bill as a whole, it appears to be more than Rs. 40,000. We are now asked to say whether it is right in these circumstances that the receiver should be directed to charge the clients' estate itself merely to raise a mortgage for the purpose of putting the solicitor in funds to pay his counsel's fees at the last moment when the taxation is already complete. It has to be observed that under our rules it is possible for an attorney when he obtains his allocatur to get a summary remedy against his client under R. 67, Chap. 38. In my judgment, there are several substantial reasons why the order asked for by the attorney should not be granted. If this order be made in this case it appears to me that it will be very difficult to refuse applications of this character which will constantly be made. It seems to me that it is in effect getting rid of the salutary rule of law which was laid down in *Holmes* v. *Penney* (5). I think, too, that the principle that an attorney's client is entitled as a special protection to have disbursements made before the bill is lodged would be seriously imperilled. It seems wrong in any case to raise money for part of the bill of costs; piecemeal charges on an estate are to be avoided. There is another objection. When this bill has been passed the clients will have an opportunity, if they desire, of raising certain claims and objections which they have indicated. I do not say that by way of encouraging them to do so, but it is quite possible that that will be done."

I will not presume to say a single word in criticism of the judgment of the Court of appeal; but it does seem to me that Rankin, J.'s attention was not drawn to his own judgment dated 26th July 1920, referred to above.

It appears that some time previously namely in March 1924, Nabin Chunder Dhur had made an application to this Court on the original side in Suit No. 563 of 1917 for an order that Mr. Ramesh Chunder Bose might be directed to make over to Mr. Remfry the receiver and commissioner of partition of the estate of Narain Chunder Dhur appointed in the said Suit No. 563 of 1917, the allocaturs of costs of the said Testamentary Suit No. 3 of 1898 and his taxed bills of costs and to furnish a full and complete account with sufficient details of all money received by him from time to time on account of the costs of the said testamentary suit. Mr. Ramesh Chunder Bose filed an affidavit on 24th March 1924 in which he stated that the said Nabin Chunder Dhur and Ashutosh Dhur used to look after the litigation from the very start and that from time to time they used to take away from his office cause papers and briefs of counsel in the testamentary and other proceedings, which papers were essentially necessary for the preparation of the bills of costs. This was a repetition of what he had already stated in 1917 and which is referred to in a previous portion of this judgment. He also stated that he had in his possession one allocatur and four taxed bills and that as regards the other allocaturs or taxed bills they were made over to Mr. Belchambers and were no longer with him. Ashutosh made an affidavit, but there is no denial therein of what had been stated by Mr. Bose. Mr. Bose's explanation was fully accepted and Nabin's application was dismissed by me on the original side and two appeals against the last-mentioned order were also dismissed by Sanderson, C. J., and Rankin, J. This was on 19th March 1925. The result was that no further question about allocaturs and taxed bills in connexion with Suit No. 3 of 1898 could thereafter arise.

Counsel employed by Mr. Ramesh Chunder Bose having been subsequently paid by him out of his own funds and the necessary vouchers being produced before the Taxing Officer, the taxation of his bill of costs, which was lodged in the Taxing Office on 27th September 1921, was completed on 26th June 1928 and an allocatur was issued allowing Rs. 12,295-8-0 as between party and party and Rs. 13,949-15-0 as between attorney and client. Mr. Bose is now seeking to obtain an order for payment by the plaintiffs and they are strenuously resisting any such order.

(5) [1856] 3 K. & J. 90=3 Jur. N. S. 80=26 L. J. Ch. 179=5 W. R. 132.

I may mention in this connexion that the attorney's bill was in the first instance finally passed by the Assistant Taxing Officer on 2nd September 1927. The plaintiffs however asked for review of taxation. The decision of the Taxing Officer dated 15th September 1927 was against the plaintiffs. They then applied to the Court for an order that the taxation should be reopened and that the bill should be retaxed. Pearson, J. before whom the matter came on for hearing was not satisfied that it was necessary to reopen the taxation altogether but he directed that the Taxing Officer should only reconsider items 1 to 5 mentioned in the plaintiffs' exceptions to taxation. It may be noted in passing that the plaintiffs queried the entire bill of the attorney, and that as many as 371 items in the bill were taken exception to.

Mr. S. C. Roy and Mr. P. N. Chatterjee for the plaintiffs, Attormani Dasi and Ashutosh Dhur have raised before us various contentions, the principal among them being the following: (1) that the award of Mr. B. C. Chatterji is binding on the attorney, and that it is quite clear that under the award the attorney is to get certain costs on account of counsels' fees out of the "estate" by which expression is meant the estate of Pitambar Dhur deceased and that as regards the balance of the costs payable on account of counsel's fees he is to get one-third from Ashutosh Dhur and two thirds from Mt. Attormani Dasi; and further, as regards the attorney's in-pocket costs, he is to get one-third from Mt. Attormani Dasi and give up the balance as against Ashutosh Dhur; (2) that Attormani Dasi and Ashutosh Dhur claim to set off certain sums of money as either having been paid to the attorney or having been lost to them on account of the negligence of the attorney. It is said that the attorney failed to carry out the order of the Assistant Referee by which he was directed to lodge with the Taxing Officer the bills of costs in the testamentary suit before the commencement of the long vacation of 1915, and that owing to the attorney's default in carrying out the said order the result was that the payments made by Mr. Belchambers to the attorneys were treated as the personal drawings of the members of Narayan's branch of the family; in other words, the latter state that by reason of the attorney's negligence they had lost the benefit of the provision in the decree of the Court of appeal as to equal contribution by the parties as to costs, and that as against the legacy payable to them out of the estate of Pitambar Dhur they were not able to set off the costs payable by them; and (3) that the attorney's claim is a belated one and that the matter obviously needs enquiry into the claims put forward by the plaintiffs; and that that being so the Court in its discretion will refuse to make the order prayed for.

I agree, if I may say so with respect, with the view put forward during the course of the argument that when an application by an attorney for realization of his costs under the rule of this Court referred to above entails an enquiry it should not ordinarily be dealt with in a summary manner.

If I were not satisfied that there is not a shade of a shadow of reality in the plaintiffs' opposition to the present application and that this rule, if applied to the present case, would work very grave injustice to the attorney, I should not be prepared to depart from this rule. But this is a very special case. And as will be shown later, there are really no matters which call for enquiry; in my opinion the case set up by the attorney is indeed admitted by Ashutosh, although he may now choose to attempt to deceive the Court. I have gone through the entire record and I am satisfied that this is a matter in which the Court ought to exercise its discretion in favour of the attorney. No one can rise after perusing the record without being conscious that at almost every step the attorney since the termination of the proceedings in the administration suit has been subjected to harassment: deliberate and prolonged, at the hands of his clients. Whether the attorney should have gone on with clients of this description on his back, is a matter on which there is room for doubt, but that is neither here nor there. The various orders of the Court from time to time referred to in a previous portion of this judgment indicate to my mind that the attorney was left under the impression that if and when he was in a position to

pay off the fees due to counsel employed by him, there would be no difficulty whatsoever in getting an allocatur issued and in obtaining an order for payment under the rule of the Court referred to above. If there had not been this impression created in the mind of the attorney, I can hardly conceive that the attorney would have waited so long. The rule of the Court referred to above is technically free from the statute of limitations and I see no reason whatsoever why the Court should not assist its own officer in getting his just and proper dues from his clients.

As regards the story of loss having been occasioned to the clients by reason of the attorney's negligence, I am by no means satisfied as regards the bona fides of the complaint made against the attorney. None of the parties cared to carry out the order of the Assistant Referee made in August 1915, neither any member of Narayan's branch nor Bipin nor Kally. Even as late as April 1924 neither Kally nor Bipin had got their bills taxed pursuant to the order of August 1915, and therefore it is difficult to see what had been lost to the estate of Narayan up to April 1924. But be that as it may I accept unreservedly the explanation offered by the attorney. He has pointed out to this Court several times that he was placed in so difficult a position by the brothers Asutosh and Nabin Chunder Dhur that it was impossible for him in the events which had happened to carry out the order of the Assistant Referee of August 1915 and to get the bills taxed as directed by him. Let us see what Ashutosh said in March 1924 in answer to Mr. Ramesh Chunder Bose's charge. Mr. Bose made an affidavit on 19th March 1924 in which he stated among others as follows:

"14. That during the prosecution of this suit and the appeal the said Ashutosh Dhur used to take from my office the cause papers and briefs of counsel most of them have not been returned to me.

"15. That in or about 1915 the said Ashutosh Dhur and Nabin Chunder Dhur quarrelled amongst themselves and Ashutosh Dhur alleged that cause papers and briefs of counsel were with Nabin Chunder Dhur and latter charged Ashutosh Dhur had them in his possession.

"16. That in Suit No. 553 of 1917 wherein Nabin Chunder Dhur is plaintiff and Ashutosh Dhur and others are defendants being a suit for partition between them of the properties allotted to the heirs of Narain Chunder Dhur out of the estate of Pitambar Dhur deceased. I am informed that an affidavit of documents have been filed by Ashutosh Dhur wherein many cause papers and briefs of counsel prepared in my office and relating to this suit have been disclosed as being in his possession and I wrote letters to Mr. K. K. Dutt, attorney for Ashutosh Dhur in the said partition suit requesting him to produce those briefs and papers at the Taxing Office for taxing my bill of costs in this suit but he refused."

Ashutosh Dhur answered these allegations by his affidavit of 31st March 1924 and he stated as follows:

"11: That I deny the correctness of the allegations contained in para. 14 of the said affidavit and state that if any papers and briefs were taken it must have been done by the defendant Nabin Chunder Dhur who used to do everything in the case and if any papers and briefs have not been returned the said Nabin Chunder Dhur must be responsible for them.

"12. That I admit the correctness of the allegations contained in para. 15 of the said affidavit but state further that the charge that I had whilst removing from the house taken cause papers and briefs of counsel with me is wholly untrue. (Note in this connexion that in para. 15 of Mr. Bose's affidavit there is no reference to anything suggesting the last three lines).

"13. That with reference to the allegations contained in para. 16 of the said affidavit as regards the papers and briefs disclosed in my affidavit of documents in Suit No. 563 of 1917, referred to in the said paragraph, I say that they were prepared by the defendant Nabin Chunder Dhur and are in his own handwriting and that they were produced before the Registrar during the enquiry about the ascertainment of counsel's fees payable by him herein and were examined and admitted by Babu Ramesh Chunder Bose to have been so prepared and I further say that I did not get any of the said papers from him but received them from Beniapukur Thana in a sealed box. In connexion therewith I further say that although my attorney at first insisted on prepayment of the costs of production of the said papers before the Assistant Taxing Officer as requested by Babu Ramesh Chunder Bose he eventually and without payment produced them before the Assistant Taxing Officer who after looking through them did not consider them relevant for the purpose of taxation. And I state that it is not true that my present attorney Babu Kumar Krishna Dutt, refused to produce them before the Assistant Taxing Officer."

The matter on scrutiny turns out to be as follows : It appears that Ashu and Nabin had quarrelled ; there were thereafter proceedings in the criminal Court ; their premises were searched and the police took charge of their papers. It appears from Ashutosh's affidavit of documents in Suit No. 563 of 1917, to which reference has already been made by Mr. Bose in his affidavit.

that eventually Ashutosh secured from the Beniapukur Thana two steel boxes. In these steel boxes were the cause papers and briefs of counsel; they were the papers &c., in the two Suits Nos. 875 of 1904 and 3 of 1898; that that was so is apparent from the affidavit of documents itself; when Ashu came to file this affidavit he made a selection from the papers which came into his possession; these papers were what he considered relevant to his case in Suit No. 563 of 1917. But the affidavit gives sufficient indication that there could be no doubt whatsoever that he and Nabin had the papers which should have been in the office of Mr. Ramesh Chunder Bose namely the papers in the two suits of 1898 and 1904.

On these materials is there any case for enquiry, detailed or otherwise, into the charge of negligence against the attorney brought by the plaintiffs? If the attorney had not the cause papers and counsel's briefs, how could he prepare and lodge bills with the Taxing Officer in accordance with the directions given by the Assistant Referee in August 1915? In my opinion on these materials the demand for enquiry is wholly unsustainable and ought not to be listened to, for Ashutosh is convicted out of his own mouth. To sum up: in my opinion the case against the attorney based on the ground of negligence is entirely disproved and there is no necessity whatsoever for any oral evidence.

The attorney has indicated in his affidavits with sufficient particularity what allocaturs and taxed bills he had in his possession; and he made over to Mr. Remfry, the receiver and commissioner of partition of the estate of Narain Chunder Dhur deceased, what papers he had in his possession. As far as I can find from the record the story of the negligence of the attorney although the same has frequently been trotted out by the plaintiffs has never been believed in by any single Judge in this Court and has in my opinion been proved to be false and I see no reason whatsoever why at the present moment, while the attorney is seeking an order for payment, it should be held, regardless of what has gone before, that the claim put forward by the plaintiffs is of such a nature as must induce this Court to hold that the attorney should be relegated to a suit in which the plaintiffs might plead set-off and where the attorney may be put to further difficulties. Further as regards the payments alleged to have been made to the attorney and not given credit by the attorney no vouchers or receipts are produced and the allegations, to my mind, are not supported by any materials whatsoever. In my opinion there is no substance whatsoever in the allegations of the plaintiffs on this point, namely that they are entitled as a matter of right to claim set-off against the attorney's claim.

I now turn to the contention founded on the award or report of Mr. B. C. Chatterji. The expression "estate" in Mr. Chatterji's award must refer to the estate of Pitambar Dhur deceased, but it may be noted in passing that the other parties interested in the estate of Pitambar Dhur deceased were not before Mr. Chatterji and they therefore would not be bound by the terms of the award. Now, as I read Chaudhuri, J.'s order, the whole object was to ascertain the quantum of fees payable to counsel. Chaudhuri, J.'s object was to deal finally with the application of Mt. Attormani Dasi which was before him after the quantum of fees payable to counsel has been ascertained. The entirety of Mt. Attormani's said application was not dealt with at any time by Chaudhuri, J., (owing to the fact that the learned Judge ceased to sit on the original side shortly after March 1920), but I am unable to read Mr. Chatterji's award or report with the consent of Mr. Ramesh Chunder Bose appended thereto, as amounting to a declaration by the attorney that in no event, as regards a substantial portion of counsel's fees, would he look to his clients for payment. In my opinion, the circumstances show that the award of Mr. Chatterji was obtained in the form in which it was couched because the plaintiffs and Nabin Chunder Dhur were anxious at the time that they should be able to set-off as against the claims of Bipin Bihari Dhur and Kali Chunder Dhur for costs, certain sums payable by the latter; in other words, the award in my opinion, was framed in the manner in which it was done in order to effectuate set-off inter

the three branches of the family of Pitambar Dhur. The plaintiffs have no doubt in the present proceedings attempted to raise a cloud, but it is a cloud of dust raised by unscrupulous people and it ought to be possible in the state of the record before us to see into the substance of the thing having regard to the history of this unfortunate litigation. In my opinion, after Rankin, J's order of 26th July 1920, the award ceased to have any operation at all and was a washout. If, as a matter of fact, distribution has taken place and the estate of Pitambar Dhur has gone out of this Court it is not the fault of the attorney. The members of the family of Narain Chunder Dhur have been fighting among themselves, they being experts in litigation, and they have failed to seize in time the opportunity of exercising their rights of set-off, if such existed, against the claims of Bipin Behari Dhur and Kali Churn Dhur. But I repeat that as the plaintiffs are bound under their retainer to pay the attorney's costs it would manifestly be against all justice and reason and common sense to hold that in the events which have happened the attorney can only look for the major portion of the costs payable on account of counsel's fees to the estate of Pitambar Dhur and to nobody else. I am satisfied from the figures placed before us by Mr. S. M. Bose that the attorney has carried out his undertaking to give up two-thirds of the in-pocket costs as against Ashutosh Dhur.

In my opinion there is no substance whatsoever in these two appeals and the same ought to be dismissed with costs.

Lort-Williams, J.—I agree with my Lord the Chief Justice.

By the Court. — The order of the Court therefore is that the appeals are allowed and the order of the learned Judge discharged. We do not propose to make any order as to costs either before the original Court or in the Court of appeal.

V.B./R.K. *Appeals allowed.*

A. I. R. 1930 Calcutta 664

JACK, J.

Abdul Sovan—Accused—Petitioner.

v.

Ramani Mohan Chatterjee—Opposite Party.

Criminal Revn. No. 389 of 1930, Decided an 15th July 1930.

Penal Code (1860), S. 485—Trade-mark consisting of impression moulded on glass and label—Person found only with mould with intention of ccunterfeiting trade-mark—Person can be convicted under S. 485.

Where a trade-mark consists of an impression moulded in the glass of which the bottles are made together with label and the person is found in possession of the mould in question with the intention of counterfeiting that trade-mark, although the apparatus for counterfeiting the label which would complete the trade-mark has not been found, the person can be convicted under S. 485. [P 664 C 2]

Amiruddin Ahmed—for Petitioner.

D. N. Bhattacharjee—for the Crown.

Judgment.—The petitioner has been convicted under S. 485, I. P. C., and sentenced to a fine of Rs. 500 on the ground that he was in possession of a mould for counterfeiting the trade-mark of G. Ghose, the manufacturer of hair oil. The rule was issued on the ground that the trade-mark was a combination trade-mark and possession of moulds for counterfeiting a part of the mark did not amount to an offence under S. 485, I. P. C. It appears that the trade-mark consisted of an impression moulded in the glass of which the bottles are made together with the label, and these moulds were for making the impression on the glass of the bottle. Under S. 485, I. P. C., whoever has in his possession any die for the purpose of counterfeiting the trade-mark is liable under the section. There can be no doubt in this that the mould in question was intended for the purpose of counterfeiting this trade-mark although the apparatus for counterfeiting the label which would complete the trade-mark has not been found, and inasmuch as this mould was certainly meant to be used in order to counterfeit the trade-mark the petitioner has rightly been held liable under S. 485, I. P. C.

The Rule is therefore discharged. The petitioner will surrender to his bail bond and serve out the remainder of his sentence.

V.B./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 665 (1)

CUMING, J.

S. C. Nandi—Accused—Petitioner.

v.

Corporation of Calcutta—Complainant—Opposite Party.

Criminal Revns. No. 1419 to 1422 of 1929, Decided on 14th January 1930, from order of Presy. and Municipal Magistrate, Calcutta D/- 26th September 1929.

Criminal P.C., S. 200—Conservancy Overseer of Calcutta Corporation is public servant—On written complaint by such officer it is not necessary to examine complainant before issuing process—Calcutta Municipal Act, S. 554—Penal Code S. 21.

A conservency officer of the Corporation of Calcutta is a public servant within the meaning of S. 21, I. P. C. and as such on the written complaint of such officer made in the discharge of his official duties it is not necessary to examine the complainant before issuing process. [P 665 C 2]

Suresh Chandra Talukdar and *Mohendra Kumar Ghose*—for Petitioner.

Md. Nurul Huq Chowdhury—for Opposite Party.

Order.—These four rules arise out of four separate prosecutions for putting up scaffoldings in a public lane belonging to the Corporation of Calcutta without obtaining licenses for so doing from the Corporation. The petitioner was apparently charged with obstructing this lane on four separate occasions. For each of these obstructions he was convicted and fined Rs. 20.

The ground which has been urged on his behalf by Mr. Talukdar is that the separate prosecutions and convictions were not maintainable and illegal, because the obstruction was one and the same in each of these cases and therefore he could not be tried and convicted four times for the same offence. Whether the obstruction for which he was prosecuted was the same in all the four cases or was a different obstruction is obviously a question of fact. When the petitioner was prosecuted on these four charges he never alleged in his defence that the obstructions complained of were one and the same. This point obviously turns upon a question of fact which was not raised by the petitioner when the cases were tried; and I have no material before me on which I can possibly decide whether the cases referred to the same obstruction or different obstructions.

Mr Talukdar had then argued that the convictions and sentences are bad in law, because the learned Magistrate did not examine the complainant according to the mandatory provisions of law before he issued the processes. The answer to this contention lies in proviso (aa) to S. 200, Criminal P. C. which provides:

"when the complaint is made in writing nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties."

The person who made the complaints was a Conservancy Overseer and purported to act in the discharge of his official duties. He was clearly a Municipal officer or a servant of the Corporation and therefore under S. 554, Calcutta Municipal Act, 1923 he is a public servant within the meaning of S. 21 I. P. C. There is therefore no substance whatever in this contention.

Lastly Mr Talukdar has argued that in the facts and circumstances of the case the conviction is improper. As far as I can understand Mr. Talukdar he would seem to urge that as the building is now finished and the whole occurrence took place some time ago the prosecution was improper. He does not suggest that it was illegal. Why it would in such circumstances be considered improper I entirely fail to understand. The mere fact that the building the construction of which caused the obstructions has been finished would be no reason for condoning the offence of obstructing the road during the construction of the building.

These are the only points which Mr. Talukdar has argued. The result is all four rules stand discharged.

R.M./R.K. *Rules discharged.*

A. I. R. 1930 Calcutta 665 (2)

C. C. GHOSE AND PEARSON, JJ.

Harbhorsha Mahommed and *another*—Petitioners.

v.

Jhapuran Bibi—Opposite Party.

Criminal Revn. No. 1311 of 1929, Decided on 10th December 1929, from order of Sess. Judge, Jalpaiguri, D/- 29th August 1929.

Penal Code, S. 363—Enticing away minor girl whose mother had lost right to guardianship by virtue of marriage — Accused must be given benefit of doubt.

Where a minor daughter of a woman who has married an outsider and sc lost her right to lawful guardianship of her daughter has been enticed away, the enticer cannot be convicted under S. 363. [P 666 C 2]

Probodh Chandra Chatterji and *Bireswar Chatterjee*—for Petitioners.

Satindra Nath Mukerjee — for the Crown.

C. C. Ghose, J. — This matter was argued before us on Friday last and has been argued today. We have had the advantage of hearing Mr. Satindra Nath Mukherjee on behalf of the Crown. But having examined the record we are of opinion that the case against the accused is not a clear one. The matter really depends upon this : as to whether Jhapuran Bibi had lost her right to the lawful guardianship of her minor daughter Amiran Bibi. If she has lost her right then the accused must be given the benefit of the doubt and their conviction set aside. If however she has not lost her right then the conviction and sentence must remain. Now, Mr. Mukherjee has gone into the matter and has, with great candour, admitted before us that Jhapuran Bibi had married a person who was not related to the infant within the prohibited degrees as laid down under the Mahomedan law. In other words Mr. Mukherjee admits that Jhapuran Bibi had married a person who was an outsider so far as the family were concerned. It follows therefore that Jhapuran Bibi had lost her right to be the lawful guardian of Amiran Bibi. If that was so then the conviction of the accused under S. 363, I.P.C., cannot be sustained at all. Mr. Mukherjee had addressed to us a lengthy argument with the object of showing that although Jhapuran Bibi might have ceased to be the lawful guardian of the infant Amiran Bibi she was still entitled to the lawful custody of Amiran Bibi, she having entrusted herself with the lawful custody of the infant before she married an outsider. This is a specious, ingenious and attractive argument. But having regard to the facts in this case the whole point is whether, in the circumstances, the accused should or should not have been given the benefit of the doubt. We are of opinion that the circumstances were and are such that it is our primary duty to examine the case of the accused with very great scrutiny and if, as we have come to the conclusion that Jhapuran Bibi has ceased to be the lawful guardian of Amiran Bibi on her marriage with an outsider, the accused must be given the benefit of the doubt. It follows therefore that the conviction and sentence must be set aside.

The accused who are on bail will be discharged from their bail bonds.

V.B./R.K. *Conviction set aside.*

A. I. R. 1930 Cacu!ta 666

GRAHAM AND PANCKRIDGE, JJ.

Panchanan Sarkar—Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 582 of 1930, Decided on 24th June 1930, from order of Magistrate, Asansol, D/- 14th April 1930.

(a) Criminal P. C., S. 347—Magistrate is empowered to commit case to Sessions on deciding that he should not try it provided evidence is completed.

A Magistrate has power at any stage of the proceedings to decide that the case is one which he ought not to try and which ought to be committed to the Sessions and he should ordinarily commit the case for a trial, provided the evidence has been completed. [P 667 C 2]

(b) Criminal P.C., S. 350 (1), proviso (a)—Enquiry before commitment—De novo trial is not necessary.

Where proceedings are in the nature not of a trial but merely of an enquiry preparatory to commitment, the necessity of any provision for de novo trial does not eixst. [P 668 C 1]

Manmatha Nath Roy (Jr.)—for Petitioner.

Nirmal Chandra Chakravarty—for the Crown.

Graham, J.—In this case a rule was issued on the District Magistrate of Burdwan to show cause why an order of the Magistrate of Asansol dated 14th April 1930 refusing the petitioner's request for a de novo trial should not be set aside or why such other or further order should not be made as might appear fit and proper to this Court. An application for revision of the order in question was made to the District Magistrate of Burdwan and was rejected by him on 26th April. It appears that

the petitioner, who was a Tahsildar at Asansol under the Maharaja of Cossimbazar, was sent up for trial on a charge of criminal breach of trust under S. 408, I. P. C. The case was at first in the file of S. K. Guha and in its early stages was apparently proceeded with on the footing that it was a trial. No less than 67 witnesses were examined for the prosecution. Thereafter, it appears that the trying Magistrate left the district and was succeeded by another Magistrate Rai Sahib Hiralal Roy. As a consequence of that Mr. Guha recorded on 29th March 1930 an order in these terms:

"As I am not going to make over charge immediately the case need not be transferred just now. In the exercise of the power under S. 347, Criminal P. C., I direct that evidence shall be taken under S. 208, Criminal P. C., the accused is therefore called upon to cross-examine the prosecution witnesses forthwith and file a list of defence witnesses whom he wishes to summon under S. 208, Criminal P. C."

After that some of the witnesses were cross-examined and eventually Rai Sahib Hiralal Roy having succeeded Mr. Guha recorded an order on 9th April 1930 to the following effect:

"After going through the record I find that my predecessor decided under S. 347, Criminal P. C., to proceed in accordance with the provisions of S. 207, Criminal P. C. The defence wants the matter to proceed in accordance with Ss. 252 and 254, Criminal P. C."

After hearing the parties the Magistrate passed the order which forms the subject matter of the present application. He stated therein that after carefully considering the arguments on both sides he thought that in view of his predecessor's decision to proceed under S. 207, Criminal P. C., he ought to abide by that decision and he accordingly followed the same course, and rejected the prayer for a de novo trial. The petitioner thereupon moved the District Magistrate with the result which has already been stated above.

The main contention which has been urged before us is that the learned District Magistrate erred in law in holding that it was entirely within the discretion of the trying Magistrate to grant the request for de novo trial or not, and it has been strenuously argued that he ought to have held that the accused had a right to a de novo trial. The matter seems to depend mainly upon the interpretation to be placed on Ss. 347 and 350, Criminal P. C. S. 347 reads as follows:

"If in any enquiry before a Magistrate or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Sessions or High Court, and if he is empowered to commit for trial, he shall stop further proceedings and commit the accused under the provisions hereinbefore contained."

Section 350 provides for cases of conviction or commitment upon evidence partly recorded by one Magistrate and partly by another. The learned advocate for the petitioner has contended that the proceedings were a trial and that that being so he was entitled to demand as of right a de novo trial. The answer to that however seems to be that the Magistrate had undoubtedly power at any stage of the proceedings to decide that the case was one which he ought not to try and which ought to be committed to the Sessions, and according to this section he would ordinarily commit the case for trial provided the evidence had been completed. In this particular instance however the evidence had not yet been completed and therefore it was not possible for the first Magistrate to make an order of commitment. He contented himself therefore with merely recording an order that the case was one which should be committed. From that moment what had hitherto been a trial became an enquiry, and the only reason why the case was not there and then committed for trial was that the enquiry was incomplete it being left by the Magistrate to his successor to finish the enquiry and make the necessary order for commitment. The argument advanced by the learned advocate for the petitioner seems really to amount to this that he wishes to tie the Magistrate down to the view which he took of the case in its earlier stages. It seems to be almost tantamount to saying "once a trial always a trial." I do not think that that view can be supported. It is to be borne in mind that the proceeding before the Magistrate was one continuous proceeding and the power which the first Magistrate possessed to take action under S. 347 existed equally in the case of the second Magistrate. Furthermore, it appears to be clear from the record that the second Magistrate did not

blindly accept the decision of his predecessor but that he brought his own mind to bear on the matter and came to the same conclusion that the case was one which ought to be committed to the Sessions.

Coming now to S. 350 it is important to note that the proviso to sub-S. (1) of that section refers to the case of a trial only, and it is only in that case that the accused may when the second Magistrate has commenced his proceedings demand that the witnesses or any of them should be re-summoned and re-heard; or in other words, that there should be a de novo trial. The principle which underlies this proposition is obvious. Where however the proceedings are in the nature not of a trial but merely of an enquiry preparatory to commitment the necessity of any provision for a de novo trial does not exist. In my judgment there has been no error of law in this case such as to render it necessary for us to interfere in the exercise of our revisional powers.

On the merits I find it difficult to understand why the petitioner who, it might be imagined, would be anxious to have a speedy trial should be so insistent upon a de novo trial in holding the examination of 67 witnesses over again and the inevitable delay and expense which would result therefrom.

In my opinion this rule must be discharged.

Panckridge, J.—I agree.

B.V./R.K. *Rule dismissed.*

A. I. R. 1930 Calcutta 668

GRAHAM AND PANCKRIDGE, JJ.

Cyril C. Baker—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 137 of 1930, Decided on 2nd July 1930, from order of Chief Presidency Magistrate.

Opium Act (1 of 1878), S. 90—Meaning of "possession".

Possession implies knowledge, and there would be no possession when there is no knowledge on the part of the ostensible occupant of the cabin or room as the case may be. Possession without knowledge can hardly have been meant since in that case the element of criminal intention or knowledge would be entirely wanting. [P 669 C 1, 2]

Where there is undoubtedly ground for grave suspicion regarding possession against the accused, but the element of reasonable doubt is not excluded, it would not be safe to conclude that the accused had the knowledge which is necessary to convict him of the offence. The onus of proving that knowledge is upon the prosecution, and relying solely upon the bare fact that the opium was found in the accused's cabin without proof of any additional or extraneous facts to establish any connexion between him and the opium is not sufficient to discharge that onus.

[P 670 C 2, P 671 C 1]

Charles Bagram and *Sudhansu Mouli Chowdhury*—for Appellant.

Monindra Nath Mukherji—for the Crown.

Judgment.—This is an appeal against the order of the learned Chief Presidency Magistrate convicting the appellant, Cyril C. Baker, of an offence under S. 9, Opium Act (1 of 1878) and sentencing him to six months' rigorous imprisonment and to pay a fine of Rupees 1,000 or in default of payment thereof to a further term of three months' rigorous imprisonment.

The facts are shortly as follows: The appellant is, or was, at the time of the alleged occurrence, Assistant Wireless Operator of the B. I. S. N. Co's "S. S. Edavana," which was due to leave on the night of 23rd January or morning of 24th January last for Rangoon and the Straits. On the evening of 23rd January at about 7 p.m. a party of Customs Preventive Officers went on board the ship and searched the appellant's cabin, which was an ordinary 2nd class cabin on the lower deck having in it two berths and a settee. The accused accompanied the officers from the top deck and opened the door of the cabin with a key which he produced either from his pocket or from the top of a ledge outside the door of the cabin. Upon that point there was some controversy at the trial. This much however is clear that the door was locked and that it was opened by a key produced by the accused. On search being made twenty-seer packets of opium were found concealed in the covering of the settee and the mattresses of the upper and lower berth. The accused was thereupon taken into custody, and was in due course sent up for trial and convicted and sentenced as stated.

The defence set up was that the accused knew nothing whatever about the opium and that to use his own expression it was "planted" there by someone else. It was suggested that a Goanese servant, or "boy", who was employed to

wait on the accused and the other wireless operator, was the real culprit, and in support of that suggestion reliance was placed on the fact that this "boy" mysteriously disappeared from the ship on that same evening just about the time of the search, that he was found missing when the ship left next morning, and that he has not since been heard of. To prove this fact an entry in the ship's log (Ex. A) was put in by the defence from which it appeared that the "boy" was entered as having deserted the ship, that a small sum was due to him as wages, and that this and his effects were subsequently made over to the Shipping Master at Rangoon.

As the learned Chief Presidency Magistrate has observed in his judgment the facts were almost all admitted. The opium was found in the accused's cabin after he had himself opened the door with the key which he produced. The question therefore was whether he was in possession of the opium within the meaning of the word as used in S. 9 (c), Opium Act. That again depends upon what is meant by possession and whether it means mere physical or de facto possession, that is to say, in the sense of something that is found in a place which is in the exclusive occupation of some person or whether something more is required, and whether it connotes conscious possession with knowledge. It has been argued on behalf of the Crown that so soon as it is established that the opium was found in the de facto possession of the accused, that is to say in the cabin exclusively occupied by him, the effect will be that under S. 10 of the Act the presumption will be that the accused will be deemed to have committed the offence unless he can satisfactorily account for his possession. The presumption will however only come into play when it has been proved that the accused has dealt with the opium in any of the ways described in S. 10. So that we come back again to the question whether he was in possession. In regard to that we take the view that possession implies knowledge, and that there would be no possession when there is no knowledge on the part of the ostensible occupant of the cabin or room as the case may be and when it is shown that the opium was placed there by some one else. Such possession as this can hardly have been meant since in that case the element of criminal intention or knowledge would be entirely wanting.

Proceeding then upon the footing that the possession must be conscious possession the question is whether it has been proved beyond reasonable doubt that the accused was in possession of the opium. Now there can be no doubt that up to a certain point the facts go very much against the accused. The opium was admittedly found in a cabin occupied exclusively by him, the door of which was kept locked and was opened with a key which he himself produced.

The quantity of opium too is remarkable being no less than 20 seers in weight in packets of 20 one-seer each concealed as already stated under the cover of the settee and in the mattresses of the two bunks. At first sight these facts seem to be almost conclusive against the accused, and it is difficult to believe that anyone else could have placed them there or that at all events that the accused could have been ignorant of the presence of the opium. If he had that knowledge he would of course be guilty.

But the case is complicated by the evidence regarding the mysterious disappearance of the Goanese boy, and the importance of this piece of evidence is this, that it gives rise to a doubt whether the boy could have been the culprit and whether it is possible that the accused was, as he claimed, ignorant of the fact that the opium was in his cabin. To my mind the fact which militates mostly against this theory is the fact that such a large quantity of opium was found, since it does seem difficult to believe that the Goanese would have dared to place such a large quantity of opium in his master's cabin knowing as he must have done that his master might enter the cabin at any moment and discover its presence with the consequences which would naturally ensue therefrom.

Whether the accused had knowledge of the opium or not one fact is we think abundantly clear and that is that the "boy" was concerned in the offence either alone and independently, or as a confederate of the accused. The evidence in that connexion is significant as

it shows that he disappeared suddenly just about the time when the search was made. According to the testimony of the first wireless operator the "boy" was serving him when he began his dinner at 7 p. m. and he then disappeared and could not be found. He was not seen again and next morning was entered in the log as having deserted the ship. Indeed he left in such a hurry that he abandoned, as stated above, his personal effects, and also a small amount of pay which was due to him. The learned Magistrate thought that his disappearance might be explained by his having had something to do with the information, but there is no evidence to support that conclusion, nor does it seem probable, if that was the reason, that the boy would have delayed his departure until the customs officers were actually on board. Had that been the reason for his departure it seems probable that he would have left much earlier, and have taken his personal effects with him. The suddenness of his departure suggests rather that he cannot have been the informant.

The "boy" had access to the cabin and the suspicious circumstances in which he left the ship go to show we think that he undoubtedly had knowledge of the fact that the opium was in the cabin.

But the question still remains whether the accused also had this knowledge. Prima facie, as I have said, it is difficult to believe that the "boy" would dare to secrete so large a quantity in the cabin with the risk of its being discovered at any moment. But there are some facts in this connexion which have to be taken into consideration. The accused was according to the evidence on duty on the top deck and it was about the time apparently when he usually had his dinner. It seems probable whoever placed the opium where it was found that it was only intended to be a temporary resting place, and that it would afterwards be removed to some safer place. There is a port-hole just over the settee where some of the packets of opium were found. It is possible that the "boy" who as we have held had undoutedly taken a guilty part in the matter, was alone responsible for placing the opium where it was found, and that taking advantage of the temporary absence of his master he hid the opium in the cabin intending afterwards to remove it to some other place. In this connexion it may be borne in mind that the cabin was on the lower deck and that the porthole would afford a convenient means of smuggling the opium on board. The sudden and unexpected arrival of the customs officers just before the ship was due to sail may have upset any such plan.

There are other circumstances which deserve consideration. We agree with the learned Magistrate that the fact that the accused took the officers to his cabin does not help him because he had no option in the matter, and it was a case of force majeure. At the same time there is nothing in the evidence to show that the accused showed any reluctance to accompany the officers or that his demeanour was that of a guilty man. On the other hand he at once disowned any knowledge of the opium and said that it must have been "planted."

I may mention at this point that the theory has for the first time been propounded on behalf of the Crown that the entire story about the "boy" is a myth, and that it was a subsequent afterthought designed with the object of exonerating the accused. We do not think that such a suggestion ought to have been made. It was never part of the case for the prosecution at the trial nor was any cross-examination directed towards showing that the boy had never in fact existed. All that was suggested was that it had not been given out on that night that the boy was missing. The evidence to prove that the boy did exist is overwhelming, and the learned Magistrate has accepted that view with which we agree.

On a careful consideration of the evidence and of all the facts and circumstances the conclusion at which we have arrived is that while there is undoubtedly ground for grave suspicion against the accused the element of reasonable doubt is not excluded, and that it would not be safe to conclude that the accused had the knowledge which is necessary to convict him of the offence. The onus of proving that knowledge was upon the prosecution and in relying solely upon the bare fact that the opium was found in the accused's cabin without proof of any additional or extraneous facts to

establish any connexion between him and the opium they have failed to discharge that onus. It is apparent that careful investigation might have been expected to establish some of these missing links. We are not prepared on the evidence as it stands to hold that it proves beyond reasonable doubt that the accused was aware of the presence of the opium in his cabin, and we think that he is entitled to the benefit of that doubt. The result therefore is that we allow the appeal, set aside the conviction and sentence, acquit the accused, and direct that the fine, if realized, be refunded. The appellant will be discharged from his bail bond.

K.N./R.K. *Appeal allowed.*

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* A. I. R. 1930 Calcutta 671

SUHRAWARDY AND COSTELLO, JJ.

Akhla Kulla Chaudury and *another*—Accused—Petitioners.

v.

Emperor—Oppcsite Party.

Criminal Revn. No. 1452 of 1929, Decided on 15th May 1930, from order of Sess. Judge, Bankura, D/- 26th August 1929.

***(a) Criminal P.C (1898), S. 476—Offence under S. 211, Penal Code—Person causing preceedings to be started may not be party to proceedings, yet Court can proceed against him.**

Court may make a complaint against a person under S. 476 for an offence under S. 211, Penal Code, if it is of opinion that the proceedings before the Court were caused to be started by that person though he was not a party to a proceeding before it : *A. I. R.* 1925 *Rang.* 321, *Foll.* ; 37 *Cal.* 250 and 7 *C. L. J.* 375, *Ref.*

[P 672 C 1]

(b) Criminal P. C. (1898), S. 195 (1) (b) and (c)—Meaning of "in" and "in relation to" explained.

The words "in" and "in relation to" mean that an offence may be committed by a person in relation to a judicial proceeding though he may not be a party to the proceeding or though it may not have been committed by that person in a judicial proceeding.

[P 672 C 1]

Manindra Nath Banerjee—for Petitioner.

Lalit Mohan Sanyal—for the Crown.

Sures Chandra Talukdar—for Complainant.

Judgment.—This rule has been issued on the ground that the petitioner not having been a party to any proceeding before the Magistrate who made the complaint against him under S. 476, Criminal P. C., the case instituted against him on such complaint should be withdrawn. The fact is that the petitioner was the Sub-Inspector of Gangajalbati Police Station in the District of Bankura. One Jugal Kishore Singh, a constable, lodged a first information report with the petitioner against certain persons charging one of them with escaping from his lawful custody and the others for rescuing him. This information was enquired into by a superior officer to the petitioner who found it to be false and concocted with the help of the petitioner and others. Mr. Bell, Superintendent of Police, Bankura, then lodged a complaint in Court under S. 211, I. P. C., against all the persons concerned including the petitioner. Jugal Kishore filed a protest petition and the the case was enquired into and ultimately dismissed as false by the Deputy Magistrate, Mr. D. R. Ghose. Mr. Ghose on dismissing Jugal Kishore's complaint asked the petitioner and other persons to show cause why they should not be prosecuted under certain sections of the Indian Penal Code.

On considering the cause shown the learned Deputy Magistrate made a complaint against them under S. 476, Criminal P. C., for offences under Ss. 120-B-211, 193, 466, 466-109. There was an appeal by the petitioner to the Sessions Judge of Bankura against the order made by the Deputy Magistrate under S. 476-B. The learned Judge in a careful and lucid judgment dismissed the appeal but made certain slight alterations in the order made by the Deputy Magistrate. The petitioner moved this Court and obtained this rule on the ground that he was not a party to the proceeding before Mr. D. R. Ghose and that officer had no jurisdiction to make a complaint against him under S. 476. Before proceeding further it may be noted that the petitioner has raised an argument before us which is more academical than of any practical importance. If we set aside the complaint against the petitionor made by the Court under S. 476 the result will be that Mr. Bell's complaint existing against the petitioner will proceed. But as the point has been raised and strenuously argued it is necessary to give our opinion on it. We have al-

ready held in giving our decision in Criminal Admitted Appeals Nos. 934 and 935 of 1929 decided on 5th May last that the Court may make a complaint against a person under S. 476, for an offence under S. 211, I. P. C., if it is of opinion that the proceeding before the Court was caused to be started by that person though he was not a party to a proceeding before it. Here we may shortly give our reasons for that view. We have expressed therein, (1) under S. 211, I. P. C., a person who institutes, and also a person who causes to be instituted, a criminal proceeding which is proved to be false may be prosecuted for an offence under that section; and under S. 195, Criminal P. C., Cl. (4), a person who abets the commission of an offence may also be prosecuted under that section; (2) S. 476 does not speak of a party to a proceeding. It says that the Court can order further enquiry in a criminal case in respect of any offence referred to in S. 195 (1) (b) (c) which appears to have been committed in or in relation to a proceeding in that Court.

The words "in" and "in relation to" must be given their meaning; otherwise there is no sense in using those words. An offence may be committed by a person in relation to a judicial proceeding though he may not be a party to the proceeding or though it may not have been committed by that person in a judicial proceeding. (3) The offences with which the petitioner is charged are covered by S. 195 (1) (b) which are not restricted to the party committing the offence in or in relation to a proceeding in Court which is similarly worded as S. 476. A different consideration may arise in respect of an offence mentioned in Cl. (c), S. 195 (1). We are fortified in this view of ours by a Full Bench decision of the Rangoon High Court in *Emperor* v. *Syed Khan* (1).

The distinction seems to be this: that if a false information is lodged to the police with the conspiracy of several persons then all of them may be prosecuted for lodging false information. If the person who lodges the information goes to the Court without the assistance or collusion of the abettors the Court may not have jurisdiction to order prosecution of the persons other than the man who actually gave the information. But where it is apparent that several persons combined to lodge a false information with the police and also lay a false complaint in Court the Court will have the power to pass orders against all the persons under S. 476 who had thus conspired. The case law on this point is not very clear as will appear from the judgment in the case of *Jadu Nandan Singh* v. *Emperor* (2) where all the cases have been noted; but it is to be noticed that the preponderance of judicial opinion is that in cases coming under S. 195 (1) (b) the Court has authority to order the prosecution under S. 476 in respect of offences mentioned therein whether committed by a person to a proceeding or by a person not apparently connected with the proceeding. In *Dharmadas Kawar* v. *Emperor* (3) sanction was given for the prosecution of two persons on the allegation that they had instigated the complainant to lodge a false information. That order was set aside by this Court on the ground that the information was lodged only before the police and, therefore, the Court had no jurisdiction to sanction the prosecution of those persons. The decision of the Court did not rest on the ground that the party against whom sanction was given was not a party to the proceeding. For these reasons, we are of opinion that the order passed by Mr. D. R. Ghosh, Deputy Magistrate directing the prosecution of the petitioner was passed with jurisdiction. This rule, therefore, will stand discharged.

As the proceedings have been so long protracted as remarked by the Sessions Judge we expect that action in the matter will be taken at once. Let the record be sent down at once.

V.B./R.K. *Rule discharged.*

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(1) A. I. R. 1925 Rang. 321=27 Cr. L. J. 4=91 I. C. 30=3 Rang. 303 (F.B.).

(2) [1909] 37 Cal. 250=11 Cr. L. J. 37=1 I. C. 710.

(3) [1908] 7 C. L. J. 373=7 Cr. L. J. 340=12 C. W. N. 575.

A. I. R. 1930 Calcutta 673

MUKERJI AND GUHA, JJ.

Debendra Nath Sadhukhan and *others* —Plaintiffs—Appellants.

v.

Naharmal Jalan and *others*—Defendants—Respondents.

Appeal No. 190 of 1927, Decided on 18th December 1929, from original decree of Sub-Judge, 24 Parganas, D/- 5th March 1927.

(a) Mahomedan Law—Wakf—Divesting of all rights of gift and sale on wakif's part and vesting them in mosque is clear proof of dedication of properties to mosque.

The divesting of all rights of gift and sale on the part of the wakif and the vesting of the same in the mosque, the omission to state anything about the residue of the profits if there be a residue, and the provisions as to other properties which may be subsequently purchased with any compensation money that may be received being invested with character of wakf properties is a clear proof of the fact that the wakif intended to dedicate the properties absolutely to the mosque. According to the Hanafi law to create a wakf delivery of seisin is not necessary as it is in the case of a hiba. According to Abu Yusuf, whose tenets hold the field as far as Bengal is concerned, the wakf becomes absolute and binding on the mere declaration of the wakf, and on such declaration being made his right in the property which forms the subject-matter of the declaration becomes extinguished at once. It may however be that the declaration is equivocal or there may be circumstances suggesting that it was not meant to be operative, and in such a case to see, whether that was so or not, the conduct of the wakif himself and other circumstances, if attendant and not subsequent, may be examined. His subsequent conduct or the conduct of the subsequent mutwallis are irrelevant for the purpose : *A. I. R.* 1922 *Cal.* 429, *Ref.* [P 675 C 1]

(b) Limitation Act, Art. 142—Each succeeding mutwalli does not get fresh starting point for the purpose of Art. 142.

The introduction of a fiction as to an idol being under a perpetual tutelage and also of a theory of suspension of cause of action during such tutelage will be an encroachment upon the statute of limitation without legislative sanction and will revolutionize all known principles of law and procedure.

Each succeeding mutwalli does not get a fresh starting point of limitation from the date of his accession to the office for the purpose of Art. 142 : *A. I. R.* 1926 *Mad.* 769; 23 *Mad.* 271 (*P.C.*); 37 *Cal.* 885 (*P.C.*); *A.I.R.* 1922 *P. C.* 123 and *A.I.R.* 1926 *Cal.* 913, *Ref.* [P 676 C 1, 2]

S. C. Basak, *Prakash Chandra Majumdar* and *Satindra Nath Ray Choudhuri* —for Appellants.

Sarat Chandra Ray Choudhuri, *Braja Lal Chakrabarty*, *Krishna Lall Banerjee* and *Presh Ch. Mitra*—for Respondents.

Mukerji, J. — One Khedu Jamadar had in his lifetime built and consecrated a mosque at Tiljala, in the suburbs of Calcutta, the place where he resided. The mosque was originally a tiled hut, but subsequently he made it brick-built. He made a will in 1867 and died in 1871, leaving him surviving his first wife Dulera Bibi and a daughter by her named Alijan, and a second wife Idun Bibi whom he had married as a widow, and by the latter a son named Didarbux. Idun Bibi had a daughter named Raju Bibi by her first husband. By his will he bequeathed a ten annas share of his properties to his first wife Dulera Bibi and the remaining six annas thereof to his second wife Idun Bibi and his son Didarbux. On Khedu Jamadar's death the two widows fell out, but the dispute was eventually settled by a sort of a family arrangement arrived at with the help of some arbitrators, and this arrangement was embodied in and carried out by two documents executed and registered in 1872. By this arrangement Idun Bibi and her son got in her six annas share the mosque at Tiljala and the lands adjoining, and two items of properties at Salkia. During her life Idun Bibi acquired certain properties and eventually, on 23rd June 1884, executed a wakfnama and had it registered in respect of nine items of properties including the properties she had got under the arrangement aforesaid. Some out of these properties are included in this suit in two schedules, Sch. A being about 10 cottahs of land in Tiljala and Sch. B consisting of 5 plots of land in Salkia.

The plaintiffs' case is that Idun Bibi acted as mutwalli in accordance with the wakfnama till her death in 1889, that after her death her daughter's, that is Raju Bibi's, son Alum succeeded her as mutwalli and acted as such till his death, which took place in 1894, that Haji Alum left a widow Samiran Bibi and four sons Nabibox, Hayatubox, Rahimbox and Kaderbox, that one Dina Nath Sanyal prevailed upon these persons to execute two mortgages in his favour, in respect of plot 5 and plots 1 and 4 of Sch. B for Rs. 700 and Rs. 800 on 7th August 1896 and 8th January 1897 respectively, describing the said properties as secular properties, that the said Dina Nath Sanyal then

caused a mortgage to be executed by those persons on 5th August 1897 in favour of one Nannilal Agarwalla in respect of the properties in Schs. A and B for Rs. 6,000 describing them as secular properties, and thereafter on 23rd August 1897 got them to sell the said properties to Ghashi Bibi, mother of Nannilal Agrani, in satisfaction of the said mortgage and for further consideration of Rs. 2,000. The plaintiff's case further is that Samiran Bibi, Nabibox and Rahimbox having died, plaintiff 1 Hayatubox and the pro forma defendant 20 Kaderbox remained to perform the duties of mutwalli. But inasmuch as both of them had to remain continually absent from India on service since 1909, and Kaderbox expressed his unwillingness to act as mutwalli, plaintiff 2 appointed Kassoo Jamadar as mutwalli on 18th July 1919. The plaintiffs' case further is that plaintiff 2, since his appointment as mutwalli, attempted to take possession of the properties in suit which are all wakf properties but was resisted by the defendants. It is also said that plaintiff 2, with a view to recover the properties, gave a lease to plaintiff 3 for a period of 99 years on receipt of premium of Rs. 12,000. The suit was instituted on 22nd December 1921 with prayers for a declaration that the properties appertain to the wakf of Idun Bibi, for recovery of possession and also for mesne profits.

Besides the pro forma defendant 20 Kaderbox, to whom reference has already been made, there were 19 principal defendants. Of these Nos. 1 to 8 were the Sanyals being the representatives of Dina Nath Sanyal whose name has appeared before, Nos. 9 to 11 (of whom No. 10 Nannilal Agrani having died, his name was struck out) are the representatives of Ghashi Bibi who has also been referred to above. Nos. 12 and 13 are subsequent transferees of plots 1 and 2, Sch. B. No. 14 is the subsequent transferee of plot 3, Sch. B, and Nos. 15 to 19 claim to be the present owners of plots 4 and 5, Sch. B.

The Subordinate Judge held that plaintiff 1 and the pro forma defendant 20 are entitled to a declaration that the properties in suit, together with other properties mentioned in Idun Bibi's wakfnama are wakf properties only to the extent that there was thereon a charge of Rs. 348 per year for the upkeep and maintenance of the mosque. He held however that except as regards the properties mentioned in Sch. A the suit for possession was barred. He accordingly made a decree declaring title in favour of plaintiff 1 and defendant 20 as mutwalli in respect of Idun Bibi's wakf and confirming their possession in respect of the property in Sch. A and dismissing the rest of the suit, i. e., for recovery of possession of the property in Sch. B.

From this decree the plaintiffs have preferred the main appeal, appeal from original decree No. 190 of 1927. To this appeal two sets of cross-objections have been filed, one by respondents 12 and 13 (the holders of plots, 1, 2 and 3, Sch. B), and the other by respondents 14 to 18 (the holders of plots 4 and 5, Sch. B.).

The first question that arises for consideration is the extent and character of the wakf, it being urged on the side of the appellants that it constitutes an absolute dedication of the properties to the Almighty, and on behalf of the respondents that it is altogether illusory and was never acted upon so that the properties covered by it remained as secular as ever. The Subordinate Judge, as already observed, has adopted a sort of middle course and has held that on looking into the terms of the wakfnama it is pretty clear that it was never meant to be an absolute wakf in the true sense of the term, but that the wakf only gave a specific sum for the benefit of the mosque. This specific sum he found to be Rs. 348 a year, and in his opinion the residue remained undisposed of. Now by this document the wakif declared that he made the wakf in the name of God—"in favour of" the three-domed mosque established by herself and her husband. She further declared that from the date of its execution whatever right of gift or sale she had in the properties being extinguished would vest in the mosque in whose favour the wakf in the name of God was made and that from that day she and her heirs and representatives would have no right of gift and sale of their own in the said properties. Lower down she declared again that if the wakf properties or any portion thereof

be acquired by the Government for their own purpose or by any company or municipality, etc., then with the proper price thereof other properties of a similar nature or price will be purchased and the same will be deemed to be the subject-matter of this wakf in favour of the mosque, and the profits thereof will be applied to the expenses as stated and all the conditions of the wakf will apply thereto. The divesting of all rights of gift and sale on the part of the wakif and the vesting of the same in the mosque, the omission to state anything about the residue of the profits if there be a residue, and the provision as to other properties, which may be subsequently purchased with any compensation money that may be received, being invested with character of wakf properties, leave no doubt in my mind that the wakif intended to dedicate the properties absolutely to the mosque. According to the Hanafi law to create a wakf delivery of seisin is not necessary as it is in the case of a hiba. According to Abu Yusuf whose tenets hold the field as far as Bengal is concerned, *Jinjira Khatun* v. *Muhamud Fakirulla Mia* (1), the wakf becomes absolute and binding on the mere declaration of the wakf and on such declaration being made his right in the property which forms the subject matter of the declaration becomes extinguished at once. It may however be that the declaration is equivocal or there may be circumstances suggesting that it was not meant to be operative, and in such a case to see whether that was so or not the conduct of the wakif himself and other circumstances, if attendant and not subsequent, may be examined. His subsequent conduct or the conduct of the subsequent mutwallis are irrelevant for the purpose.

In the present case there is evidence of at least two witnesses, P. W's. 2 and 3, who have given definite evidence of Idun Bibi having all along acted in accordance with the directions in the wakf. This evidence has been believed by the learned Judge and there is no reason why we should not rely on it as being true in the main, though the said witnesses have painted the picture a little too thick. In 1890, after Idun Bibi's death, the next Mutwalli Haji Alum, in his suit against Alijan Bibi in respect of the Tiljala property, asserted his right as mutwalli under the wakf and in the judgment in that suit there is the finding, for whatever it may be worth, that upon the evidence of both the parties Idun Bibi, after executing the wakfnama and till her death, defrayed all expenses necessary for the management of the Masjid. It is true that Idun Bibi did not get her name mutated either in the Collectorate or in the municipality as mutwalli and it is also true that in the documents between herself and her tenants she did not describe herself as mutwalli (Ex. C-22 and Ex. C-25), but I am not prepared to make too much of this circumstance. I am of opinion that there are no materials on the record which would indicate with anything like reasonable certainty that the wakf was anything but real and that on the other hand there is some material which in view of the time that has elapsed since then must be regarded as sufficient, showing that the wakf was acted upon by Idun Bibi herself as also by her successor Haji Alum. Furthermore there are in Ex. A and Ex. B, written statements filed by plaintiff 1 and the pro forma defendant 20 in 1909 and 1911, admissions made by them in the clearest possible terms that till the death of Haji Alum the wakf was religiously and faithfully administered. The Subordinate Judge appears to have made a mistake in supposing that only Rs. 348 were to be spent for the upkeep and maintenance of the mosque, because the figure he has given omits to take into account a part of the directions which runs in these words:

"First the sarkari taxes and all sorts of revenue shall be paid and then the expenses for the mosque and buildings, etc., will have to be defrayed; after that the following expenses shall be duly made."

It is the expenses following, of which a schedule has been given, that the learned Subordinate Judge has made a total and found the aggregate to be Rs. 348. For these reasons I am of opinion that the wakfnama created an absolute endowment vesting the properties in the mosque, which is the endowed institution in the case.

The next point that has to be considered is the question of limitation. It has been strenuously contended on be-

(1) A. I. R. 1922 Cal. 429=67 I. C. 77=49 Cal. 477.

half of the appellant that each succeeding mutwalli gets a fresh starting point of limitation from the date of his accession to the office for the purpose of Art. 142 to the schedule to the Limitation Act, and that Art. 144 is not applicable because a person who derives his title from a mutwalli cannot set up against the endowment a title which his vendor could not assert, a contention urged on the authority of the decision of the Madras High Court in the case of *Rama Reddi* v. *Ranga Dasan* (2). It has been urged with great insistence on behalf of the appellants that the earlier decision of the Judicial Committee in the cases of *Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram* (3) and *Damodar Dass* v. *Lakshan Dass* (4) must be taken to have been implicitly overruled by their Lordships' decision in *Vidya Varuthi Tirthaswamigal* v. *Baluswami Ayyar* (5) as the true nature of endowed property and of the position of mutwalli was more accurately realized in the last-mentioned case. I have carefully considered all that has been said in support of these arguments, but I see no reason to differ from the view which I expressed in the case of *Raja Manindra Narain Roy* v. *Sarat Chandra Bandyapadhya* (6), in which, though these questions did not directly arise, it had to be gone into in view of the arguments that were then put forward. In the case of a sale there can be no question of the vendee's possession, and relying upon the two earlier decisions of the Judicial Committee cited above, I have no hesitation in holding that a suit instituted after 12 years' adverse possession since the date of the sale would be barred.

I am also of opinion that there is no good reason as to why Art. 142 should not also be held to apply to the case, in which case the plaintiff will have to be established his possession at a point of time within 12 years before the suit. With all respect I would dissent from the view taken in the *Madras* case cited above, firstly for the reason that it proceeds on the unfounded assumption that the earlier decisions of the Judicial Committee are no longer law; and secondly because the introduction of a fiction as to an idol being under a perpetual tutelage and also of a theory of suspension of cause of action during such tutelage will be an encroachment upon the statute of limitation without legislative sanction and will revolutionize all known principles of law and procedure.

On the merits, so far as limitation is concerned, I am in entire agreement with the Subordinate Judge in his conclusion, namely that the evidence of possession is practically one-sided, that the plaintiffs have adduced no evidence of possession within 12 years of the suit, and that on the other hand Ghashi Bibi and thereafter her legal representatives have been in continuous possession ever since the sale in 1897. (After considering the evidence the judgment proceeded.) Lastly, it has been urged on behalf of the respondents that the declaration of a charge to .the extent of Rs. 348 upon the properties of Sch. B which the Subordinate Judge has made is wrong. Upon a construction of the wakfnama I have already held that there was an absolute dedication of the properties themselves vesting all rights in the mosque and it seems to me that the provisions as to the expenses that are to be incurred which are detailed in the wakfnama are merely directions to the mutwallis as to how the endowment was to be administered. These directions can hardly be read as creating merely a charge within the meaning of S. 100, T. P. Act. There is no question of property of one person having been made security for payment of money to another; the whole property appears to have been dedicated. Besides, such a declaration was never asked for in the plaint and it was never the plaintiffs' case that there was such a charge.

The result is that the appeal fails and the cross-objections succeed. The suit, in so far as it relates to the properties mentioned in Sch. B, must be dismissed in its entirety. The result is that the plaintiffs will get a declaration that the property mentioned in Sch. A to the plaint is a part of the

(2) A. I. R. 1926 Mad. 769=96 I. C. 371=49 Mad. 543.
(3) [1900] 23 Mad. 271=27 I. A. 69=7 Sar. 671 (P.C.).
(4) [1910] 37 Cal. 885=7 I. C. 240=37 I. A. 147 (P.C.).
(5) A. I. R. 1922 P. C. 123=65 I. C. 161=48 I. A. 302=44 Mad. 831 (P.C.).
(6) A. I. R. 1926 Cal. 913=95 I. C. 644.

wakf properties dedicated by Idun Bibi and their possession therein will be confirmed, but that the suit in so far as it related to the properties mentioned in Sch. B will be dismissed.

The Subordinate Judge appears to have awarded to the contesting defendants namely defendant 13, defendant 14 and defendants 15 to 19 three-fourths of their costs in the suit, but he has been in error in awarding each of these three sets of defendants costs on the basis of full pleader's fees on the total value of the suit, i. e. Rs. 63,750 whereas as a matter of fact each of these three sets of defendants are only interested in a separate and different part of the properties. As the properties have not been separately valued anywhere we think it would be fair so far as the Court below is concerned, to make the calculation by dividing the total amount of pleader's fees, namely Rs. 943, equally amongst the three sets of defendants. In other respects the decree of the Court below as to costs will stand.

So far as the appeal and cross-objections before us are concerned, the appearing respondents, namely respondents 12 and 13 and respondents 14 to 18, will get their respective costs from appellants, but the hearing fee on the total value of the appeal will be divided between the said two sets of respondents in the proportion of 2/3 and 1/3.

Guha J.—I agree with my learned brother in the judgment delivered by him. I desire to add that in my judgment it cannot be held that their Lordships of the Judicial Committee of the Privy Council have either explicitly or by implication said anything in the case of *Vidya Varuthi Thirthaswamigal* v. *Baluswami Ayyar* (5), which might have the effect of overruling the previous decisions given by their Lordships, of which the case of *Gnana Sambanda Pandara Sannadhi* v. *Velu* (3) is typical and which directly bears upon the question of limitation raised in the present appeal. It also appears to me that in the cases cited in the argument before us by the learned advocate for the appellants the alienation of debuttar, or wakf properties was by the mohunt, shebait or mutwalli as such; in the present case the mutwalli Hayatubox Jamadar had on 23rd August 1897 alienated the properties in suit by a conveyance with definite recital that he was dealing with the properties in his own right as one of the heirs of Haji Alum Jamadar, the other heirs joining him in the transaction. This fact, to my mind, takes the present case out of the class of cases dealing with alienation by a mohunt, shebait, mutwalli as such, in regard to which there may be a seeming divergence of judicial opinion, as to the point of time when exactly adverse possession by the alienee could be said to have commenced. In the present case the date of alienation by Hayatubox Jamadar himself claiming adversely to the wakf must in my judgment be taken to be the date from which possession of the defendants became adverse. I would further desire to say in this connexion that in consonance with the decisions of the Judicial Committee it must be taken to be settled that a distinction exists so far as wrongful alienation of debuttar or wakf properties by way of lease and that by way of out and out sale as indicated in the case of *Munindra Narain Roy* v. *Sarat Chandra* (6).

So far as evidence of possession relating to plots 4 and 5 in suit is concerned, it is to my mind sufficient for the purposes of defeating the plaintiffs' claim as laid in the plaint on the ground of limitation. On the footing that the burden of proof lay with the contesting defendants to prove 12 years' adverse possession I would on the materials on the record decide the question in their favour. That these defendants did exercise acts of possession there is no manner of doubt. These acts of possession, it cannot be denied, were done in the assertion of claim of title, and there are circumstances to link together various portions of the property in suit so as to make the possession of a part amount to possession of the whole : see *Basanta Kumar Roy* v. *Secy. of State* (7). In the above view of the case, the plaintiffs' claim in suit is barred by limitation. I have nothing to add to what has been said by my learned brother on the other points raised in the appeal and cross-objections preferred by some of the respondents.

K.N./R.K. *Appeal dismissed.*

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(7) A. I. R. 1917 P. C. 18=40 I. C. 537=44 I. A. 104=44 Cal. 958 (P. C.).

A. I. R. 1930 Calcutta 678

PAGE, J.

Moolji Sicca & Co.—Plaintiff.

v.

Ramjan Ali—Defendant.

Ordinary Original Civil Jurisdiction Suit No. 2178 of 1927, Decided on 24th July 1928.

(a) Trade-mark—Nature of property in trade-mark stated.

A man has no right to put off his goods for sale as the goods of a rival trader and he cannot be allowed to use names, marks, letters or other indicia by which he may induce purchasers to believe that the goods he is selling are manufacture of another person. Whatever be the particular mode adopted by him, if the trade-mark is a work or device never in use before and meaningless, except as indicating by whom the goods in connexion with which it is used were made, there can be no conceivable legitimate use of it by another person, his only object in employing it in connexion with goods of his manufacture being to deceive. Mere proof that the trade-mark of one manufacture has been thus appropriated by another is enough to entitle the person aggrieved for injunction to restrain its use. In the case of a trade-mark thus identified with a particular manufactory the rights of the person whose trade-mark it was would not differ substantially from those which would exist if it were strictly speaking his property : *Reddaway* v. *Banham* (1896), *A. C.* 199, *Ref.* [P 679 C 2, P 680 C 1]

(b) Trade-mark—Infringement—Refraining from taking steps against infringer who has undertaken not to violate right in future does not weaken right of owner of trade-mark to sue for infringement.

In the case of piracy of a trade-mark the person who is entitled to the mark must be guided by reason and good sense. It may not be worthwhile to spend money on every man of straw who comes in his way and the person might not forthwith prosecute the infringer or might not take any step on the infringer giving an undertaking not to violate the right in future; the mere fact of his omission to prosecute in earlier cases does not in any way deprive the person of his right to an injunction suit : *Rowland* v. *Michell*, 14 *R. P. C.* 43, *Ref.* [P 682 C 1]

(c) Acquiscence—Principle and essentials stated.

Acquiescence is only a form of an estoppel and it is of the essence of the acquiescence that the party acquiescing should be aware of and by words and conduct should represent that he assents to what is a violation of his rights and that the person to whom such representation is made should be ignorant of the other party's right and should have been deluded by the representation into thinking that his wrongful action was assented to by the other party: *Proctor* v. *Bennis*, 30 *A. D.* 740, *Ref.* [P 684 C 1]

(d) Acquiescence—Fraud.

Where there is fraud there is no rule for doctrine of acquiescence to operate. [P 684 C 1]

(e) Trade-mark—Declaration of description is evidence of genuineness.

Although there is no Trade-mark Act in India a declaration of the description of a trade-mark serves the useful purpose of being some evidence of genuineness of the mark which is the subject matter of it. [P 679 C 1]

(f) Trade-mark — Infringement.

Where both the parties deal in the same manufacture the mere fact that the dealers in those manufactures are not deceived by the labels does not conclude the case. It has to be considered what class of people buy the manufactures. [P 680 C 1]

Judgment.—This is a passing off action. The trial ran its tedious course for many days but in my opinion it is a very plain case. The suit relates to labels attached to packets or bundles of biris. A biri is an inferior substitute for a cigarette and is composed of rolled tendoo leaves with a little tobacco inside. Many decisions were canvassed before me at the trial but the law applicable to the circumstances of this case is clear and simple and the decision will be seen to turn upon the issue whether the plaintiffs' or the defendant's labels were the first to be put on the market.

The plaintiffs' case is that the defendant's labels (Exs. 10 and 4) are colourable imitations of the plaintiffs' label, Ex. T. They claim that the word "Mohini," the registered number "247" and the figure of a woman upon Ex. T are distinctive marks of the plaintiffs' goods and together make up Ex. T which is a device distinctive of the biris sold by them. The defendant admits that the registered number 247 is a distinctive mark of the plaintiffs' biris. He also admits that the word "Mohini" and the figure are distinctive marks of the plaintiffs' biris but he claims that the word "Mohini" and the figure have long been used by him in connexion with the sale of his biris and that his label (Ex. 10) was upon the market and had obtained a reputation in connexion with his biris long before the plaintiffs' label (Ex. T) was put upon the market. The defendant however does not claim an exclusive right to the use of the word "Mohini" or the figure of the woman but claims a concurrent right with the plaintiffs to the user of those marks.

The plaintiffs' case is a simple one. It was stated on their behalf that in 1912 the firm of Moolji Sicca & Co.

started business in Calcutta and that in 1913 biris were sold by the plaintiffs loose and not done up in packets or bundles. In 1914 Kalyanji a partner of the plaintiff firm saw in the shop of one Joshi in Bombay a coloured lithograph of a well known picture by a Bengali artist, Banerji by name, known as Durbasha's Wrath. The plaintiffs determined to initiate a new method of selling biris, that is to say, they decided to sell them not loose but done up in packets of 25 and bundles of 500. For the purposes of their business they decided to use a label with the figure thereon of Sakuntala taken out of Mr. Banerji's picture and to put on the label above the picture the word "Mohini" which means "dear to the heart" or "charming." Accordingly, Ex. T was produced by Joshi for the plaintiffs, and on 16th March 1915 a declaration on behalf of the plaintiffs was made before the Chief Presidency Magistrate of Calcutta declaring that this was the label which they had adopted for use in their business. There are no Trade-mark Acts in this country but a declaration of this description serves a useful purpose as being some evidence of the genuineness of the mark which is the subject-matter of it. On 16th May 1916 the label (Ex. T) was affixed to the declaration. The plaintiffs asserted that before 1919 nobody other than themselves so far as they knew sold biris in packets and the defendant in his evidence admitted that nobody other than the plaintiffs and the defendant himself before 1919 had sold biris in packets. In the city of Calcutta the class of biri in suit which relatively is a cheap and inferior one is not sold, a more expensive biri being bought by persons who smoke biris in the city of Calcutta and it is the common case of both parties that the biris with which the Court is concerned in this case are sold to dealers for resale in the mofussil.

The defendant further admitted that at the present time the biris sold by the plaintiffs under the label Ex. T are well known in the market and have an established reputation, Ex. T being distinctive of the brand manufactured by the plaintiffs. He does not admit, however, that in 1919 the plaintiffs had established under Ex. T a reputation in the market such that Ex. T would denote goods manufactured by the plaintiffs.

I find upon the evidence that from 1916 onwards the plaintiffs' biris have been sold sometimes as "Mohini" biris sometimes as "Mohini 247" and sometimes as "247." I further find that in 1919 the plaintiffs had acquired a reputation under Ex. T for the biris manufactured by them and I also find that the word "Mohini" in 1919 then indicated in the market goods belonging to the plaintiffs and that "247" also indicated goods manufactured by the plaintiffs, as also did the figure of Sakuntala on Ex. T. I am satisfied upon the evidence that by 1919 Ex. T had acquired a reputation that would indicate to customers buying biris that biris bearing that label were of the plaintiffs' manufacture. In my opinion the word "Mohini" the number "247" and the figure were all ingredients in a distinctive device which denoted biris manufactured by the plaintiffs. (His Lordship here considered the evidence in support of the above observations and proceeded). In my opinion in those circumstances the law which is to be applied was laid down by Lord Herschell in *Reddaway* v. *Banham* (1) at p. 209:

"The principle which is applicable to that class of cases was in my judgment well laid down by Lord Kingsdown in *Leather Cloth Co.* v. *American Leather Cloth Co.* It had been previously enunciated in much the same way by Lord Langdale in the case of *Croft* v. *Day*. Lord Kingsdown's words were as follows: 'The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader and he cannot therefore (in the language of Lord Langdale in the case of *Perry* v. *Truefitt*) be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person.' It is in my opinion this fundamental rule which governs all cases, whatever be the particular mode adopted by any man for putting off his goods as those of a rival trader, whether it is done by the use of a mark which has become his trade-mark or in any other way. The word 'property' has been sometimes applied to what has been termed a trade-mark at common law. I doubt myself whether it is accurate to speak of there being property in such a trade-mark, though no doubt some of the rights which are incident to property may attach to it. Where the trade-mark is a word or device never in use before, and meaningless, except as in-

(1) [1896] A. C. 199=65 L. J. Q. B. 331=44 W. R. 638=74 L. T. 289.

dicating by whom the goods in connexion with which it is used were made, there could be no conceivable legitimate use of it by another person. His only object in employing it in connexion with goods of his manufacture must be to deceive. In circumstances such as these the mere proof that the trade-mark of one manufacturer had been thus appropriated by another would be enough to bring the case within the rule as laid down by Lord Kingsdown, and to entitle the person aggrieved to an injunction to restrain its use. In the case of a trade-mark thus identified with a particular manufactory the rights of the person whose trade-mark it was would not, it may be, differ substantially from those which would exist if it were, strictly speaking, his property."

Now none of the essential ingredients of Ex. T are descriptive of anything. By themselves or in combination they are meaningless, except as indicating the goods of the plaintiffs as I hold they do. In such circumstances, the law as laid down in the passage which I cited covers the present case, for Ex. T is meaningless except as a device distinctive of the plaintiffs' biris.

The next question that arises is:

"Are the defendant's labels (Exs. 10 and U or either of them), if used with biris that are put upon the market calculated to delude persons who seek to buy biris of the plaintiffs' manufacture into thinking that they are buying the plaintiff's goods when they are buying biris with either Ex. 10 or Ex. U ? "

Now, in considering that question I have to form my own opinion as to whether Exs. 10 and U in such circumstances are calculated to deceive buyers of biris after looking at the plaintiff's label and the defendant's labels, and also bearing in mind any relevant evidence there may be to the effect that persons buying the defendant's goods under labels 10 and U were in fact deceived into thinking that they were buying the plaintiff's goods.

There is very little evidence of actual deception ; indeed, the evidence of actual deception is so exiguous that I disregard it. Both the plaintiffs and the defendant sell biris to dealers, and it may be that a dealer might not be deceived by the defendant's labels. But that does not conclude the case in favour of the defendant, for the persons whom I have to consider in this connexion are the persons, sometimes called the unwary or the ignorant ultimate buyers, who for the most part belong to the lower classes of the people, and nearly all of whom are illiterate. Apart from any relevant evidence there may be upon the record with respect to actual deception (and for the purposes of this judgment I disregard and leave out of consideration any evidence of or in connexion with actual deception that there may be on the record), and confining myself to a consideration of the three labels, that is Ex. T on the one hand and Ex. 10 and U on the other, without doubt or hesitation I come to the conclusion that Exs.10 and U, are calculated to deceive such persons as are accustomed to buy and to smoke biris of the sort that form the subject-matter of this suit. I do not require oral or extrinsic evidence upon such a matter as that. No reasonable person, in my opinion, looking at Ex. T on the one hand and Exs. 10 and U on the other, can have any doubt that illiterate persons who form the great preponderance of the buyers of these biris would be likely to be deceived into thinking that goods bearing the label Exs. 10 or Ex. U were goods of the manufactory of which Ex. T is the distinctive label, res ipsa loquitur. If ever there was a case in which it would be safe to say that the unwary customer would be likely to be deceived, to my mind the present case is that case. (His Lordship here reproduced Q. 399 and proceeded). Under those circumstances prima facie the plaintiffs are entitled to a decree. I now desire to say something about the circumstances out of which this suit has arisen. In 1919 the plaintiffs filed a suit against one Bhailal Bikhabhai, and in that suit the defendant filed an affidavit on 26th May 1919. That affidavit was sworn four days after a letter had been sent to the defendant by an attorney on behalf of the plaintiffs. Kanji, in his evidence, has stated that in the course of that suit (which was a passing off action against Bhailal Bikhabhai), the plaintiffs received information that the defendant was violating their rights in connexion with Ex. T, and the plaintiffs therefore, through their attorney, sent the following letter to the defendant:

9, Old Post Office Street,
Calcutta, 23rd May 1927.

Messrs Bhola Meah & Co.
71/2, Canning Street.

Dear Sirs,

Re: Mohini Biri

I am informed by Messrs Moolji Sicca & Co of No. 51 Ezra Street, Calcutta the sole manu-

facturers and proprieters of Mohini biris and the sole proprietors of the get up and label containing the picture of a female form with the words Mohini Biri that you have prepared labels bearing same and similar name under get up similar to that of my clients which is a colourable imitation of my clients' said get up and trying to pass off the same in collusion with designing individuals as and for the biris of my clients' manufacture with a view to cause serious loss and damage to my said client.

In these circumstances I am instructed to call upon you (which I hereby do) and require of you forthwith and immediately to desist from such nefarious practice or otherwise my instructions are peremptory to move the Court in the matter. Please treat this as urgent.

Yours faithfully,
Sd. Surendra Chunder Ghose
Attorney-at-law and Attorney
for Messrs. Moolji Sicca & Co.

Now, ultimately it was not disputed by the learned counsel for the defendant that that letter was written and sent by the plaintiffs to the defendant. It was however denied that the letter was received. I think that it is inconceivable in the circumstances that the plaintiffs should have taken no further steps in the matter if they received no answer to that letter, and four days later in the affidavit to which I have referred the defendant stated in para. 3 that

"my firm manufactures and sells biris with labels with configurations of female form printed on it known as Mohini Sakuntala."

Why should the letter have been written and sent if it was not to be followed up by some action? Kanji stated that after a consent decree had been passed in the Bhailal Bikhabhai action he saw the defendant in the Court-house, and that the defendant, being threatened with a suit, promised to desist from using any label which was a colourable imitation of Ex. T, and further promised to buy Mohini biris from the plaintiffs. Strong corroboration of Kanji's evidence is to be found in the fact that on 31st October 1919 the defendant bought 70,000 Mohini biris from the plaintiffs, and continued to buy biris in 1920 and 1921 and it may be from time to time afterwards. Kanji stated that, having this undertaking and having obtained the defendant as a prospective customer of the plaintiffs' goods, they took no further steps in the matter. He further stated that the plaintiffs at that time had no information that in 1919 Kalumia had registered Ex. 10 in the police Court and he added that the first information they received of such registration was in the course of the present proceedings.

It was alleged on behalf of the defendant that the plaintiffs ought to have taken steps either to prosecute or to sue the defendant in 1919. Nobody can live long in this country without noticing that there are a good many colourable imitations of genuine articles to be seen in Calcutta, and worthless and impecunious men of straw would not be slow in seeking to imitate Ex. T, for since 1916, when the plaintiffs commenced to sell these biris in packets of 25 with Ex. T, their success in business has been phenomenal. A glance at the chart showing an abstract of their sales from 1915/1916 to 1926 is evidence enough of the success of the venture into which they had entered. It was only to be expected that, becoming aware of the success which had attended Ex. T rogues would be found prepared, if they could, to take advantage of the successful mark which the plaintiff had established. One of those rogues, in my opinion, was the defendant. In 1919 there can be little doubt that the defendant's business was on a small scale, carried on in a little shop which we are told is about 2 ft. broad, at 71/2 Canning Street, the business having been started in circumstances which are somewhat obscure. Kalumia, the defendant's brother, had stated in his declaration in 1919 that he had carried it on since 1900, but Ramjan gives a different account of its origin. When the business started, and how it started, is not very clear. Learned counsel for the defendant, acting no doubt on instructions, stated that Kalumia's story as set out in the declaration of 1919 was "wholly untrue." I regret to say that I can give no credence to any statement either of the defendant Ramjan, or of Kalumia, except in so far as the statement is one against his interest. That the business was a small one is clear enough, and the boy Ramjan Ali, as he then was, when he took over the business in 1914, found that the value of the biris in stock was only Rs. 4/5,000. That is the sort of impecunious person whom it is urged that the plaintiffs must prosecute or sue forthwith so soon as they dis-

cover that he is guilty of piracy at the risk of losing their rights in Ex. T.

But in such circumstances the person who is entitled to the mark must be guided by reason and good sense. It may not be worth while to spend money on every man of straw who comes in your way, and in my opinion it was natural and reasonable that the plaintiffs in 1919, having obtained the undertaking from the defendant, and finding that the defendant was prepared apparently to make good his promise to purchase goods from them, should refrain from taking further steps in the hope that the defendant in the future would not violate their rights: see Per Russell, C. J., in *Rowland* v. *Michell* (2).

Information was received in 1921 by the plaintiffs that there had been some further piracy of Ex. T on the part of the defendant, and I find that in 1921, in company with his attorney, Kanji went to the defendant's shop, but found nothing wrong. It is stated on behalf of the defendant that when Kanji with his attorney went to the defendant's shop in order to find out whether there had been any infringement of Ex. T he saw bundles of biris exposed with Ex. 10 attached to them, and yet that Kanji did nothing. It is an incredible story. Why did Kanji go to the shop? In order to discover (if it was the fact) the very thing which the defendant had exposed for all to see. And yet he does nothing. I find upon the evidence that when Kanji went with the attorney in 1921 to the defendant's shop at 71/2 Canning Street, there were no bundles on view bearing Ex. 10 upon them.

In 1924 the plaintiffs were informed that a number of Ex. T lablels had been stolen at Tumsar Road station, and they obtained a search warrant because they had received information that the defendant had some of their labels in his possession; and they not unnaturally drew the inference that the labels that the defendant had in his possession were some of the labels that had been stolen from Tumsar Road. Kanji went to the defendant's shop with a Police Inspector and searched the premises. Apparently two bags of biris were found with the plaintiffs' label on them, but Kanji was unable to say whether the biris were the plaintiffs' or the defendant's, and Kanji was told that the defendant had got these bags from one Emanali Biswas. It was contended however on behalf of the defendant that biris were found with the defendant's label upon them and a witness was called who stated that when these labels were seen by Kanji, Kanji said: "Oh, these are like my labels," but that he did nothing more. Certain entries in a book were tendered, which, it was stated had been initialled by the Inspector relating to Mohini Sakuntala biris. I do not believe the defendant's story on this matter. I do not believe the witnesses who were called to corroborate it, and I am the less disposed to accept the defence story as to what took place at the visit of Kanji with the Inspector in 1924 because not one word of this suggested admission by Kanji was ever put to Kanji himself in the course of cross-examination.

In 1926 the plaintiffs in the course of an investigation into alleged infringements at Dacca and Rungpur received information that the defendant was again infringing Ex. T. Those proceedings took place in 1926, and the Rungpur prosecution, so far as I recollect, concluded in August 1927. On behalf of the defendant it was contended that to have waited all that time before prosecuting or suing the defendant was inexcusable. Kanji's answer was that as the defendant had agreed to their terms after the decree in the Bhailal Bhikabhai action he waited until the result of the Rungpur or Dacca cases was known as he thought that the defendant might then agree to desist from further infringement. However that was found not to be the case, and in September 1927 the present suit was filed. That is the plaintiffs' case.

I heard the plaintiff and Kalianji in the witness box, and the impression which I gained from their evidence and the manner in which they gave it was that they were witnesses of truth. I accept their evidence and that of the witnesses who were called to support it. The result is that, inasmuch as it is alleged and asserted by the defendant that since 1919 he has been selling biris in large quantities, the packets and bundles bearing Ex. 10 or Ex. U, prima facie the plaintiffs are entitled to relief.

(2) 14 R. P. C. 43.

What is the defence? The defendant, as I have stated, does not claim the right to restrain the plaintiffs from using Ex. T, but that is not because he admits that he never had a right to do so, but because it is conceded that he knew of the large sales of biris with Ex. T since 1919, and took no steps to assert his rights, and therefore he cannot now be heard to resist the plaintiffs' claim to use Ex. T. He says, however:

"If I had asserted my rights in due course I could have restrained the plaintiffs from using Ex. T, because I had upon the market a label substantially like Ex. 10 for years before 1915, and as my label (which the plaintiffs have copied) was on the market first, I am entitled to a concurrent right with the plaintiffs to use Ex. 10 and since 1922 also Ex. U."

The decision of the case therefore turns upon the question: Did the defendant use Ex. 10 before 1915 or at any rate before 1916, when the plaintiffs first put biris with Ex. T on the market? Now, what are the probabilities? It is the common case of both parties that either the plaintiffs' label Ex. T is a copy of Ex. 10 or Ex. 10 is a copy of the plaintiffs' label, and that the original picture from which the figure on both was taken was Banerji's painting Durbasa's Wrath. Which was first in the field, and which was a copy of the other? One would expect to find that the first person who took a copy of Sakuntala from Durbasa's Wrath had taken an exact copy, and if somebody else afterwards was minded to make a colourable imitation of the first copy that he had produced the copy with such differences therein as he thought might enable him to steer clear of the wind. In this case the copy of the original picture is that on the plaintiffs' label Ex. T whereas on Ex. 10 the figure is reversed. Again, one would have expected when the first copy was taken that the figure would be taken as it appears in the original painting and that the person seeking to make a colourable imitation of the first copy would make some alteration in the original figure and its surroundings. The true copy of the figure and the steps upon which the figure is sitting was on the plaintiffs' label, whereas in the figure in Ex. 10 there were two strange alterations from the original, viz. the ends of the steps are rounded off, and in the hands of the lady is placed a fishing rod. The defendant, in his evidence, laid emphasis upon this alteration and stated that Ex. 10 came to be known as "Chip Mohini." So far as the taking of the copy from the original picture is concerned, the probabilities, as it seems to me, point to Ex. T as being the first copy that was taken from the original. (After considering carefully the evidence, the judgment concluded). The result is that I find that the plaintiffs had acquired a reputation for their distinctive device Ex. T in the market before 1919, and that Ex. 10 was not in existence or put upon the market before 1919.

In my opinion the defendant has deliberately and fraudulently created Ex. 10 and Ex. U with a view to deceive unwary customers or buyers of biris from him into thinking that in buying the defendant's goods under Exs. 10 and U they were buying those manufactured by the plaintiffs. Notwithstanding some inconspicuous differences in the get up of the labels I have no doubt that the defendant's labels were calculated to deceive purchasers of biris. By stages even those unsubstantial differences were being obliterated from the defendant's label, for, first, the rounded edge was replaced by steps, and then the number 395 was changed into 2047; afterwards the full size O is found to be shrinking, while "Mohini Sakuntala" gives place to "Monmohini."

The defendant, no doubt, has sold large quantities of biris since 1919 with labels Ex. 10 and Ex. U, and he claims a concurrent right to use those labels with the plaintiff's right to use Ex. T. I adopt the language of Lord Justice James:

"It has been said that one murder makes a villain and millions a hero; but I think it would hardly do to act on that principle in such matters as this, and to say that the extent of a man's piratical invasions of his neighbour's rights is to convert his piracy into a lawful trade. That ground of defence therefore in my judgment, fails: *Ford* v. *Foster* (9)."

In no event however could the defendant have a concurrent right to use Exs. 10 and U, for it is conceded that in order to establish a concurrent right it was essential for the defendant to prove prior user and that Ex. 10 was put upon the market before Ex. T, and that I have found not to be the fact.

(9) [1872] 7 Ch. 625.

There remains the question as to whether the defendant is entitled (notwithstanding that he has not proved prior user of Exs. 10 and U), to make use of these labels upon the ground that the plaintiffs have acquiesced in his user of them.

Now, acquiescence is only a form of estoppel, and it is of the essence of acquiescence that the party acquiescing should be aware of, and by words or conduct should represent that he assents to what is a violation of his rights, and that the person to whom such representation is made should be ignorant of the other party's rights, and should have been deluded by the representation into thinking that his wrongful action was assented to by the other party.

I find however in this case that the plaintiffs never assented, or represented to the defendant that they assented, to the defendant invading their rights in respect of Ex. T, and that the defendant all along knew of the plaintiffs' rights and fraudulently violated them.

In *Proctor* v. *Bennis* 36 *Ch. Div.* 760 Lord Justice Cotton observed that :

"it is necessary that the person who alleges this lying-by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title,"

and at p. 761 Lord Justice Bowen added:

"In order to make out such acquiescence it is necessary for them to establish that the plaintiff stood by and knowingly allowed the defendants to proceed and to expend money in ignorance of the fact that he had rights and meant to assert such rights."

Moreover, in this case I have found the defendant guilty of fraud, and where there is fraud there is no room for the doctrine of acquiescence to operate. For these reasons the defence of acquiescence fails.

As the learned counsel for the defendant however presented an exhaustive argument on the facts in connexion with the issues of acquiescence and delay, I will add that I find upon the evidence that at all material times the defendant was acting at his peril and knew throughout that he was so acting, and that there was nothing said or done by the plaintiffs to lull him into security or to lead him to believe that the plaintiff assented to the defendant violating the plaintiff's right in connexion with Ex. T.

I have stated what the plaintiffs alleged had been the various steps that they had taken from time to time with respect to the conduct of the defendant. It is apparent that the plaintiffs' success in their biri business has caused rogues in different parts of Bengal to endeavour to pirate Ex. T. A list of the proceedings taken by the plaintiffs to prevent the piracy of their label Ex. T was produced and not challenged, and it is apparent, and I find that the plaintiffs have taken all the steps that they might reasonably be expected to take to put down any invasion of their rights in connexion with Ex. T.

The learned counsel for the defendant complained that the plaintiffs did not sue the defendant in 1919 at the time when they first came to know that he was attempting to pass off his goods as theirs under Ex. 10 ; but, as I have pointed out, it was not necessary or reasonable that the plaintiff should have proceeded to sue or prosecute the defendant in 1919 owing to the undertaking which he then gave and the fact that in accordance with his promise he afterwards purchased for resale the plaintiffs' goods.

With respect to 1921 the learned counsel for the defendant urged that, although goods with the defendant's label Ex. 10 were exposed in the defendant's shop, the plaintiff made no complaint. The answer, as I have stated, is that it is inconceivable, if that had been the fact, that the plaintiff who went with his attorney for the express purpose of seeing whether he could find any labels infringing Ex. T should have seen packets or bundles with Ex. 10 exposed in the defendant's shop and taken no action.

I have found that when the plaintiff and his attorney went to the defendant's shop in 1921 Ex. U was not to be seen exposed in the shop.

I have already dealt with the proceedings in connexion with the search warrant in 1924. As regards 1926, in my opinion, it was reasonable in the circumstances that the plaintiff should have waited to see the result of the Rangpur and Dacca cases before he took proceedings against the defendant.

There remains the question of the signboard, the posters and the advertisements in the newspapers. As regards the signboard, in my opinion, Ramjan Ali in his evidence obviously was not speaking the truth. At Q. 882 he was asked when the signboard was put up over his shop, and he stated: "By guess it was either towards the end of 1919 or beginning of 1920."

Under the stress of cross-examination at Q. 886 he stated that it might have been either 1919 or 1920, but when it turned out that the "Manohara" mark was not registered till after that date (i. e. Q. 914 "I suggest to you that your 916 Manohara was not registered until 1921?") he answered: "It now comes back to my mind that the signboard was put up in 1920 or 1921."

As regards the posters, I am unable to accept Ramjan's evidence as to the poster being put up in close proximity to the plaintiffs' shop in Ezra Street, or the evidence as to the poster being pulled down at the instance of Kanji. And as to the advertisement, it may well be that the advertisements were not brought to the plaintiffs' notice.

In my opinion the truth of the matter is that the plaintiffs have had great difficulty in tracking down persons who have been endeavouring to imitate their label Ex. T, and have taken all such steps as might reasonably be expected of them to prevent the infringement of Ex. T.

The result is that I find that the plaintiffs are not disabled in any way by acquiescence or delay from pursuing their legal rights, and they are entitled to an injunction and to an account of profits.

In order to afford reasonable protection to the plaintiffs the injunction will be in the following form: That the defendant, his servants and agents be restrained from selling or offering for sale biris in packets, bundles or cases bearing the label Ex. 10 or Ex. U or any other label (whether the word "Mohini," the figure of the woman, or the registered number 247 in Ex. T are used alone or in combination therein or not) in a form calculated or intended to pass off or to enable others to pass off his goods as and for the goods of the plaintiff.

I further order that the defendant within a week from the date hereof do file an affidavit stating the number of labels Ex. 10 and Ex. U in his possession or that of his servants and agents, and within a fortnight after the filing of such affidavit the defendant do destroy the said labels in the presence of the plaintiffs or the agents, prior notice in that behalf to be given to the plaintiffs or their attorneys.

I further direct that an account be taken by the Referee or the Assistant Referee as the Registrar may determine of the profits that have accrued to the defendant from selling or otherwise disposing of biris under labels Ex. 10 and U within a period of three years prior to the date of the institution of the suit.

The plaintiffs are entitled to all the costs of and incidental to the suit, the costs of the commissions, and reserved costs, on scale No. 2. Costs subsequent to the decree reserved. Liberty to apply.

V.B./R.K. *Suit decreed.*

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* A. I. R. 1930 Calcutta 685

LORT-WILLIAMS, J.

Umeshchandra Banerji—Plaintiff.

v.

Kunjilal Biswas and *others* — Defendants.

Original Suit No. 1319 of 1927, Decided on 25th June 1929.

*** Civil P. C., O. 21, Rr. 89 (3) and 93—Purchaser in addition to 5 per cent is entitled to any loss of interest and costs.**

It cannot have been intended to give the judgment-debtor a special indulgence at the expense of an innocent third party. Therefore the purchaser in addition to the 5 per cent is entitled to be paid by the judgment-debtor any loss of interest and costs which he may have incurred. *A. I. R.* 1929 *Cal.* 574 and 26 *Cal.* 449 (*F. B.*), *Rel. on.*; *A. I. R.* 1921 *Cal.* 169, *Dist.*

[P 686 C 2]

Laha—for Plaintiff.

P. C. Basu—for Defendants.

N. P. Seal—for Purchaser.

Judgment.—Section 129, Civil P. C., provides that

"notwithstanding anything in this Code, any High Court established under the Indian High Courts Act, 1861, or the Government of India Act 1915, may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code."

Advocate High Court Jammu & Kashmir Srinagar.

The object of this section was to provide for elasticity in procedure and to enable defects in the Code to be remedied without the dilatory process of legislation, and the High Court was given power to vary or amend the rules of procedure which appear in the Code; see notes on p. 487, Woodroffe on Civil Procedure,' Edn. 2.

For this reason the sections dealing with procedure were taken out of the body of the Code and placed in a separate schedule. Therefore, if the matter were res integra I am doubtful whether I should decide that O. 21, R. 89, applies to the High Court, because it is incompatible and inconsistent with the rules of the High Court on the original side. But it was decided in 1920 by Mukerjee, A. C. J., and Fletcher, J., in *Virjiban Das Mooljj* v. *Biseswar Lal Hargovind* (1), that the rule does apply, and further they went on to say that the practice on the original side was contrary to law. I must confess that it is difficult to see how the rules of the High Court can be held to be contrary to law in view of S. 129. It should be observed that there is nothing in the Code to say that those rules must not be inconsistent with the code. What they must not be is inconsistent with the Letters Patent establishing the Court. However this case has been followed consistently and it is not for me to disagree with it —the question must await final solution hereafter. The difficulty in applying O. 21, R. 89 to sales on the original side was recognized by Rankin, C. J. in *Kalyanee Debi* v. *Hari Mohan Ghose* (2). In that case the learned Chief Justice said that, as the rule is a concession to the judgment-debtor, it ought to be applied strictly and where owing to the difference between our original side practice and the mofussil practice, which is contemplated in the rule, it is impossible to apply the rule strictly, the Court must apply it as fairly as possible to the circumstances of a sale on the original side. It was said by Francis Maclean, C.J., in *Chundi Charan Mandal* v. *Banke Behary Lal Mandal* (3) that the rule affords a special indulgence to the judgment-debtor and that the 5 per cent was given partly as a solatium to the purchaser for the loss of his bargain. In many cases, if the 5 per cent is all that the purchaser is entitled to it would mean that he would not get anything for the loss of his bargain and might be actually out of pocket on account of loss of interest on his money and for costs incurred.

It cannot have been intended to give the judgment-debtor a special indulgence at the expense of an innocent third party. I am of opinion, therefore that that the purchaser in addition to the 5 per cent is entitled to be paid by the judgment-debtor any loss of interest and costs which he may have incurred. This conclusion in my opinion is indicated by O. 21, R. 89 (3) and O. 21, R. 93.

V.B./R.K. *Order accrdingly.*

(1) A. I. R. 1921 Cal. 163=60 I. C. 406=48 Cal. 69.
(2) A. I. R. 1929 Cal. 574=120 I. C. 718=56 Cal. 477.
(3) [1899] 26 Cal. 449=3 C. W. N. 383 (F.B.)

A. I. R. 1930 Calcutta 686

RANKIN, C. J.

In the matter of the Court-fees Act and *Kalipada Mukharjee*—Appellants.

In the matter of Court-fees Act. Decided on 28th April 1930.

(a) Suits Valuation Act, S. 8—Value for jurisdiction follows value for the court-fee and not vice versa.

The meaning of S. 8 is that the value for purpose of jurisdiction shall follow the value given for purposes of court-fee and not vice versa. [P 688 C 2]

(b) Court-fees Act, S. 7 (4) (c)—Suit for declaration and consequential relief—Plaintiff must put one single sum as representing total value of relief claimed—Case is outside Court-fees Act, S. 17.

A suit for a declaration that a sale in execution is illegal and inoperative and for an injunction restraining the auction-purchaser and puisne mortgagee from taking possession, is suit to obtain a declaratory decree or order where consequential relief is prayed under S. 7 (4) (c). The case is clearly outside the provision of S. 17 of the Act and the piaintiff has the right and duty to put down one single entire sum as representing the value of the total relief sought by him in the suit : 35 *Cal.* 202 (*P. C.*), *Rel on.* [P 687 C 2]

(c) Civil P. C., O. 7, R. 11—R. 11 does not enlarge any taxing section.

Order 7, R 11, is mere procedure ; it is not meant to enlarge any taxing section but only to ensure the proper application of the Court-fees and other Acts. [P 688 C 2]

Panchanan Ghose, and *Durgadas Ray* for *Hira Lal Ganguli*—for Appellants.

Sarat Chunder Basak and *Nasim Ali* —for the Government.

Judgment.—In Suit No. 135 of 1926 certain mortgagees sued to enforce by

sale a mortgage granted by the present plaintiff-appellant for Rs. 40,000 and interest over property which the plaintiff now values at Rs. 1,20,000. A puisne mortgagee was impleaded as defendant. In the end, the property was sold to respondent 1 on the present appeal for Rs. 58,500. The amount due upon the first mortgage is not stated but the Registrar of this Court has been informed that it amounted to some Rs. 60,000. The sale was confirmed and a sale-certificate issued. On the auction-purchaser seeking an order for possession thereunder the plaintiff objected and his objection was dismissed.

Alleging that an extension of time to deposit the balance of the purchase money was fraudulently obtained from the execution Court by the auction purchaser and that the auction purchaser was merely a benamidar for the puisne mortgagee defendant the plaintiff brought the present suit asking for a declaration that he still retains his equity of redemption and that the sale was illegal and inoperative and for an injunction restraining the auction purchaser and puisne mortgagee from taking possession of the mortgaged property which is still in plaintiff's possession. The suit was brought on 5th July 1929 before the Subordinate Judge.

Para 19 of the plaint was as follows:

"For determining the jurisdiction of the Court and court-fees, the suit for declaration rights etc., in respect of the disputed property being laid at Rs. 1,20,000 the value of the disputed property, the plaintiff brings this case on payment of a court-fee of Rs. 20 for declaration and a court-fee of Rs. 3-2-2 on Rs. 50 at which the suit is valued for issue of an injunction."

No objection on the score of jurisdiction or of sufficiency of court-fee was taken in the trial Court which (on 25th January 1930) heard and dismissed the suit on the merits.

Thereupon a memo random of appeal was presented to this Court headed:

"Suit valued at Rs, 1,20,000. Suit for a declaration and for an injunction valued at Rs. 50"

and stamped with Rs. 23-12-0 by way of court-fee. The sufficiency of this court-fee having been objected to by the office. I am dealing with the matter under S. 5, Court Fees Act, upon a reference by the Registrar.

The suit is in substance a suit to set aside a sale in execution with an ancillary prayer for a permanent injunction which would have been better omitted. It is somewhat curious that nowhere in the Court-fees Act is there any express or specific mention of a suit to set aside a Court sale. If there had been any fee prescribed for such a suit or any principle of valuation laid down therefor I should have made the plaintiff pay Court-fee in accordance wherewith and on the authority of *Phul Kumari* v. *Ghanshyan Mistra* (1) refused to charge him anything more. But I can find no such provision and the suit is in form a suit for a declaration and for an injunction by way of consequential relief. I have some doubt whether a decree setting aside a sale is really and only a declaration but under the Court-fees Act it has apparently been so considered and in the present case the plaintiff asked expressly for a declaration. This being so I am of opinion that the plaint had to be stamped in accordance with S. 7 (iv) (c), Court-fees Act, 1870. The suit being

"to obtain a declaratory decree or order where consequential relief is prayed."

Court-fee was payable

"according to the amount at which the relief sought is valued in the plaint or memorandum of appeal."

The case is clearly outside the provisions of S. 17 of the Act and in my opinion the plaintiff had the right and duty to put down one single and entire sum as representing the value of the total relief sought by him in the suit. I have observed decisions of other High Courts which seem to mean that so much is to be put down for the declaration and so much for each consequential relief prayed for, but this is in my opinion a plain perversion of the Act. Cumulative fees are dealt with by S. 17 and the litigant is not intended to pay in respect of the same thing over and over again because of the need for consequential relief. The Act, in sub-S. (4), is dealing with claims which do not yield themselves readily to any statement of money value and in leaving the matter to the plaintiff's valuation, subject to Ss. 4 and 9, Suits Valuation Act, it proceeds just as much upon a considered policy as it does when by Art. 17, Sch. 2, of the Act it charges certain classes of suits with a fee which is ir-

(1) [1907] 35 Cal. 202=35 I. A. 22=7 C. L. J. 36 (P. C.).

respective of value : *Phul Kumari* v. *Ghanshyan Mistra* (1).

Section 8, Suits Valuation Act, and S. 24, Civil P. C., have to be considered in relation to the class of case specified in Cl. C, sub-S. (4), S. 7, Court-fees Act. The District Court or the High Court can always transfer a case to a Court more suitable than the Court in which it is brought, but subject thereto the jurisdiction of the trial and appellate Courts will depend in the cases dealt with by sub-S. (4) upon the plaintiff's valuation : *Sundarbai* v. *Collector of Belgaum* (2).

In the present case it is clear that the plaintiff valued his suit in a manner contrary to the statute. He dealt with his claim for a declaration under Art. 17, Sch. 2, which applies only to a suit for a declaratory decree where no consequential relief is prayed for and then he valued his claim to consequential relief independently as a claim for an injunction under Cl. (d), sub-S. (4), S. 7, of the Act. He coupled this, contrary to S. 8, of Rs. 1,20,000 for purposes of jurisdiction. The plaint should have been returned to him for proper valuation under Cl. (e), sub-S. 4, S. 7. He never has valued " the relief sought " within the proper meaning of Cl. (d).

Now that he has presented an appeal the question is as to the proper ccurse to be adopted. The stamp reporter thought that the appeal should be valued for court-fee on either Rs. 58,500 (the auction price) or Rs. 1,20,000, the plaintiff's value of the property. The Registrar suggests that Rs. 1,20,000 less Rs. 60,000 due on the mortgage would be the proper figure. The senior Government Pleader argues that Rs. 1,20,000 as the plaintiff's own valuation for purposes of jurisdiction should be the figure taken for court-fee and refers me to *Bal Krishna* v. *Jankinai* (3), *Manni Lal* v. *Radhe* (4) and *Raj Krishna* v. *Bepin Behary* (5). It seems clear that whatever figure be adopted it must under S. 12, Court-fees Act, be made applicable both to the suit and to the appeal.

Now I must reject altogether the suggestion that it would be reasonable in this case to require the appellant to pay court-fees on Rs. 1,20,000. That figure, according to him, is the unencumbered value of the mortgaged property. Because in a way which is entirely misconceived he has given that as the value of the suit for purposes of jurisdiction, claiming at the same time to assess court-fee in an entirely different way, he cannot be said directly or indirectly to have valued the relief sought at that figure. He has claimed to be exempt from valuing his claim to a declaration, and he has valued his claim to an injunction at Rs. 50. The meaning of S. 8, Suits Valuation Act, is that the value for purpose of jurisdiction shall follow the value to be given for purpose of court-fee not vice versa. To charge him with court-fee on Rs. 1,20,000 would be an irrational and illogical procedure, and the cases cited do not in my opinion justify such action in the present case. The Bombay decision seems to be reasonable enough and the Calcutta case depends upon the view that the Court can revise the plaintiff's valuation. But whether they be right or wrong I need not for this purpose consider.

The next question is whether from the plaint and memorandum of appeal the Court can put a valuation of its own on the relief sought. In *Umatul* v. *Mt. Nauji* (6) it was held that the Court can revise the plaintiff's valuation if it is capricious and arbitrary, but in recent cases *Official Trustee, Bengal* v. *Gobardhan Guchait* (7) this view has not been taken. As at present advised I incline to think that the view is that adopted in the last-mentioned case. If we take the statute book as we find it to-day then, while O. 7, R. 11, clearly applies to cases coming within sub-S. 4, S. 7, Court-fees Act, it is very difficult indeed to take the phrases " where the relief claimed is under-valued " and " where the relief claimed is properly valued " both quite general phrases applicable to all classes of suits as trenching upon the right of the plaintiff to pay court-fee on the footing of his own valuation of the relief sought. O. 7, R. 11 is mere procedure : it is not meant to enlarge any taxing section but only to ensure the proper application of the Court-

(2) A. I. R. 1918 P. C. 135=52 I. C. 897 = 46 I. A. 15=43 Bom. 376 (P. C.).
(3) [1919] 44 Bom. 331=56 I. C. 340.
(4) A. I. R. 1925 All. 602=87 I. C. 190 = 47 All. 501.
(5) [1912] 40 Cal. 245=17 I. C. 162.
(6) [1907] 11 C. W. N, 705=6 C. L. J. 427.
(7) [1928] 118 I. C. 357.

fees Act and other Acts. It was thought in *Umatul's* case (6) that the previous history of these enactments warranted the conclusion that the plaintiff's valuation can be corrected by the Court.

I quite appreciate that it may be said of the subsequent cases that the argument of Mookerji, J., has not been grappled with and I think it also true to note that the Privy Council in the case of *Sunderbai* v. *The Collector of Belgaum* (2) had not this exact point before it; but there are great difficulties in the view taken in *Umatul's* case (6). At the time the decision was given, there was a large body of authority the other way. It is clear from the Court-fees Act that there is no provision in that Act itself for the revision of the plaintiff's valuation in such cases as the present. The provision in the Civil Procedure Code is certainly a provision which is intended to apply to cases under sub-S (4), S. 7. The present case is a very good example of the necessity of that. Here is a case within sub-S. (4), S. 7, Court-fees Act, and yet no valuation is given for one claim and the whole case is dealt with on a principle which is erroneous altogether. Such a case as that must be amenable to the jurisdiction of the Court under O. 7, R. 11, Civil P. C., and there are many reasons which show that that rule is applicable to all classes of suits. But it is another thing altogether to say that because the words used are "if the plaintiff's claim is undervalued" they mean that the Court in the special class of cases where the plaintiff is allowed to put his own valuation has a right to revise the valuation. I do not think that Mookerjee, J., in coming to the conclusion to which he did in *Umatul's* case (6) gave sufficient weight to the circumstances that the cases dealt with in sub-S. (4) are cases where no real objection based on valuation will in general be possible.

They are cases which are not easily valued and in many cases not capable of being valued in money terms on any precise principle. It does strike me being at all incredible that with regard to that limited class of cases the legislature should have thought it right to give to the plaintiff a certain amount of option as to the value which is to be put upon the claim especially as I find that in certain cases the legislature has thought fit to allow people to pay a small fixed court-fee in respect of the relief claimed. However that may be, I am sitting here as a taxing Judge and I do not think that it is admissible that in the capacity in which I am really representing the interest of revenue, I should undertake, unless I am obliged to pronounce finally upon matters which have produced differences of opinion between Divisional Benches. In the present case the plaintiff has at no time made a valuation of the relief sought as he should have done under S. 7, Court-fees Act. On the face of the plaint and the memorandum of appeal I do not think there are sufficient materials for the Court to make a valuation for itself even if it has the power. In any case, if the plaintiff originally had a right to value and if he has not done so, there is every advantage, in my judgment, in applying the Act in the way which the Act contemplates. It appears to me therefore that the fairest thing will be to require the plaintiff to value his relief in this memorandum of appeal properly. I may observe that this case was tried by a Subordinate Judge at Alipore and I find, looking at the name of the gentleman and the time, that, if the plaintiff had not put this high valuation for purposes of jurisdiction but had put a valuation under Rs. 2,000 the case would have been tried by a Munsif. It is quite clear that the plaintiff cannot now put his valuation at less than Rs. 2,000. The plaintiff will have however liberty by a petition and within one fortnight from today to value the relief sought in this appeal properly and in the plaint properly, the two things being exactly the same.

But the figure at which he values it is not to be less than Rs. 2,000 in view of the fact that he has represented the value for purposes of jurisdiction to be a figure which has resulted in the case being already tried by a Subordinate Judge. It will be open to the plaintiff to value it at less than Rs. 5,000 or at more than Rs. 5,000 and, according as he does that or not, he will have an appeal to the High Court or somewhere else. In any event, whether he has an appeal to the High Court or another Court it will be the duty of that Court to see that not only does he pay the proper court-fee upon the memorandum of

appeal but also that under Cl. (2), S. 12, he is made to pay the court-fee upon the plaint in the trial Court. That appears to me to be the reasonable way of dealing with this case. The actual form of the order will be an order under O. 7, R. 2, Civil P. C., requiring the appellant to value the relief within a fortnight from today and to amend his valuation by lodging a proper petition to that effect and stamping the memorandum of appeal in accordance therewith. When that has been done the procedure no doubt will be for the appeal to be registered and any action necessary to be taken under S. 12 will be taken thereon.

M.N./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 690

S. K. GHOSE, J.

Hara Chandra Mistry and *others*—Plaintiffs—Appellants.

v.

Bhagabat Mandal and *others*—Defendants—Respondents.

Appeal No. 2509 of 1927, Decided on 28th November 1929, from appellate decree of First Addl. Dist. Judge, 24-Parganas, D/- 15th September 1927.

Civil P. C., S. 11—Might and ought—Suit for ejectment of defendant on ground of his being under-raiyat, and notice to quit being served—Previous suit for ejectment on ground of defendant being trespasser dismissed—Plea that defendant was under-raiyat not decided in previous suit—Subsequent suit held barred by res judicata.

Whether a particular matter might be and ought to be raised in a previous suit depends in each case on the circumstances. [P 691 C 1]

Where the right claimed in both the suits is the same the subsequent suits willbe barred as res judicata, though the right in the subsequent suit may be sought to be established by a title different from that in the previous suit. [P 691 C 2]

Plaintiffs sued to eject the defendants alleging that the latter were under-raiyats and had been served with notice to quit. The defendants pleaded that they were not under-raiyats but were occupancy tenants and that the notice was not sufficient. The plaintiffs had previously brought a suit to eject the defendants alleging that they had no tenancy rights and were trespassers. It was held in that suit that the defendants were tenants and not trespassers. Their status was not however expressly decided.

Held: that, in view of the fact that the tenancy was originally taken by the father of the defendants, the point whether the defendants were tenants or under-tenants might and ought to have been raised for decision in the previous suit and therefore the decision in the previous suit was in effect a res judicata in the subsequent suit. [P 691 C 2]

Sarat Chandra Bose and *Sarat Chandra Jana*—for Appellants.

Jadu Nath Kanjilal, Harendra Kumar Sarvadhicary and *Subodh Chandra Dutta*—for Respondents.

Judgment.—The plaintiffs sue to eject the defendants alleging that they are under-raiyats and have been served with notice to quit. The defence is that the defendants are not under-raiyats, but that they are occupancy raiyats and that the notices were not sufficient. On these two points the learned Munsif held against the defendants and decreed the suit. On appeal the Additional District Judge agreed with the trial Court on the two points; but he held that the suit was barred by the principle of res judicata. The plaintiffs now come in second appeal.

It is pointed out that the question of res judicata, though raised at the trial, was not pressed before that Court. Nevertheless it is a point of law which can be properly urged in appeal; and the learned Additional District Judge was quite right in deciding it on merits. It is next pointed out that this question of res judicata has been decided upon the judgment in a previous suit in 1920 between the parties, but that neither the pleading nor the issues in that suit have been filed. But where the judgment is sufficient to indicate the pleadings and the issues, it affords sufficient materials for the decision of the question of res judicata; and I do not think that in the present case this objection has any force. The question of res judicata arises in this way: In 1920 the plaintiffs brought a suit to eject the defendants, their father having died in 1914. It was alleged by the plaintiffs that the defendants and their father had no tenancy right, that the defendants were trespassers, and that they had wrongfully dispossessed other persons who had been holding the land as tenants under the plaintiffs. It was further alleged by the plaintiffs that in a previous criminal case the defendants had given out that they were tenants in respect of the land and had filed rent receipts. In their defence, the defendants stated that they were tenants in respect of the lands for a long time past and that they were holding the lands at a rental of Rs. 67 a year. The issues as they appear in the judgment are:

"(1) Are defendants 1 to 6 tenants or trespassers? and

(2) Can the plaintiffs get khas possession and mesne profits?"

The finding as recorded in the judgment is :

"In the above circumstances the defendants cannot be trespassers and I believe they are tenants as alleged and I find the issue accordingly."

It is no doubt true that the question of status was not expressly decided. Upon this point the learned Additional District Judge remarks as follows :

"It was incumbent on the plaintiffs to make their case as they make it now that even if the defendants' father be found to be tenant, the tenancy being under-raiyati-defendants could not inherit and were therefore trespassers and they not having done so it must be taken to be a matter which might and ought to have been raised as a ground of attack and it must be held that it was decided against the plaintiffs by implication when their prayer for khas possession was refused on the finding of the tenancy upon materials which show payment of rent by the father only up to 1320 B. S."

In this view the learned Additional District Judge held that the decision in 1920 was res judicata in the present suit. On behalf of the appellants it is contended that, having accepted the decision in the previous suit, the plaintiffs were entitled to treat the defendants as tenants, to give them notice to quit, and to bring thereupon the present suit in ejectment. It is also pointed out that one of the defendants in the previous suit died and his heirs were substituted; and to that extent the plaintiffs had recognized the tenancy. But all this argument begs the question that the point as to status had not been decided in the previous suit. The whole point comes to this: Whether in the previous suit the point whether the defendants were tenants or under tenants, might and ought to have been raised for decision. If the answer is in the affirmative, then according to the rule of res judicata it must be taken to be a point already decided as against the plaintiffs. Now it has been held in several cases that, whether a particular matter might be and ought to be raised in a previous suit, depends in each case on the circumstances. In the present case the circumstances are as indicated already. Upon the pleadings of the parties on both sides there was a question as to whether the defendants were tenants. In the plaint it was alleged that in a previous criminal case the defendants alleged themselves to be tenants. In their defence the defendants alleged that they were tenants for a long time and in support of this they filed receipts up to 1320 B. S., and granted in the name of their father. Another noteworthy fact is that the Record-of-Rights has already been finally published in 1919 and in that record the present defendants were recorded as underraiyats. It is contended by the learned advocate for the appellants that it was not open to the plaintiffs to make out an alternative case that the defendants' father's tenancy was an under-tenancy and not heritable, because in that case there would have been contradictory pleadings and different causes of action. But this does not follow. The defendants' father died in 1914 and it was never the plaintiffs' case that they had exercised their option to recognize the defendants as under-tenants in succession to their father. On the contrary, the very suit that they brought indicated that they were all along regarding the defendants as trespassers. It has been held as a rule of res judicata that where the right claimed in both suits is the same, the subsequent suit will be barred as res judicata though the right in the subsequent suit may be sought to be established by a title different from that in the previous suit. For instance I may refer to the case of *Fateh Singh* v. *Jagannath Baksha* (52 *I. A. p.* 100).

In the present case I fail to see how it would have been inconsistent with the plaintiffs' claim in ejectment if they had made out a case that the tenancy, as alleged in the defence and also in the previous criminal suit, was merely an under-tenancy of the defendants' father which had not descended to the defendants. On the contrary, that would have been a proper ground of attack which might and ought to have been raised for decision in that suit. Instead of doing that, in spite of the fact that there was a Record-of-Rights showing that the defendants were under-tenants, the plaintiffs at first sought to eject the defendants on the allegation that they were trespassers, and they have now brought another suit for the same relief upon a different ground. In my opinion the learned

Subordinate Judge was right in holding that the decision in the previous suit was in effect res judicata in the present suit.

The appeal is therefore dismissed with costs.

The application is also dismissed.

R.M./R.K. *Appeal dismissed.*

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* A. I. R. 1930 Calcutta 692

BUCKLAND, J.

A. G. Kidston & Co. Ltd.—Plaintiff,

v.

Seth Brothers—Defendants.

Original Civil Suit No. 2259 of 1928, Decided on 8th July 1930.

*** Negotiable Instruments Act, Ss. 11, 12 and 104—Bill of exchange wherever drawn but on resident in British India is inland bill.**

If a bill of exchange is drawn upon a resident in British India it still remains an inland bill wherever it may have been drawn.

[P 692 C 2]

F. S. R. Surita—for Plaintiff.

C. T. Moore—for Defendants.

Judgment.—This is a suit on dishonoured bills drawn in England on a firm carrying on business in Calcutta. When the case was before me some days ago, Mr. Moore, on behalf of the defendants, contended that, by virtue of S. 104, Negotiable Instruments Act, coupled with S. 51, Bills of Exchange Act, the bills ought to have been protested, and, that not having been done no suit could be brought upon them. I considered the point and expressed my opinion upon it. At that time, it was assumed that the bills were foreign bills. Subsequently, however, for my own satisfaction, I turned to the definition of a foreign bill and it appeared to me clear, as I now think, that the question which was then argued by Mr. Moore never arose, because these bills are not foreign bills at all. A foreign bill is defined by S. 12, Negotiable Instruments Act, which provides that any instrument not drawn or made or made payable, as provided by S. 11, shall be a foreign instrument. S. 11, defines an inland instrument as a note, bill or cheque drawn or made in British India and made payable in or drawn upon any person resident in British India. That should be read thus: (1) a note, etc., drawn or made in British India and made payable in British India, or (2) a note, etc., drawn upon any person resident in British India. In the latter case, it is immaterial where the promissory note, bill, etc., is drawn. A reference to the definition in the English Act, S. 4, which the draftsman of the Indian section probably took as a model, makes this clear. In that, the second part of the definition defines an inland bill as a bill drawn within the British Isles upon some person resident therein. This undoubtedly suggests that in the second part of the definition in S. 11 the words "in British India" were deliberately omitted after the word "drawn." If a bill is drawn upon a resident in British India, it still remains an inland Bill wherever it may have been drawn. In these circumstances, the other point argued by Mr. Moore does not arise and this judgment supersedes my former judgment on this point. The remainder of my earlier judgment is incorporated herewith as follows.

The only other point taken at the hearing is that the plaintiff company have not given the defendants credit for all payments made on account of these bills and the defendants claim to be credited with a further sum of Rs. 100. The position is by no means clear, and a small balance, such as a hundred rupees, may involve a protracted account. Learned counsel for the defendants is not in a position to explain to me with any reasonable exactitude how the figure is arrived at, and, reluctant though I am to send so small a point to a reference, I must direct that it be referred to the Assistant Referee to enquire and report as to what payments have been made by the defendants to the plaintiffs on account of the sums due in respect of the bills in suit. The defendants must pay the costs of the suit, and if it shall appear that full credit has been given to the defendants for all sums paid by them, then the defendants must pay the costs of the reference as well; on the other hand, if it shall appear that full credit has not been given by the plaintiff company for all payments made by the defendants, then the plaintiff company will have to pay the costs of the reference.

The plaintiff company claim Rupees 2,651-5 9 due for principal and interest. They admit they have omitted to give credit for £2, apart from the item of Rs. 100 already mentioned. Rs. 28 must

therefore, be deducted from the sum claimed, and, as it is not claimed that there are more than Rs. 100 still in dispute, I will now make a decree for Rs. 2,523-5-9. The balance of Rs. 100 will depend upon the reference.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 693

RANKIN, C. J., AND C. C. GHOSE, J.

Raj Chandra Bhownick—Appellant.

v.

K. Habibulla and *others* — Respondents.

Letters Patent Appeal Nos. 38 to 43 of 1929, Decided on 15th January 1930, from judgment of Mukerji, J., D/- 30th January 1929, in Second Appeal Nos. 41 to 46 of 1928.

(a) Bengal Tenancy Act, S. 167—Defendant-tenant without mirash rights holding land under plaintiff's share — Tenancy in separate and joint lands not single unit—No previous assessment—Decree for assessment can be made.

It was found that the defendants-tenants had no mirash right and that some lands were held exclusively under the one anna share owned by the plaintiff. There was nothing to show that the tenancy of the defendants in the separate and joint lands was held as a single unit. No rent having ever been assessed before there was no question of their holdings being at an entire rent.

Held: that in these circumstances there could be a decree for assessment of rent in respect of these lands. [P 695 C 2]

(b) Bengal Tenancy Act, S. 188—*C* holding tenure under joint landlords *A* and *B*—Suit by *A* alone for declaration that he is not tenure-holder is not maintainable.

If *A* and *B* are joint landlords of a plot held by *C*, and *C* has been recorded in the Record-of-Rights as holding a tenure under both of them as joint landlords, a declaration that *C* has not the right he claims should prima facie be refused to *A* unless *B* has been impleaded. The fact that *A* and *B* hold their interest in defined shares is not of itself any reason for proceeding in the absence of *B*: *A. I. R.* 1925 *Pat.* 559, *Appr.*; 46 *I. C.* 428 and 7 *C. W. N.* 670, *Ref.* [P 696 C 2]

Atul Chander Gupta and *Nripendra Chunder Das*—for Appellant.

Sarat Chunder Basak and *A. S. M. Akram*—for Respondents.

Rankin, C. J.—The facts involved in these appeals shortly stated, are as follows: The plaintiffs are the zamindars of mauza Islampur, bearing Tauzi No. 446 of the Tipperah Collectorate. The mauza, according to the plaintiffs, was held under them in patni in certain defined shares, i. e., two taluks of six annas each, one taluk of three annas and one taluk of one anna. This last mentioned one anna share was held by one Ramdhone Nath. He died some time ago, and on or about the dates hereinafter preferred to, his heirs and successors were in possession of the said patni taluk of one anna share under the plaintiffs on payment of a sum of Rs. 82-15-0 as annual rental. In 1918 there were arrears of rent due on account of the said one anna share. A suit was instituted by the plaintiffs for the recovery of the arrears; a decree was obtained and in execution of the decree for arrears of rent the plaintiffs purchased the patni interest in the said one anna share. The sale was confirmed some time in 1920. The plaintiffs obtained delivery of possession in 1921. Their case is that the lands of the one anna had been separated from the lands of the other shares and their one anna patni taluk comprised certain plots exclusively belonging to it and certain undivided but defined shares of other plots held by it jointly with another of these patnis, apparently a patni of three or two and a half annas. That this is really the position is not now disputed. Nor is it disputed that the defendants in these suits are in fact in possession of the whole of both sets of plots, viz. those exclusively belonging to the plaintiffs' patni and those belonging jointly to the plaintiffs' patni and the other patni. The plaintiffs further say that after their purchase of the one anna patni they came to know that in the settlement records (the settlement having taken place before the purchase of the said one anna share by the plaintiffs) the defendants had been recorded as being in possession in mirash right. In point of fact the Record-of-Rights does not record the defendants as holding solely under the one anna patni. It records the mirash as being held under both the patnis, but the plaint confines its allegation to the plaintiffs' patni. According to the plaintiffs the mirash right, or whatever it was, was in the nature of an incumbrance and accordingly, as they allege, a notice under S. 167, Ben. Ten. Act, was served by the plaintiffs on the defendants with a view to cancel the incumbrance. The plaintiffs thereafter instituted the present suits in 1926 against the defendants praying (inter

alia) (a) for a declaration that the defendants had no mirash right in the plaintiff's patni lands and that the plaintiffs were entitled to get the said lands assessed to rent at the rate prevalent in the locality ; and (b) for assessment of fair and equitable rent and for recovery of the same. The tenants who were in possession of specific lands alleged to belong to the said one anna share were different, and the khatians in which their mirash right was recorded were numbered 317, 318, 319, 321, 323 and 324. This fact accounts for the circumstance that the plaintiffs had to bring separate suits.

The defendants raised various contentions in their written statements. I do not propcse to set out in detail the contentions of the defendants except one. The defendants alleged that the lands in suit were held by them in mirash right under the patnidars of a certain 2½ annas share in mauza Islampur and not under the one anna share which originally belonged to Ramdhone Nath. According to them there were two brothers of the name of Ram Mohan and Basi Nath and each of them owned a 2 annas share in patni in the said mouza. Ram Mohan had two sons named Ramdhone and Kristo Mangal. Ramdhone had a one anna share and Kristo Mangal had a one anna share. It is alleged that Ramdhone sold ½ anna out of his 1 anna share to Bashi Nath and that the latter thereby became owner of 2½ annas share in patni. The contention of the defendants was, to repeat that they held the lands under this last-mentioned 2½ annas share and not under the 1 anna share. They therefore argued that the present plaintiffs had no cause of action and further that should it be found that some of the lands held by them did belong to the share which originally belonged to Ramdhone Nath and that some belonged to the said 2½ annas share, the present suits were bad inasmuch as the owners of the 2½ annas share had not been made parties thereto.

All these suits came on for hearing before the learned Munsif of Comilla and the following specific issues were raised on the pleadings in the said suits:

(a) Are the suits bad for defect of parties?

(b) Are the suits barred by S. 188, Ben. Ten. Act and

(c) Do the suit lands appertain to one anna hisya (share) or do these lands appertain to 2½ annas hisya ?

The learned Munsif held that S. 188, Ben. Ten. Act, did not operate as a bar but, having regard to the prayers of the plaintiffs in their plaints, the owners of the 2½ annas hisyas were necessary parties. The learned Munsif further held that the purchase of the said one anna share by the plaintiffs in execution of their rent decree was under the Bengal Tenancy Act and not under the Patni Regulation, that the notices under S. 167 were not served within the time limited by statute, that therefore the mirashes, mention of which is to be found in the settlement record, had not been annulled, that on the evidence adduced on behalf of the plaintiffs it was clear that some of the lands in suit were held exclusively under the said one anna share and that some were held jointly under the said one anna and 2½ annas shares, that the presumption about the correctness of the entries in the settlement records had not been rebutted and that therefore the plaintiffs were not entitled to any reliefs in these suits. The Munsif thereupon dismissed these suits. The matter of these suits was carried on appeal to the learned Subordinate Judge of Tipperah and his findings were as follows. He found that Regn. 8 of 1819 applied to the shares in which the mouza had been let out in patni and that the one anna share which originally belonged to Ramdhone had passed to the plaintiffs under the sale in execution of the rent decree referred to above, that the plaintiffs were not bound to recognize the transfer of the ½ anna share out of the said one anna share and that the plaintiffs were entitled to annul incumbrances if any really existed, that the mirashes relied upon by the several defendants did not exist and that there was no evidence in support of the entries in the settlement records, that the defendant's mirashes being non-existent, no question of any notice under S. 167, arose, and lastly that the fact that some plots of the said one anna share were joined with the lands of the two and half annas share did not preclude the plaintiffs from obtaining the reliefs prayed for by them and that there was

no defect of parties. He accordingly allowed the appeals pending before him with costs. The defendants thereupon preferred appeals to this Court. These appeals were heard by my learned brother. Mukerji, J., and by his judgment dated 30th January 1929, the second appeals in question were dismissed. Thereafter the present appeals have been brought under the Letters Patent.

Before my learned brother several points were urged on behalf of the defendants tenants. Mukerji, J., accepting the findings of fact by the learned Subordinate Judge, negatived the contentions that the plaintiffs had not acquired title to the 1 anna share which originally belonged to Ramdhone that the presumption of correctness in respect of the entries in the settlement records had not been rebutted and that the plaintiffs had recognized the transfer of the said half anna share to Bashi Nath. Mukerji, J., referred to the finding of the Munsif concurred in by the learned Subordinate Judge, that some of the lands in suit were held exclusively under the one anna share and that some were held jointly under the one anna and 2½ annas shares and proceeded to observe as follows:

"Then it has been urged that if the finding on Issue 6 be as above, then the owners of the 2½ annas hisya are necessary parties to the suit, as the learned Munsif had held. It has been contended that the declaration which the plaintiff has asked for as regards the non-existence of the incumbrances will affect the said owners and such a declaration cannot be obtained in their absence. But on reading the schedule to the plaint I find that the plaintiffs have confined their prayers for relief to such share in the lands as they themselves have. However much it may be said to have been convenient if the plaintiffs had made those owners parties, it cannot be held that the said owners were necessary parties in the sense that the suit could not proceed in their absence."

"Lastly, it has been contended that the prayer for assessment of rent in the absence of the said owners of the 2½ annas hisya was not maintainable, and in support of this contention a decision of the Patna High Court in *Partap Mahton* v. *Wazirunnissa* (1), has been cited. That decision was upon a very special case, and in any case, the decision of this Court in the case of *Dhanunjoy* v. *Upendra* (2) is against the appellants' contention."

Mr. Gupta who appeared for the appellants (the defendants tenants) argued that there was no evidence sufficient in law to rebut the entries in the khatians and that the Subordinate Judge had given no clear finding that they had been rebutted. On this point however I agree with the learned Judge in this Court in thinking that the finding of the lower appellate Court is clear enough and that it was open to him on the evidence to negative the existence of the mirash rights claimed by the defendants. Mr. Gupta further contended that the suit as framed were not maintainable in the absence of the owners of the two and half annas share and that the learned Judge in this Court was in error in thinking that *Dhanunjoy's* case (2), was against the appellant's contention. He pointed out that although S. 188, Beng. Ten. Act, did not come into play, no case had gone to the length of holding that in the absence of the cosharer landlords, a decree for assessment of rent could be made and that in *Dhanunjoy's* case (2), the other cosharer landlords had been made parties. He argued that the present cases were indistinguishable from *Pratap's* case (1) and were covered by it.

Before I deal with Mr. Gupta's contentions, I desire to clear the ground as regards one matter. The finding of fact being that the defendants have no mirash right and that some lands are held exclusively under the 1 anna share, there is no valid reason why the plaintiffs should not get assessment of rent in respect of those lands. There is nothing to show that the tenancy of the defendants or any set of them in the separate and joint lands is held as a single unit. No rent having ever been assessed before there is no question of their holdings being at an entire rent. In these circumstances it seems to me that there should be a decree for assessment of rent in respect of these lands. I can see nothing in the records before me which can disentitle the plaintiffs to this modicum of relief.

Now it appears from an examination of the khatians that each set of defendants has set up one mirash in respect of the lands held by them. In view of the findings of fact arrived at by the learned Subordinate Judge to the effect that the defendant's lands comprise land held jointly under the one anna and 2½ annas share, we have to see whether

(1) A. I. R. 1925 Pat. 559=88 I. C. 687=4 Pat. 604.
(2) [1918] 46 I.C. 423.

the plaintiffs can get the declaration which they seek and can get the joint lands assessed to rent in the absence from the records of these suits of the owners of the said $2\frac{1}{2}$ annas share? On the latter question the learned Judge in this Court has relied on *Dhanunjoy's* case (2), but in that case the cosharer landlords had been made parties. They were not indeed in the category of plaintiffs but they were in the category of defendants. The case seems to be quite consistent with the decision in *Partap's* case (1), which really followed it. Adami, J., who delivered the judgment of the Court went at length into the various authorities and observed as follows:

"The question next arises whether, under the general law, a suit by a cosharer landlord for an assessment of the rent of a tenant's holding is maintainable where the other cosharers have not been made parties either as plaintiffs or defendants. It is to be noticed that in the various cases noted above, except in the case of *Govind Chandra Pal* v. *Hamidulla Bhuiyan* (3), the other cosharers were made parties defendants to the suit for assessment; in the present case the plaintiffs have not made their cosharers parties to the suit at all and the plaint tells us that the cosharers refused to take any action: they are apparently satisfied with the rent now paid to them in accordance with the Record-of-Rights. Two of the cosharers come forward and ask for an assessment of the rent of the 22 bighas and for their proportionate share; the other cosharers are vitally interested. It may be that it was unnecessary to join the other cosharers as plaintiffs as S. 188 does not apply, but surely they should have been made parties defendants, so that the assessment when made might bind all equally. As pointed out by the learned Munsif, great hardship will be caused to the tenants defendants if each of the other cosharer landlords is left free to bring a separate suit for assessment; not only may there ensue a multiplicity of suits but also the tenant, if different assessments are made in the separated suits, will be uncertain as to what is really the assessed rental. No really effective decree can be made in the absence of the interested cosharers and there can be no finality as to what is really the fair and equitable rent as in a partition suit so in a suit for asesssment all the interested persons should be made parties."

These observations appear to me to be sound in principle and in my judgment any departure from the rule laid down must be in practice inconvenient and liable to produce anomaly and difficulty.

The Sub-Judge dealt with this matter by saying:

"It is true that some plots of one anna hisya are joint with land of the two annas hisya, but a tenure may consist of undivided shares of lands and that fact does not afford any ground for adding the owners of the other shares as parties."

Dr. Basak for the respondents before us argued on the same lines. The question however is not what a tenure may consist of, but what in fact the tenancies of these defendants are. Their mirash right having been negatived there is neither evidence nor finding that they are tenure-holders at all. It may not legally be absolutely impossible, even if these tenancies are only ryotis that the joint lands have been let to them for cultivation as to one undivided share by one patnidar and as to another such share by another patnidar: c.f. *Govind's* case (3). It would however be a very improbable inference of fact in the present case where no kabuliyats have been produced and there has not been an assessment of rent. The claim to mirash right was laid on very different lines and the Record-of-Rights was also to the contrary.

Hence in my judgment the plaintiffs cannot in these suits get a decree for assessment of rent of the plots which have the two patnis as joint landlords.

As to the prayer for a declaration "that the defendants have got not mirash or permanent right in the disputed lands": It is quite true as the learned Judge observes that the plaint has been so framed as to confine this prayer "to such share in the lands as they themselves have". As regards those plots which are entirely within the plaintiff's patni the declaration may stand, but if *A* and *B* are joint landlords of a plot held by *C* and *C* has been recorded in the Record-of-Rights as holding a tenure under both of them as joint landlords, a declaration that *C* has not the right he claims should prima facie be refused to *A* unless *B* has been impleaded. The fact that *A* and *B* hold their interest in defined shares is not of itself any reason for proceeding in the absence of *B*. The greatest caution must be exercised in granting declarations whether these be granted as substantive relief under the Specific Relief Act or are merely ancillary to or explanatory of other relief. The absence of a party whose presence is necessary to quiet the real dispute (in this case to settle the nature and terms of the defandants' tenancies

(3) [1903] 7 C. W. N. 670.

under their joint landlords) is a good reason for refusing this form of relief. On the other hand if, as here, the plaintiff proves that the defendants hold certain lands under himself alone then, though they may set up title in fifty other people the plaintiff may clear his title as against the defendants in a suit against them alone.

The plaints contained a prayer for back rents or compensation for use and occupation. This does not appear to have been canvassed in any of the Courts, and I do not understand that it is persisted in.

The result is in my judgment that these appeals fail in respect of so much of the lands as are held exclusively under the 1 anna share and must be allowed in respect of the lands held jointly under the 1 anna and 2½ annas shares. It may be that the learned advocates on either side will be able to agree or to satisfy us as to the consequences of this decision in each of these suits so as to enable a decree to be finally drawn up here. We will adjourn the case for a fortnight for this purpose. Otherwise we will have to remand the case in order that a decree may be settled or worked out in accordance with our decision. As to costs assuming that in each suit there are some separate lands in respect of which the plaintiffs are entitled to relief, we think that the plaintiffs should get their costs according to their success in the trial Court and in the lower appellate Court, but that the defendants should have their costs of the second appeal and before us. If in any suit the plaintiffs wholly fail the defendants must have their costs of that suit throughout.

C. C. Ghose, J.—I agree.

M.N./R.K. *Appeals dismissed.*

A. I. R. 1930 Calcutta 697

GRAHAM AND MITTER, JJ.

Jogeshchandra Dhar—Plaintiff—Appellant.

v.

Mahammad Ibrahim and *others*—Defendants—Respondents.

Appeal No. 1543 of 1927, Decided on 3rd July 1929, from appellate decree of Sub-Judge, Chittagong, D/- 8th March 1927.

(a) Negotiable Instruments Act, Ss. 5 and 17—Hundi ambiguous as to whether promissary note or hundi held to be hundi—Deed—Construction.

The document in question was in the following form, on a paper, which was described as a "hundi" in print: "Forty-five days after date without grace we jointly and severally promise to pay to the order of *J* the sum of one thousand rupees only for value received in cash and that with interest at 3 per cent. per annum after due date."

In the corner, at the top, was the endorsement: "Accepted payable on the date 23rd September." Below this endorsement there were two signatures.

Held: That it was a bill of exchange, as defined in S. 5 of the Act, and, even if there was any ambiguity about its being either a promissory note or a bill of exchange, the holder of the bill is entitled to treat it as either, having regard to the provisions of S. 17: *Lloyd* v. *John Edward Oliver*, (1852) 18 *Q.B.* 471, *Rel. on.*

[P 698 C 2]

(b) Negotiable Instruments Act, Ss. 5 and 49—Instrument not addressed to drawee—Third person endorsing acceptance not inconsistent with address becomes acceptor and instrument becomes bill of exchange.

An instrument not addressed to a drawee can become a bill of exchange if a third person endorses an acceptance which is not inconsistent with the address and that the acceptor might be deemed to have admitted himself to be the party addressed. The endorsee thus becomes liable under the instrument and is estopped from contending that he is not the drawee. *Lloyd* v. *John Edward Oliver*, (1852) 18 *Q. B.* 471 and *Gray* v. *Milner*, (1819) 8 *Taunt* 739 *Ref*, *Davis* v. *Henry John Clarke*, (1844) 6 *Q.B.* 16, and *Steele* v. *M'Kinlay*, (1880) 5 *A. C.* 754, *Dist.*

[P 699 C 2]

(c) Negotiable Instruments Act, S. 28—Agent signing hundi for drawee — Acceptance is good.

Where a bill of exchange is accepted by an agent of the drawee instead of by drawee himself the acceptance is good. The hand that holds the pen is immaterial if in fact there is authority to sign: *A. I. R.* 1918 *P. C.* 146, *Ref.*

[P 700 C 2]

Probodhkumar Das and *Apurbacharan Mukherji*—for Appellant.

Nasim Ali and *Nurul Huq Chaudhuri*—for Respondents.

Mitter, J.—The action in which this appeal is taken was brought by the plaintiff, now appellant, for the recovery of Rs. 1 044-8-0, which is the principal and interest alleged to be due on an instrument, which is described in the plaint as a hundi or bill of exchange. To this suit are impleaded as defendant the Guptas (defendants 1 and 2), who borrowed Rs. 1,000 from the plaintiff on 9th August 1924 and executed the hundi in question, promising to repay the same within 45 days from that date

and Mahammad Ibrahim (defendant 3) and a firm known as Makbul Ahmed and Sons of Chittagong (defendant 4), who are alleged to have accepted the hundi or the bill of exchange. Both the Courts agreed in dismissing the plaintiff's suit against defendants 3 and 4 and in decreeing the suit ex parte against defendants 1 and 2, although their reasons for so doing are different. The lower appellate Court does not regard the instrument in question as a bill of exchange, within the meaning of the Negotiable Instruments Act, 1881, but regards it as a promissory note and, as the Guptas are the makers of the promissory note, and not defendants 3 and 4, he considers defendants 3 and 4 are not bound by the instrument.

The plaintiff in this appeal contends that the lower appellate Court was in error in holding that the instrument in question was not a "bill of exchange," whereas the respondent contends that the deed is merely a promissory note and the question for determination in this appeal is whether the view taken by the lower appellate Court is right.

The document in question is in the following form, on a paper, which is described as a "hundi," in print:

Forty-five days after date without grace we jointly and severally promise to pay to the order of Babu Jogeshchandra Dhar, Chittagong, the sum of one thousand rupees only for value received in cash and that with interest at 3 per cent. per annum after due date.

Prasannakumar Gupta.
Ramkamal Gupta.

In the corner, at the top, is the endorsement "Accepted, payable on due date 23rd September." Below this endorsement there are two signatures of defendant 3, Mahammad Ibrahim, one for self and the other for Makbul Ahmed & Sons.

Defendants 1 and 2 did not appear in the suit. Defendant 3 filed a written statement, which was rejected, as having been filed too late. Defendant 4 filed a written defence and defendant 3, in his evidence, said that he was asked to sign the document as a witness and he did so. He also said that the words "Accepted, payable on due date 23rd September" were not in the document when he signed it.

The Munsif found that:

"it seemed to him very likely that the words 'Accepted payable on due date' were subsequently inserted in the document, with a view to make defendant 3 or his firm liable for the money, probably because they were more solvent than defendants 1 and 2."

The lower appellate Court apparently does not accept this conclusion of the Munsif and, although its finding in the part of the case is somewhat involved, it says:

"Though, on the facts, having gone through the evidence of defendant 3, the plaintiffs' ledger, Ex. 3, I am of opinion 'that there was no inherent improbability in the circumstances of the case of Mahammad Ibrahim representing the firm of defendant 4, or of his standing surety for defendants 1 and 2 (though not in the sense in which that term is used in the Negotiable Instruments Act),"

and the lower appellate Court rejects the story of defendant 3 as untrue, for it says:

"that if it be true, as Mr. Ibrahim says, that he attested the document as a witness merely, there would not be two signatures, one for self and the other representing the firm."

As I said the finding of the Subordinate Judge is open to the comment of its being somewhat involved, but, as I read it, it means that the defence of subsequent interpolation of the words "accepted," etc., and of defendant 3's signing as a witness, did not find favour with the Subordinate Judge. We are unable to agree with the somewhat insistent contention of the learned advocate for defendant 3 that the finding of the Munsif on this part of the case has not been displaced by the Subordinate Judge. The Subordinate Judge evidently proceeds on his view of the law that the document in question is not a bill of exchange and rests his judgment on that alone.

The question for determination in this appeal really turns on the construction of the document dated 9th August 1924.

We have no doubt that it is a bill of exchange, as defined in S. 5, Negotiable Instruments Act, and, even if there is any ambiguity about its being either a promissory note or a bill of exchange, the holder of the bill is entitled to treat it as either, having regard to the provisions of S. 17, Negotiable Instruments Act, which enacts that:

"where an instrument may be construed either as a promissory note or a bill of exchange, the holder may at his election treat it as either, and the instrument shall be thenceforward treated accordingly."

It seems clear that it is a bill of exchange. So far back as 1852, in the

case of *Lloyd* v. *John Edward Oliver* (1), it was held, with reference to a document closely resembling the instrument in question, that it was a bill of exchange. In the English case the document was in the following form :

"London, July 17th, 1851, £99. 15*s*.

Two months after date I promise to pay Mr. T. R. Lloyd or order the sum of ninety-nine pounds fifteen shillings for value received.

Henry Oliver."

"John Edward Oliver,
Birmingham."

Across this was written :

" Accepted, payable Spooner, Attwood & Co., Bankers, London. Edward Oliver."

It was proved that Edward Oliver was the signature of the defendant. Lord Campbell, C. J., was of opinion that this instrument, even before acceptance, might be treated as a bill of exchange as against Henry Oliver, the drawer. As against the defendant it was clearly a bill of exchange.

This case is sought to be distinguished by the respondent from the present case on two grounds: (i) although there were no express words of request to J.E. Oliver to pay, it had always been the custom in drawing bills of exchange to place the name of the party to whom the bill was directed, where the name of J. E. Oliver was written ; (ii) the acceptor could not be rendered liable unless he was the drawee. Lord Campbell did not rest his decision on the ground that J. E. Oliver's name was placed where, according to mercantile usage, the name of the drawee would be placed. It is true Erle, J., referred to it, but neither Lord Campbell nor Crompton, J., referred to mercantile usage, from which it could be inferred that there was an implied request to J. E. Oliver to pay.

Reliance was placed by the learned advocate for the respondent on the case of *Davis* v. *Henry John Clarke* (2), for the proposition that, unless the acceptor is named expressly as the drawee, his acceptance does not render him liable. But the case lays down no such proposition and is obviously distinguishable. There, John Hart drew a bill payable to himself or order addressed to John Hart. Clarke wrote across this "Accepted, H.J. Clarke" ; and it was held that Clarke could not be sued as acceptor of a bill of exchange directed to Hart. Lord Denman, C. J., pointed out that there is no authority either in the English law or the general law merchant for holding a party liable as acceptor of a bill addressed to another. In the present case, let us assume that no party is named in the address, but the acceptance by defendants 3 and 4 was not inconsistent with the address, so that the acceptors might be deemed to have admitted themselves to be the party addressed. The present case also resembles the case of *Gray* v. *Milner* (3). Patteson, J., while delivering judgment in *Davis* v. *Henry John Clarke* (2), commented on *Gray* v. *Milner* (3) as follows :

" In *Gray* v. *Milner* (3) no party was named in the address ; and I must say that the decision in the case appears to me to go to the extremity of what is convenient. It may be considered as having been decided on the ground that the acceptance was not inconsistent with the address, so that the acceptor might be deemed to have admitted himself to be the party addressed."

In the case before us the document, on the face of it, is shown to be a hundi or bill of exchange. Here, the Guptas are the drawers and, in the corner, are shown the names of defendants 3 and 4, who, by signifying their acceptance, have admitted themselves to be drawees. Defendants 3 and 4 are now estopped from contending that they are not the acceptors and that they are not drawees. No question of estoppel could arise in *Davis* v. *Henry John Clarke* (2), for, on the face of the bill, it was addressed to a person other than the acceptor : see the remarks of Patteson, J., at p. 19 of the Report in 6 *Q. B.* We are not unmindful of the decision of the House of Lords in the case of *Steele* v. *M'Kinlay* (4), where it was laid down that, save in the case of acceptances for honour or per procuration, no one can become a party to a bill qua acceptor, who is not a proper drawee or an addressee. But, here, defendants 3 and 4 have, by accepting, admitted themselves to be drawees and this view is not inconsistent with the decision of the House of Lords just referred to. It has been contended for the respondent that no consideration

(1) [1852] 18 Q. B. 471=21 L. J. Q. B. 307=16 Jur. 893.
(2) [1844] 6 Q. B. 16=1 Car. & K 177=13 L. J. Q. B. 305=8 Jur. 688.
(3) [1819] 3 Taunt 739=2 Stark 336=3 Moore C. P. 90.
(4) [1880] 5 A. C. 754=43 L. T. 358=29 W. R. 17.

passed from plaintiff to defendants 3 and 4; therefore, under S. 45 of the Act, the plaintiff can have no relief against them. There is no substance in this ground, for it is common ground that the sum of Rs. 1,000 was paid to defendants 1 and 2, and S. 45 does not contemplate a further consideration flowing from the plaintiff to the drawee. Defendants 3 and 4 were under no obligation to accept the hundi, but, having done so, they were bound to make good the acceptance to the plaintiff who acted on the faith of it, provided defendant 3 had authority to bind the firm (defendont 4) by the acceptance.

We think therefore the judgments and decrees of the Courts below, in so far as they dismiss the suit against defendant 3, must be set aside and there will be a decree against defendant 3.

Defendant 4 has entered appearance separately from defendant 3 and has contended that defendant 4 firm is not bound, as defendant 3, who is the servant of the firm, had no authority to bind the firm by the acceptance of the hundi. The first point for decision is whether the hundi has been so drawn that in form it binds the firm of defendant 4. The first signature of defendant 3 below the acceptance is for himself and the second signature is "for Makbul Ahmed & Sons." It is plain therefore that the firm of defendant 4 is intended to be bound. In so holding, we are not unmindful of what was said by their Lordships of the Judicial Committee of the Privy Council in the case of *Sadasuk Janki Das* v. *Kishan Pershad* (5). at p. 668 (*of* 46 *Cal.*) in the passage quoted below. In that case Lord Buckmaster observed as follows:

"It is of the utmost importance that the name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document, so that the responsibility is made plain and can be instantly recognized as the document passes from hand to hand."

In the present case there can be no difficulty in this behalf, for the form of the hundi shows that defendant 3 was signing on behalf of the firm defendant 4.

It now becomes necessary to determine whether defendant 3 had authority to accept the hundi on behalf of the firm, and to sign such acceptance. The true rule is that where a bill is accepted by an agent of the drawee instead of by the drawee himself, the acceptance is good. The hand that holds the pen is immaterial if, in fact, there be authority to signs: see Halsbury's Laws of England, Vol. 2, p. 486. The decree of the lower appellate Court, in so far as it dismisses the suit against defendant 4 firm, must also be set aside and the case remitted back to the lower appellate Court in order that it may determine the question whether defendant 3 had authority to accept hundis or bills of exchange on behalf of the firm. If it comes to the conclusion that he had such authority, then it will pass a decree against defendant 4. If it comes to a contrary conclusion, then plaintiff's suit against defendant 4 will be dismissed. Costs will abide the result.

As defendants 1 and 2 have not appealed, the ex-parte decree against them will stand. The result is that plaintiff's claim is decreed against defendants 1 to 3. Defendant 3 will pay to the appellant costs throughout. Plaintiff's appeal against defendant 4 will be reheard in the light of the observations we have made.

Graham, J.—I agree.

V.B./R.K. *Case remanded.*

(5) A. I. R. 1918 P. C. 146=50 I. C. 216=46 I. A. 33=46 Cal. 663 (P.C.).

A. I. R. 1930 Calcutta 700

SUHRAWARDY AND COSTELLO, JJ.

Bala Baksh Bhararia and *another* — Plaintiffs—Petitioners.

v.

Amiruddin Mian and *others* — Defendants—Opposite Parties.

Civil Revn. No. 1210 of 1929, Decided on 7th February 1930, against order of Sub-Judge, Rangpur, D/- 24th June 1929.

(a) Civil P. C, O. 9, R. 13 — Mortgage suit jointly against mortgagors who have no specified shares — Setting aside decree against non-appearing mortgagors — Entire decree must be set aside.

A mortgage suit brought jointly against several mortgagors whose shares in the property are not specified if decreed ex parte against some of the several mortgagors, the ex parte decree if set aside must be set aside in its entirety and not so much of it as was passed against absent mortgagors. [P 701 C 1]

(b) Civil P. C., O. 9, R. 13 — Test to see whether entire decree or part of it can be set aside.

One test which may be applied in order to determine if the decree is of such a nature

that it can or cannot be set aside partially, is whether the decree against the non-contesting defendants may or may not be affected by the result of the trial against the other defendants. [P 701 C 1]

Jitendra Kumar Sen Gupta for *Satis Chandra Sinha*—for Petitioners.

Hemendra Chandra Sen—for Opposite Parties.

Judgment. — The facts of this case are that the petitioner brought a suit on a mortgage bond against the opposite party. The suit was decreed ex parte. Thereafter opposite parties 2 and 3 applied to the trial Court to have the ex parte decree set aside. That application succeeded and the decree passed against all the defendants was set aside. This rule was obtained on the ground that the trial Court was wrong in setting aside the entire decree including that portion of it which was passed against opposite party 1.

It appears that the mortgage bond on which the suit was based was executed by opposite party 1 for himself and on behalf of his minor brother Samiruddin who is now dead and through whom opposite parties 2 and 3 claim. The suit was brought on the basis of the bond against the defendant opposite party 1 as well as against the heirs of Samiruddin defendants 2 and 3. The decree prayed for was a joint decree against all the defendants and the decree passed in the suit was against all the defendants jointly. Neither in the mortgage bond nor in the plaint or the decree there is any specification of the shares and the liabilities of the several defendants in the suit. In my opinion the Court was right in the circumstances of this particular case in setting aside the entire decree. It is not possible to maintain the decree as against defendant 1 and to set it aside as against the other defendants. The decree is a joint decree and is of such a nature that it cannot be set aside against some of the defendants in the suit. One test, which may usefully be applied in such cases in order to determine if the decree is of such a nature that it can or cannot be partially set aside, is whether the decree against the non-contesting defendants may or may not be affected by the result of the trial against the other defendants. If in the present case the suit is dismissed against defendants 2 and 3 the decree against defendant 1 cannot be maintained in fact. The mortgage bond says that the property does not belong to defendant 1 alone but to him and his younger brother. So that the decree that can be passed against defendant 1 will be a decree to the extent of his share in the property in suit. There cannot be a mortgage decree affecting the entire property of which admittedly defendant 1 is not the sole owner. In this view of the matter I am of opinion that the order passed by the Court below is correct and this rule should be discharged with costs, two gold mohurs.

V.B./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 701

S. K. GHOSE, J.

Gurupada Haldar—Petitioner.

v.

Upendra Nath Mukerjee — Opposite Party.

Civil Revns. No. 1757 (S) and 1758 (S) of 1929, Decided on 28th February 1930, against judgment of B. B. Ghose and S. K. Ghose, JJ. D/- 8th August 1929.

Civil P. C., S. 114 — Erroneous view of evidence or of law is no ground for review.

Even if the view of the Court is inconsistent with an authority an, erroneous view of evidence or of law would be no ground for review. [P 703 C 1]

Sarat Chandra Basak, Hiralal Chakravarty and *Shamadas Bhattacharji*—for Petitioner.

Sarat Chandra Roy Chowdhury, Ramgati Sircar and *Upendra Kumar Roy*—for Opposite Party.

Judgment.—These two applications are for review of judgment which was passed by this Court on 8th August 1929 in appeals from appellate decrees No. 2306 of 1927 and No. 612 of 1928. The judgment of this Court was delivered by my learned brother B. B. Ghose, J., and I was a party to it. It is not necessary to recapitulate the facts. In the application with reference to second appeal No. 2306 of 1927 the Rule was issued on ground 1 of the petition which is to this effect:

"For that there is an error apparent on the face of the record inasmuch as the learned Judges have omitted to consider the effect of the subsequent litigation between Biswamoyee and Nitambini which clearly showed

that Biswamoyee obtained only a Hindu widow's interest and not absolute interest in the six annas share given to her for maintenance."

The judgment of the Court shows that it was argued that the point on which the decision of the right of the plaintiff must rest was with regard to No. 1 of the effect of the decree in suit 1868 brought by Nitambini against Biswamoyi. Nitambini brought the suit against Biswamoyi on the ground that the latter had dispossessed her. In the decree she got ten annas share and her suit regarding the remaining six annas share was dismissed. The question was whether the plaintiff was entitled in spite of that decree to recover possession of the property as the reversionary heir of Pran Krishna, the husband of Nitambini. It was pointed out that according to the report of the arbitrator, Nitambini was giving up her interest in six annas share of the property because Biswamoyi was entitled to maintenance out of her son's estate. But the decree was made to the effect that Nitambini's suit; with regard to six annas interest was dismissed. It was held that the effect of the decree was that Nitambini had relinquished six annas share, whatever the reason might have been, and as a matter of compromise in the suit and the compromise was binding on the reversioner. In this view it was held that the decree in Suit No. 1 of 1868 was binding on the plaintiff. It is now contended that we were in error in not referring to the decision in another suit, namely, Suit No. 74 of 1869 which Biswamoyi brought to recover her right of residence in her son's dwelling house as against Nitambinj. In that suit the defence of Nitambini was that as Biswamoyi had already been given six annas share in the previous suit she was not entitled to the right of residence as claimed by her. It is contended that in this second suit it was held that Biswamoyi got six annas share only for her maintenance and this decision is binding as res judicata in the present suit. It is true that there is no reference to the result of this suit in the judgment of this Court. The learned advocate for the plaintiff-appellant, who is the petitioner before me states that he did argue the point and that he did place some portions of the judgment Ex. 2 before the Court. The learned advocate on the other side has no recollection on the subject. In any case it seems to me that the argument was not put in the forefront, otherwise it could not have escaped our notice. It is further noteworthy that the point does not seem to have impressed the parties in either of the Courts below and it was not raised then. However, I have looked into the matter myself and have examined the judgment Ex. 2. It appears from that judgment that the defence of Nitambini was that, as Biswamoyee had obtained a decree in respect of six annas share of other property, she was entitled to bring the present suit. Upon that two issues were raised and issue (1) is to this effect:

"For the reason stated by the plaintiff, is she entitled to a right of residence in the house of the defendant or has she lost the right on account of the previous suit?"

In the course of the judgment it is stated that by the decision of the previous suit the plaintiff obtained a small share of the property for her maintenance and she did not lose thereby her right of residence. It does not seem to me that in this there is a decision of the question as to whether Nitambini had parted with the absolute interest on only her life-interest. It was not necessary for the decision of the suit of 1869 that such a question should be raised and decided, for even if the absolute interest had been transferred, still it was open to Biswamoyi to make a claim regarding her right of residence in her son's house. I also do not find, either in the issue or in any part of the judgment, that a question was raised and decided that the six annas share of the property, which was decreed in favour of Biswamoyee, related to the absolute interest in the property and not to Nitambini's life-interest. In this view it seems to me that there is no force in this ground for review.

Then, as regards the application for review in Second Appeal No. 512 of 1928 the rule was issued on ground 1 of the application which is in these terms:

"For that the learned Judge erred in holding that the kabala raises a presumption of legal necessity and the recitals therein are evidence of legal necessity."

The judgment shows that the Court was impressed by this that the document of transfer by Nitambini in favour of Kenaram itself recites the existence of legal necessity and further that the document was dated 1877 and both the parties to it were dead. Thereupon the judgment goes on to state that the presumption as held by the Privy Council arises that there was legal necessity and unless it was rebutted, the Court was entitled to act upon it. It is contended that this goes beyond the decision of the Privy Council in the case of *Bhanga Chandra Dhur Biswas* v. *Jagat Kishore Chowdhury* (1). It is pointed out that what was held in that case was that when proof of actual enquiry became impossible the recital coupled with circumstances would be sufficient evidence to support the deed. Even if our view were inconsistent with this authority an erroneous view of evidence or of law would be no ground for review. But as a matter of fact I find in the judgment that a reference is made to the circumstances that Nitambini had failed to obtain possession of the property and further that Kenaram also found it difficult to take possession as against Biswamoyee. It cannot be said therefore that the circumstances were not considered. In this view it seems to me that the grounds urged might properly be good grounds of appeal but they would not support the application for review.

The Rules are therefore discharged with one set of costs. The hearing fee is assessed at three gold mohurs.

S.N./R.K. *Rules discharged.*

(1) A. I. R. 1916 P. C. 110=36 I. C. 420=43 I. A. 249=44 Cal. 186 (P. C.).

A. I. R. 1930 Calcutta 703

GUHA AND M. C. GHOSE, JJ.

Afiruddi and *others* — Defendants — Appellants.

v.

Joy Chandra Naha and *others* — Respondents.

Appeal No. 1929 of 1928, Decided on 11th June 1930, from appellate decree of Fifth Sub-Judge, Dacca, D/- 23rd April 1928.

(a) Transfer of Property Act (1882), S. 68 —Suit for mortgage money on dispossession —Cause of action arises on date of dispossession and is not suspended till date stipulated for under mortgage bond.

Where the mortgage bond stipulates for the peaceful possession for a particular period and the mortgagee is dispossessed from the property, although the mortgagee may be entitled to sue for mortgage money under the mortgage bond on the expiry of the period stipulated for, the cause of action for the suit arises on the date of dispossession and cannot be suspended till the date under the mortgage bond : *A. I. R.* 1929 *P. C.* 139, *Ref.* [P 703 C 2, P 704 C 1]

(b) Practice—New plea—Question of limitation can be taken in second appeal for first time—Limitation Act, S. 4

The mere fact that the question of limitation was not raised in the trial Court or in the first appellate Court or in memo of appeal does not debar the Court of second appeal from going into the question, if it arises on the pleadings and no question of fact has to be enquired into to dispose of the question : 34 *Cal.* 941, *Ref.* [P 704 C 2]

Gunada Charan Sen, *Jatindra Nath Sanyal* for *Suresh Chandra Taluqdar*, and *Sarajit Chandra Lahiri* — for Appellants.

Dwijendra Krishna Dutt—for Respondents.

Guha, J—This appeal which arises out of a suit to enforce a mortgage bond brought by the plaintiff, must, in our judgment, succeed on one ground, namely, the ground of limitation. The plaintiff based his cause of action in the suit, on the stipulation contained in a document executed on 10th Magh 1316 B. S., corresponding to 23rd January 1910. In that document there was a stipulation to the effect that the mortgage money was to be repaid in Falgoon 1321 B. S. It appears however that in Baisakh 1320 B. S., i. e., in April 1914, the plaintiff was dispossessed from the mortgaged property. So far as the plaint is concerned both the due date according to the mortgage bond, viz., Falgoon 1321 and the dispossession of the plaintiff in 1320, have been mentioned. The question is having regard to the accrual of the cause of action for the present suit in Baisakh 1320 by the dispossession of the plaintiff, could it be said that limitation was saved by the stipulation contained in the mortgage bond to the effect that the money was to be repaid by Falgoon 1321 B. S. The answer to that question must be in the negative, regard being had to the definite stipulation contained in the mortgage bond itself, and regard being had

also to the provisions of law contained in S. 68, T. P. Act. We have anxiously considered the terms of the document and it appears to us that it could not be said that the cause of action so far as the present suit was concerned was the non-payment of the mortgage money in Falgoon 1321. It seems to us that upon the wording of the document as it stands the plaintiff was entitled to sue for the mortgage money on his being dispossessed by the mortgagor in Baisakh 1320 (April 1914). The position taken up by the appellant before us is amply supported as we have already indicated above by the mortgage bond itself as also by the provisions contained in S. 68, T. P. Act. It also finds support to a certain extent from the decision of the Judicial Committee of the Privy Council in the case of *Lal Narsingh Partab Bahadur Singh* v. *Mohammad Yaqub Khan* (1).

In this view of the matter it must be held that the plaintiff's cause of action for the present suit having arisen in April 1914 and a suit not having been instituted before 8th December 1926, the plaintiff's claim in suit was barred by the law of limitation. It need hardly be stated that the accrual of the cause of action in 1321 on the due date mentioned in the mortgage bond could not in any way stop the period of limitation which had commenced to run against the plaintiff from Baisakh 1320, the time when the plaintiff was dispossessed by the mortgagor, and which dispossession gave the cause of action to the plaintiff for the present suit.

Our attention has been drawn by the learned advocate appearing for the respondents to two decisions; one a decision of the Patna High Court in the case of *Jag Sahu* v *Mt. Ram Sakhi Quer* (2), and the other a decision of the Bombay High Court in the case of *Dattambhat Rambhat* v. *Krishna Bhat* (3). We have been unable to discover anything contained in those two cases which would support the position sought to be taken up by the respondents in this appeal or which could in any way be held to go against the position which the appellants have taken up before us with reference to the question of limitation arising for consideration in the present case. It is to be noted that the question of limitation urged in the present appeal has been raised before us for the first time. The question was not raised either in the trial Court or in the Court of appeal below, nor was the question of limitation raised in the grounds of appeal presented to this Court, but all this would not debar us from going into the question of limitation which arises upon the pleadings in this suit and which can be disposed of on the judgments of the lower Courts as they stand, and no question of fact has to be enquired into to enable us to dispose of the question. Reference in this connexion may be made to the decision of a Special Bench of this Court in the case of *Balaram* v. *Mangta Dass* (4), where it was held by the Special Bench as a Court of last resort, that a question of limitation raised before that Bench for the first time, was one which could be gone into, although it was not raised or discussed at any previous stage of the litigation and was not raised even in the memoramdum of appeal to the High Court. The Special Bench held that the provisions of S. 4, Lim. Act, being mandatory, the Court was bound to give effect to the plea of limitation, and hold that the suit was barred by limitation. We gave the learned advocate for the appellants in this appeal, leave to argue the question of limitation, and have arrived at a conclusion in favour of the appellants, so far as that question is concerned. In this view of the matter it is not necessary for us to discuss the other points that have been taken in support of the appeal to this Court. The plaintiff's claim in suit is held by us to be barred by limitation.

In the result therefore the appeal is allowed. The judgment and decree passed in this case by the lower appellate Court are discharged, and the plaintiff's suit is dismissed. The parties will bear their own costs in the litigation, including the costs in this appeal.

M. C. Ghose, J.—I agree.

V.B./R.K. *Appeal allowed.*

(1) A. I. R. 1929 P. C. 139=116 I. C. 414=56 I. A. 299=4 Luck. 363 (P.C.).
(2) A. I. R. 1922 Pat. 167=65 I. C. 666=1 Pat. 350.
(3) [1910] 34 Bom. 462=7 I. C. 446.
(4) [1907] 34 Cal. 941=6 C.L.J. 237=11 C.W. N. 959 (F.B.).

A. I. R. 1930 Calcutta 705

PEARSON AND JACK, JJ.

Satis Chandra Mallik and *others* — Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1451 of 1929, Decided on 16th May 1930, from order of Dy. Magistrate, Pabna, D/- 16th August 1929.

Criminal P. C., S. 476—Opinion that there may be prima facie case against persons but no finding as required by S. 476 on expediency of prosecution in interests of justice—Case held not to come under S. 476.

In connexion with the conduct of a proceeding under S. 145, Criminal P. C., the order of the Magistrate was as follows: "Considered. Cause shown and heard pleaders. There is material for prosecution of (1) *B* under Ss. 465, 467 and 193, Penal Code; (2) *S* under Ss. 467, 114 and 193, Penal Code; (3) *R* under Ss. 467, 114, 471, 193 and 196, Penal Code. Draw up formal complaint against them for their prosecution and trial for the above-noted offences."

Held: that in stating that there was "material for prosecution" of these persons the Magistrate indicated that in his opinion there may be a prima facie case against them. But nowhere within the four corners of this order could it be said that there was any finding recorded such as is referred to in S. 476, nor has he in any way directed his mind to the question as to whether any such order as he makes is expedient in the interests of justice as to bring the order within S. 476.

[P 705 C 2]

N. K. Basu and *Ramoni Mohan Chatterjee*—for Petitioners.

B. C. Chatterjee—for the Crown.

Judgment.—This rule was directed against an order for a complaint to be made against certain persons for the offence of perjury and kindred offences in connexion with the conduct of a proceeding under S. 145, Criminal P. C. The Magistrate made the order and the learned Sessions Judge has confirmed it.

One ground that is taken is that having regard to the fact that in the proceeding under S. 145 it was held that it was not maintainable, the order of complaint was bad. There is no substance in this because the proceedings themselves were perfectly in order and were in no sense illegal, and therefore the utmost that can be said is that it is a matter which might be considered as a possible element upon the question whether it was expedient in the interests of justice to make the complaint.

Another ground is that the order should not have been made because the dakhilas in respect of which the offence is alleged were not material to the case. But that however does not appear to be in accordance with fact because they were intended to support the case made by the party producing them that he was in exclusive possession of the particular portion of the land.

The other point raised is that the order of the Magistrate is not in conformity with the provisions of S. 476, Criminal P. C. That section lays down that when any Court is of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence .... such Court may after such preliminary enquiry if any as it thinks necessary, record a finding to that effect and make a complaint thereof in writing. The order of the learned Magistrate in the present case is as follows:

"Considered. Cause shown and heard pleaders. There is material for prosecution of (1) Baroda Kinkar Ghose under Ss. 465, 467 and 193, I. P. C.; (2) Surendra Krista Dutta under Ss. 467, 114 and 193, I. P. C.; (3) Satis Chandra Maulik under Ss. 467, 114, 471, 193 and 196, I. P. C. Draw up formal complaint against them for their prosecution and trial for the above-noted offences."

In stating that there is "material for prosecution" of these persons we apprehend the learned Magistrate to indicate that in his opinion there may be a prima facie case against them. But nowhere within the four corners of this order can it be said that there is any finding recorded such as is referred to in S. 476, nor is it to be discovered that the learned Magistrate has in any way directed his mind to the question as to whether any such order as he makes is expedient in the interests of justice. On this ground the order of the learned Magistrate is set aside. It will of course be open to him if so advised to reconsider the matter in the light of the above remarks on the questions whether further proceedings should be instituted.

In these terms the rule is made absolute.

V.B./R.K. *Rule made absolute.*

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A. I. R. 1930 Calcutta 706

RANKIN, C. J. AND PATTERSON, J.

Khadem and *others* — Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 70 of 1929, Decided on 14th August 1929, from order of Addl. Sess. Judge, Midnapur, D/- 4th December 1928.

(a) Criminal P. C. (1898), S. 297—While charging jury, Judge saying nothing about particular witnesses' evidence while considering whether offence was committed on that day or not—But while dealing with evidence against particular accused bringing in evidence of that witness—Evidence not given before Sessions nor his deposition before committing Magistrate put in Sessions—Such evidence should not have been brought in, as being extremely damaging to general case of accused.

While charging the jury the Sessions Judge said nothing at all about the evidence of a certain witness in that part of the charge in which he considered whether the offence was committed on that day or not. But when he came to that part in the charge in which he dealt with evidence against particular accused, he referred to evidence of that witness. It was not given before the Sessions but had been given before the committing Magistrate. But his deposition before the committing Magistrate had also never been put in before the Sessions.

Held: that under the circumstances such evidence should not have been brought in while charging the jury as it is of an extremely damaging character to the general case of the accused. [P 707 C 2]

(b) Criminal P. C. (1898), S. 288—Examination-in-chief of prosecution witness before committing Magistrate, without his cross-examination on a vital point, brought on record before Sessions—Though Sessions Court had discretion it was not allowed in as being unfair to defence.

The evidence of a prosecution witness during his examination-in-chief before the committing Magistrate without his being cross-examined was brought on record before the Sessions Court.

Held: that though a Sessions Judge has discretion to put in depositions before the committing Magistrate, that discretion must be carefully exercised. Under the present circumstances the evidence should not be put in before the Sessions, as being very unfair to the defence. [P 707 C 2]

Sasmal and *Phanindranath Das*—for Appellants.

Debendranarayan Bhattacharya—for the Crown.

Rankin, C. J.—In my opinion, this appeal must succeed, the conviction and the sentences must be set aside and the case must be retried.

The allegation against the seven appellants was that they had committed a dacoity in the house of the complainant on Saturday night, 16th June, at about 8 o'clock in the evening. The first information was lodged at the thana, some two or three miles away, by 9 o'clock. The amount of property taken away was in value only some Rs. 50 and the case for the prosecution is that the inmates of the house were allowed to leave the house and that, in a very short time, the neighbours were assembling with the result that the dacoits could not continue with their endeavours and in the end managed to get away with very little. The defence clearly denied that there was any dacoity at all and they laid stress upon certain suspicious features in the prosecution case and maintained that there were reasons why the prosecution witnesses had enmity against these accused, who lived not far off, in a neighbouring village and why the attempt to make out that they were guilty of dacoity should be indulged in. The accused people were persons who were known to the inhabitants of the house and it appears that a number of them were said to be identified by different witnesses for the prosecution.

So far as can be gathered from the charge of the learned Judge, there is undoubtedly a substantial body of evidence called by the prosecution to the effect that this dacoity took place. There are the first six prosecution witnesses, who are inmates of the house. P. W's. 7, 9 and 10 appear to be close neighbours and P. W. 8 appears to be a co-villager.

The jury had before them the question whether they would or would not believe the general story told by these prosecution witnesses; and, if this case had been tried upon evidence that was on the record there can be no doubt that very strong reasons indeed would be required before this Court, on appeal, would think of interfering with the verdict of the jury.

What has happened in the present case is that a witness, who appears to be a Mahomedan witness (P. W. 13) and who lived in the same village as the accused persons, gave evidence before the committing Magistrate and,

in the course of that evidence, as recorded, he stated, among other things, that, on this very night, he saw 18 or 19 persons coming out of the barhi of the accused man Bhuta. When the case was tried in the Sessions Court this piece of evidence which, if true, was extremely important, was not thought of such importance by the prosecution that they were minded to examine this witness before the jury at all. He was tendered merely for cross-examination. He was asked one or two harmless questions about the topography of his own village and about certain persons which affected only the fringe of the case, and nothing more happened as regards this witness. He did not tell before the jury any story about seeing 18 or 19 people leaving the barhi of Bhuta on the night of the occurrence. Then, when the learned Judge comes to charge the jury, he says nothing at all about the witness' evidence in that part of the charge in which he is considering the question whether there was dacoity at all on that night or not. But when he comes to the part of the charge, in which he deals with the evidence against particular accused, he says :

"Prosecution witness 13 says that he saw 18 or 19 persons coming out of Bhuta's barhi on Saturday evening. Of course he did not say he recognized the men."

Prosecution witness 13 had never given any such evidence before the Sessions. His deposition before the committing Magistrate had never been put in. No reference had been made to it accordingly, and the learned Judge in bringing in this as a piece of evidence, to my mind, brought in a piece of evidence which was of an extremely damaging character. To begin with it was extremely damaging as regards Bhuta, and the learned Judge introduces it apparently with the idea that it is evidence identifying and implicating Bhuta.

It is said that, as the learned Judge has not introduced it in that part of the charge where he is considering whether there was a dacoity or not, we should not pay too much attention to this statement in the case of the other accused. It appears to me, on the contrary, that what Mr. Sasmal has represented to us may well be the true state of affairs, namely, that the evidence of this co-villager and co-religionist to the effect that he saw such a large number of people on that night proceeding from the barhi of Bhuta in this neighbouring village, may well have appeared to the jury to be remarkable confirmation of the evidence as regards the existence of a dacoity. I do not feel disposed to speculate too closely as to the effect it would have on the mind of the jury. It appears to me that, on the whole, the probability is that if the jury noticed this part of the charge, as they must be supposed to have done, it would have a highly prejudicial effect upon the general case of the accused.

It is said that this evidence could have been put in under S. 288, Criminal P. C. A Sessions Judge certainly has a discretion to put in depositions before the committing Magistrate, but I am bound to say that, in this case, I am somewhat clearly of opinion that, if the learned Judge had, in the circumstances, put in this evidence about this gang of men by means of S. 288, he would have exercised his discretion in a manner that was anything but fair to the defence. For the first time, in this way, there would have come upon the record an extremely damaging piece of evidence, a piece of evidence which should have been got from the mouth of the witness in the examination-in-chief; and, speaking for myself, I cannot imagine I should have allowed such evidence to go in, there being no cross-examination directly or indirectly affecting or purporting to impinge upon this very cardinal question. In my judgment, the discretion to let in such evidence under S. 288, Criminal P. C., is one that must be carefully exercised, and in this case I have no hesitation in saying that nothing would have induced me to let this piece of evidence in by this roundabout method. But, apart from that, there remains the fact that the deposition was not put in under S. 288, Criminal P. C. Had it been put in, the pleader for the defence would have had his chance to represent to the jury that this was a way of making out the prosecution case which rendered the prosecution case highly suspicious. He would have been able to deal with it. He would have notice of it. He might apply for a further opportunity to cross-examine the witness. In my judgment

this is a case where a quite important matter, which is not on the record, has been treated as being in evidence, and I am not prepared to let the conviction stand either in the case of Bhuta or in the case of any other appellant.

The appeal must therefore be allowed, the convictions and the sentences must be set aside and the case must be remanded for a retrial. The appellants may continue on the same bail as before to the satisfaction of the District Magistrate.

Patterson, J.—I agree.

B.V./R.K. *Case remanded.*

A. I. R. 1930 Calcutta 708

JACK AND PANCKRIDGE, JJ.

Nababali and *others* — Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 30 of 1930, Decided on 9th July 1930, from judgment of Asst. Sess. Judge, Mymensingh.

(a) Criminal P. C., S. 221—Mere slip in form of charge whereby accused is not prejudiced does not make conviction bad.

Where in the form of the charge there was a mere slip, the word "or" being used for "and" between two charges framed under Ss. 221 and 242, Penal Code, and none of the accused was in any way prejudiced by the fact that in form the charge was in the alternative whereas in substance two quite distinct offences were charged.

Held: that the conviction of the accused in respect of both the charges was not bad.

[P 708 C 2]

(b) Criminal P. C., S. 297—Non-direction — Prosecution failing to produce material witnesses - No explanation offered in case of one witness—Judge not specifically mentioning to jury of non-acceptance of explanation offered— Omission is non-direction amounting to misdirection.

Where the prosecution failed to produce material witnesses on the ground that they were relatives of the accused and where the trying Judge drew the attention of the jury to the explanation suggested by the prosecution for their absence and said that it was for the jury to accept or reject it without saying that the jury would be at liberty to draw an inference adverse to the prosecution if the explanation suggested were not acceptable to them and where no specific mention was made to the jury by the Judge regarding the fact that no explanation was offered about the non-production of one of the material witnesses for the prosecution.

Held: that the omission of the trial Judge to direct the jury as to the inference they were entitled to draw if they were not satisfied with the explanation suggested for the absence of material witnesses was a non-direction amounting to a misdirection and to be a good reason for setting aside the conviction of the accused person: *A. I. R.* 1921 *Cal.* 257, *Foll.*; 36 *Cal.* 281, *Ref.*; *A. I. R.* 1930 *Cal.* 481, *Dist.*

[P 709 C 2]

Suresh Chandra Taluqdar — for Appellant.

B. M. Sen and *Anil Chandra Roy Chaudhury*—for the Crown.

Panckridge, J.—This is an appeal on behalf of the accused persons, Nababali, Biswanath Das and Rameswar who have been convicted by the Assistant Sessions Judge of Mymensingh and sentenced to various terms of imprisonment under Ss. 221, 388 and 342, I. P. C. The jury returned a unanimous verdict of guilty against all the accused in respect of the charge under S. 342, a unanimous verdict of guilty against Rameswar in the case of the charge under S. 221 a majority verdict of three to two guilty in the case of the charge under S. 388, I. P. C., against all the accused. The Judge accepted the verdict of the majority of the jury and sentenced the accused to various terms of imprisonment.

A preliminary technical point is taken on behalf of the accused persons, namely that the convictions are bad because the jury have returned a verdict of guilty against Rameswar under S. 342 and S. 221, whereas the charge was framed in the alternative. No one could suppose from reading the charge of the learned Judge that the charges had been framed in this way, and indeed the only fact that supports this is the word "or" appearing at the beginning of the charge under S. 342 against Rameswar. Logically, there was no justification for charging Rameswar in the alternative as will appear from the facts of the case when we come to deal with him. We think that the form of the charge was a mere slip and that none of the accused was in any way prejudiced by the fact that in form the charge was in the alternative, whereas in substance two quite distinct offences were charged and, in the view of the jury, proved against the accused. There is however another point which we consider is of some importance. The story for the prosecution was that the complainant Jogendra met the first two accused Nababali and Biswanath in a certain bazar where it is

the practice of persons so disposed to gamble. A dispute arose owing according to the prosecution, to the fact that Nababali tendered to the complainant Jogendra a counterfeit currency note in payment of gambling loss. Thereupon Jogendra according to the prosecution case called on the third accused Rameswar to take Nababali and Biswanath into custody. This Rameswar refused to do and at the instigation of the first two accused proceeded to apprehend Jogendra. Thereafter Jogendra was removed to a place which has been referred to as the bari of one Santoshwhere by threats of violence a sum of Rs. 105 was extorted from him, and he was not successful in obtaining his release until this sum had been made over. This is the story of the prosecution in respect of which the charges were brought and the accused persons were convicted.

Now the passage in the learned Judge's charge to which exception is taken is that which deals with the stage when the gambling was going on. It is evident that the place where the occurrence is alleged to have happened is, as one would expect not unfrequented and it is also evident that some of the prosecution witnesses spoke to the presence of other persons at the scene of the occurrence in addition to those who were directly concerned. Prosecution witness 5, for example, said that 10 or 12 elderly men were present at the time of the occurrence, and with reference to the witnesses named in the complaint Jogendra said that of them, Dwijendra Gurudayal, Phanindra and Narendra Sukladas saw the occurrence. None of these witnesses was called in support of the prosecution case. This aspect of the matter is dealt with as follows: The learned Judge says that Jogendra said that Gurudayal belonged to the party of gamblers and that another prosecution witness said that Dwijendra and Phanindra are cousins of Biswanath, that is to say, accused 2 and he adds that as it was not likely that they would depose against their uncle the prosecution did not call them. He goes on as follows:

"It is for you to consider if you will accept this explanation for the non-production of those witnesses."

Then he proceeds to observe that the occurrence admittedly took place near the shop of one Kunja Saha and he alludes to the fact that Kunja Saha has not been called nor any other person frequenting the bazar. Then he proceeds to make some general observation as to the likelihood of the persons engaged in the gambling being desirous of assisting the prosecution. With regard to Kunja and the witnesses who are described as "the bazar people" we do not think that any harm has been done by the omission of the learned Judge to carry the matter further. But we do consider that the learned Judge failed to direct the jury properly as regards the absence of those persons who according to the complainant's case were witnesses to the occurrence. He does, it is true, with regard to three out of the four draw the attention to the explanation which is suggested by the prosecution for their absence and he says that it is for the jury to accept or reject it. But what he does not say is that the jury would be at liberty to draw an inference adverse to the prosecution story if the explanation suggested by the advocate for the prosecution is not acceptable to them.

With regard to witness 4 apparently no explanation was offered but the learned Judge does not call the attention of the jury specifically to this fact. Our attention has been directed to the case of *Tenaram Mondal* v. *Emperor* (1) where in circumstances which we do not feel justified in distinguishing from the present, the omission of the trial Judge to direct the jury as to the inference they were entitled to draw if they were not satisfied with the explanation suggested for the absence of material witnesses was held to be a non-direction amounting to a misdirection and to be a good reason for setting aside the conviction of the accused persons. A previous decision of this Court was referred to in that case namely the case of *Fanindra Nath Banerjee* v. *Emperor* (2) in which it was said that it is not necessary that the actual word "presumption" should be used. But the two cases taken together seem to indicate that it is necessary that there should be a substantive direction on the part of

(1) A.I.R. 1921 Cal. 257=61 I.C. 1003=22 Cr. L.J. 475.
(2) [1909] 36 Cal. 81=9 Cr. L.J. 452=1 I.C. 970.

the learned Judge as to the view of the prosecution which the jury is entitled to adopt if they are not satisfied with the explanation offered for the absence of a witness who is material. We have also been referred to the case of *Hachani-khan* v. *Emperor* (3). But this in our opinion merely shows that there may be a case where this omission in the particular circumstances is unimportant.

In that case it does not seem that it was clearly established that the witness who, it is alleged should .have been called, was really a material witness at all. That case differs from the present case. As I have pointed out, from the evidence of the complainant himself there were at least four eyewitnesses to the beginning of the transaction in respect of which the prosecution was eventually launched who were not called. It has been urged that this omission only affects the case in so far as some of the charges are concerned ard with regard to the charge of extortion the convictions can stand, inasmuch as it cannot be suggested that the witnesses could have testified as to the subject matter of that charge. We do not agree. Although the charges are concerned with different incidents yet all the incidents are parts of one transaction and we think that it is quite possible that if the jury under a proper direction of the learned Judge were not disposed to accept the prosecution evidence with regard to the commencement of the transaction they would probably have been equally loth to accept the prosecution story with regard to the subsequent transactions.

In the circumstances we direct that the convictions and sentences of the appellants be set aside and that the case be retried. Pending the retrial the appellants will be released on bail to the satisfaction of the District Magistrate.

Jack, J.—I agree.

K.N./R.K. *Order accordingly.*

(3) A.I.R. 1930 Cal. 481.

A. I. R. 1930 Calcutta 710

SUHRAWARDY AND COSTELLO, JJ.

Tura Sardar—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 1404 of 1929, Decided on 16th May 1930.

(a) Evidence Act (1872), S. 25—Excise officer is not police officer.

An excise officer is not a police officer within the meaning of S. 25: *A. I. R.* 1927 *Cal.* 527; 45 *I. C.* 284 and 46 *Cal.* 411, *Foll.*; *A. I. R.* 1927 *Bom.* 4, *not Foll.* [P 711 C 1]

(b) Criminal P, C. (1898), S. 162—Statement to excise officer not being statement to police officer during investigation is not inadmissible—S. 162 has no application to accused persons.

The accused was charged under S. 46, Excise Act. A statement was made by his co-accused to the Excise Inspector to the effect that as soon as the Excise Inspector came, there was a man with him who ran away.

Held: that it was not a statement made to the police officer in course of investigation under Ss. 160 and 170, Criminal P. C., and was not inadmissible in evidence. Nor was the statement reduced to writing so as to be inadmissible under S. 162, Criminal P. C. Even if the statement was taken as confession under S. 25, Evidence Act, S. 162, Criminal P. C. did not apply in cases of accused persons: *A. I. R.* 1927 *Cal.* 17, *Rel on.* [P 711 C 1, 2]

Santosh Kumar Pal for *Sarat Chandra Jana*—for Petitioner.

Anil Chandra Ray Chaudhury—for the Crown.

Judgment.—The petitioner in this case Tura Sardar has been convicted under S. 46, Excise Act, and sentenced to six months' rigorous imprisonment. He was also charged under S. 61, Excise Act read with S. 109, I.P.C., but no sentence was passed under that charge. This rule was granted on two grounds. The first is that any statement made by the co-accused Faizuddin, who was also convicted, to the Excise Inspector and Sub-Inspector is inadmissible under S. 25, Evidence Act. The second ground is that the District Magistrate has not in his judgment found all the facts necessary to sustain the conviction. With regard to the second ground, it may be dismissed in a few words. The learned District Magistrate in a careful judgment has dealt with all the points taken in the grounds of appeal before him. In discussing the points he has entered sufficient findings of his own with regard to the points that require to be proved in support of the conviction. He says that Faizuddin said that on the approach of the Excise Officer the accused ran away and he was caught shortly after in circumstances that showed that he had come hurriedly through mud. The learned Judge believed the witness Santosh and his evidence is enough to convict the accused of the offence charged.

As regards the first ground, Mr. Pal argues that an excise officer is a police officer within the meaning of S. 25, Evidence Act. The point may be arguable, but so far as this Court is concerned it is now res integra. It has been held in several cases that he is not, in *Harbhanjan Sao* v. *Emperor* (1), *Rokumai* v. *Emperor* (2) and *Ah Foong Chinaman* v. *Emperor* (3). Reference has been made to a Full Bench decision of the Bombay High Court in *Nanoo Sheikh Ahmed* v. *Emperor* (4). The learned Chief Justice giving the judgment of the Full Bench at p. 93 of the report distinguished the Calcutta case on the ground that Abkari law in Calcutta was different from that in Bombay and that the latter was more stringent than the former. This point is settled by authorities of this Court and as the law now stands an excise officer is not a police officer within the meaning of S. 25, Evidence Act. As a branch of this ground Mr. Pal has also argued that under S. 74, Bengal Excise Act of 1909, an excise officer is a police officer within the meaning of S. 162, Criminal P. C. and any statement made to him cannot be proved against the accused.

Under S. 74, Excise Act whenever an excise officer suspects the commission of an offence he is empowered to investigate it and in carrying on such investigation the powers of a police officer under Ss. 160 to 170, Criminal P. C. have been conferred upon him. It may be reasonable to argue that when the power of investigation under this section has been conferred upon an excise officer it must be taken to have been conferred with all the limitations which the law imposes. But in the present case the question does not arise. The statement objected to by Mr. Pal is the statement of Faizuddin the co-accused who said that as soon as the Excise Inspector came he said that a man had been with him who had run away. That is not a statement which was made in the course of the investigation held under Ss. 160 to 170, Criminal P. C. Nor was that statement reduced in writing as to be made inadmissible under S. 162. What happened was that Faizuddin was arrested on the spotand as soon as the Excise Inspector came there Faizuddin told him that there was a man with him who ran away. This is not a statement made to a police officer under the provisions of any section of the Criminal Procedure Code. Besides, if the statement is taken as a confession under S. 25 which apparently it is not, S. 162, Criminal P. C. does not apply in cases of accused persons: see the case of *Azimaddi* v. *Emperor* (5). Both the grounds therefore fail and the rule is discharged.

The petitioner must surrender to his bail and serve out the remainder of the sentence.

R.M./R.K. *Rule discharged.*

(1) A. I. R. 1927 Cal. 527=102 I. C. 547=28 Cr. L. J. 579=54 Cal .601.
(2) [1917] 19 Cr. L. J. 529=45 I. C. 284.
(3) [1918] 46 Cal. 411=20 Cr.L.J. 94=48 I. C. 504.
(4) A. I. R. 1927 Bom. 4=99 I. C. 330=28 Cr. L. J. 122=51 Bom. 78 (F.B.).
(5) A. I. R. 1927 Cal. 17=99 I. C. 227=28 Cr. L. J. 99=54 Cal. 237.

A. I. R. 1930 Calcutta 711

CUMING, J.

Topzal Hossain—Accused—Petitioner.

v.

H. C. Hunt—Complainant—Opposite Party.

Criminal Revn. No. 1399 of 1929, Decided on 22nd January 1930, against order of Sub-Divisional Magistrate, Feni, D/- 25th June 1929.

(a) Criminal P. C., S. 260—Offence under S. 211, Penal Code cannot be tried summarily.

An offence falling under S. 211, Penal Code, cannot be tried summarily. [P 712 C 1]

(b) Criminal P. C., S. 260—Offence not triable summarily, tried snmmarily—High Court set aside conviction.

Where an offence as disclosed was not summariiy triable and the Court adopted the summary procedure the High Court set aside the conviction and remanded the case for retrial. [P 712 C 1]

(c) Penal Code, S. 211—False information to Superintendent of Police as to wrongful confinement of informant by police officer constitutes institution of criminal proceedings.

Lodging false information with Superintendent of Police that the informant and his mother were wrongfully confined by a police officer constitutes institution of criminal proceedings within the meaning of S. 211. [P 712 C 1]

Nurul Huq—for Petitioner.

Debendra Narain Bhattacharji—for Opposite Party.

Judgment.—The petitioner in this case is found guilty in a summary trial on a charge under S. 182, I. P. C., and was sentenced to pay a fine of Rs. 200.

The charge against him was that he gave false information to a certain public servant, the Superintendent of Police, that he and his mother had been unlawfully confined by a certain police officer and that money was extorted wrongly from them. He has moved this Court and has obtained this Rule.

The only ground which it is necessary for me to deal with is ground 3, namely that the offence falls under S. 211, I. P. C., and therefore not triable summarily. Mt. Bhattacharji who appears for the Crown admits himself that the case is an important one and that he would prefer that the accused should be, under the ordinary procedure, tried on a charge under S. 211. There is, I think, no question but that the charge against the petitioner does fall under S. 211, I. P. C. This point was decided by the decision of a Full Bench of this Court in the case of *Karim Buksh* v. *Queen-Empress* (1) where it was held that a person who sets the criminal law in motion by making a false charge to the police of a cognizable offence institutes criminal proceedings within the meaning of S. 211, I. P. C. In this case the allegation against the petitioner is that he has made a false report to Mr. Hunt, the Superintendent of Police, that certain persons had wrongfully confined him and his mother. Now the wrongful confinement of the petitioner's mother would fall under S. 342, I. P. C. S. 342 admittedly is a cognizable offence. Therefore it is clear that the present charge against the accused does fall under S. 211 and that therefore he should not have been tried summarily. I therefore set aside the conviction and sentence against the accused and order that the petitioner should be retried under S. 211, I. P. C., or any other section that may be applicable.

In this view it is unnecessary to deal with the other grounds on which also the Rule was issued. The Rule is accordingly made absolute. The fine if already paid will be refunded.

V.B./R.K. *Rule made absolute.*

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(1) [1890] 17 Cal. 574.

A. I. R. 1930 Calcutta 712

JACK AND PANCKRIDGE, JJ.

Hafezali Haldar—Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 25 of 1930, Decided on 25th July 1930.

Criminal P. C., Ss. 367 and 423 (2)—Head of charges to jury enumerated only by sections—Before High Court can interfere with verdict on ground of insufficiency of record, misdirection and misunderstanding of law causing erroneous verdict must be proved.

Although it is desirable that the record of heads of charges should indicate far more fully than mere enumeration of the numbers of the sections, in order to entitle the High Court to interfere with the verdict of the jury and set it aside, it must be affirmatively proved that there has been misdirection and misunderstanding and the verdict is erroneous owing to misdirection by Judge and misunderstanding on the part of the jury of the law as laid down by him: *Cr. App. No.* 248 *of* 1929 and 47 *Cal.* 796, *Ref.* [P 713 C 1]

Gregory and *Sures Chandra Taluqdar*—for Appellant.

Debendra Nath Bhattacharjya and *Kiron Mohan Sircar*—for the Crown.

Panckridge, J.—This is an appeal by one Hafezali Haldar who has been convicted by a verdict of a jury of offences punishable under Ss. 148 and 326, I. P. C.

The ground of appeal which has been urged before us is that the recording of the heads of the charge is insufficient and the criticism is based upon the fact that the heads of the charge do not reveal the way in which the learned Sessions Judge explained the sections under which the accused has been charged. Nor the sections concerned with the exercise of the right of private defence on which the accused relied. In the heads of the charge there is a paragraph which runs as follows:

"Sections 141, 142, 146 to 148, 319 to 322, 326, 201, I. P. C, explained; Ss. 96, 97, 99 to 106 I. P. C. explained. Charges explained."

The learned advocate appearing for the Crown concedes that it is highly desirable that the heads of the charge should indicate far more fully than has been done here what the learned Sessions Judge has said in his explanation of the law to the jury and there are many reported cases dealing with the form which record of the learned Sessions Judge's direction on the law

should take. Among others we were referred to the observation of Sanderson, C. J., in the case of *Kasimuddin Nasya* v. *Emperor* (1). But in spite of this the learned advocate for the Crown argued that before we were justified in setting aside the verdict of the jury on the ground which I have indicated we must be in a position to come to the conclusion under S. 423, sub-S. (2), Criminal P. C., that the verdict is erroneous owing to misdirection by the Judge or misunderstanding on the part of the jury of the law as laid down by him, and he says that it is for the appellant to show affirmatively that there has been such misdirection or misunderstanding. He is supported in this contention by an unreported case decided by Graham and Lort-Williams, JJ., in *Appeal No.* 248 *of* 1929 where the point urged here on behalf of the appellant was taken and the Court pointed out that in no case had the verdict of a jury been set aside solely on the ground that the heads of a charge were in the form with which we are dealing in the present case, and that in the opinion of the Court the provisions of sub-S. (2), S. 423, were effective to prevent a Court from interfering with the verdict of a jury on this ground alone. It is also pointed out on behalf of the Crown that, although we do not know exactly what the learned Judge said to the jury as to the right of private defence, yet in concluding his charge he gave direction to the jury that, unless they were satisfied with the evidence of possession by the complainant's party they were bound to acquit the accused, thereby leaving out of account the possibility of their right of private defence being exceeded. We do not think that there is any substance in the other criticism which has been directed against the charge and it seems to us that the learned Judge dealt with sufficient fullness with the inference which the jury were entitled to draw from the failure to examine witnesses who in his opinion should have been examined.

In the circumstances, we do not think that the present case is distinguishable from the unreported case to which we have already referred and we agree with the reasons given therein.

(1) [1920] 47 Cal. 795=21 Cr. L. J. 694 = 57 I. C. 984.

The appeal is therefore dismissed.

Jack, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 713

SUHRAWARDY AND JACK, JJ.

K. T. Hing—Applicant.

v.

I. N. Silas—Opposite Party.

Criminal Revn. No. 857 of 1929, Decided on 31st July 1929, from order of Ch. Presy. Magistrate, Calcutta, D/- 19th June 1929.

Penal Code (1860), S. 290—Annoyance to members of single house is not public nuisance.

Per Jack, J.—To constitute a public nuisance as contemplated by S. 290, the annoyance must actually be caused to people in general occupying property in the vicinity. Consequently, because the residents of a single house are annoyed by the noise of a theatre, the house holder is not entitled to prosecute unless he can show that the noise annoys other people living in the vicinity : *Soltau* v. *de Held*, (1851) 2 *Sim.* (*N.S.*) 133 ; *Allen* v. *Lloyd*, (1802), 170 *E. R.* 691, *Ref.* ; *A. I. R.* 1924 *All.* 194, *Dist.* (*Suhrawardy, J., Dubitante*). [P 714 C 1]

S.N. Banerji, S. K. Sen and *Satindranath Mukherji*—for Applicant.

B. C. Chatterji and *Manindra Nath Mukerji*—for Opposite Party.

Jack, J.—The petitioner is one of the proprietors of the Chinese Theatre Studio on Chittaranjan Avenue. He has been convicted under S. 290, I. P. C., of committing a pubiic nuisance by the annoyance caused by the sounds made by his theatre band, in connexion with performances at the theatre from 12 noon to 4 p. m. and 8 p. m. to midnight every day.

The only ground for revision seriously urged is that the prosecution has failed to prove the existence of a public nuisance inasmuch as it has not been shown that annoyance has been caused to the public or to the people in general who dwell or occupy property in the vicinity in accordance with the terms of S. 268, I. P. C. defining "public nuisance." On this point the finding of the learned Chief Presidency Magistrate is as follows :

"It is suggested that this is not a public but a private nuisance. Some Mahomedans have been called by the complainant to help him over the difficulty. I doubt if their grievance is very genuine. I imagine they are less susceptible to noise. But, in the peculiar circumstances of this case, as shown by the plans, the complainant and his tenants, represent sub-

stantially the public in general who dwell and occupy property in the vicinity. The complainant's house is at present the only substantially inhabited property in the neighbourhood. The rest is mostly open space, or covered by small huts. If these were occupied by buildings inhabited by people who would say they did not mind the noise (e.g., Chinese) the matter might be different. But the accused has not called a single person living in the vicinity to contradict the evidence given by the prosecution."

The learned Magistrate finds that:

"partly owing to the proximity of the theatre to the complainant's building and partly owing to the unusual nature of the sounds which constitute Chinese music, the complainant and his tenants have a genuine grievance."

On the findings, it appears that the only persons affected are those occupying the end of the complainant's building next the theatre. Not more than seven or eight persons in all occupy these rooms. Of these four including the complainant, have been examined and say that they are annoyed by the noise from the theatre especially at night. The question then is whether the annoyance of these few residents of a single house is sufficient to show that the noise made by the theatre band constitutes a public nuisance, i. e., whether it can he said to cause annoyance to the people in general who dwell or occupy property in the vicinity. There are practically no other people occupying property in the vicinity except the occupants of some huts, the nearest of which is 30 or 40 yards from the front of the theatre. That the other people are affected I do not believe on the evidence or findings of the Magistrate. Taking it for granted that, at the time complained of, the noise was sufficiently loud to seriously annoy the residents of the end rooms of the Silas building, which is built almost right against the stage end of the theatre, it does not follow that it would necessarily cause annoyance to the residents of other buildings in the vicinity, except those very close to the stage end of the theatre. But there are in fact no other people dwelling in the vicinity within unpleasant range of the noise or music of the band. In these circumstances the noise can hardly be called a public nuisance.

In the case of *Soltau* v. *De Held* (1), the Vice-Chancellor held that a peal of bells which caused a nuisance to the residents of the adjoining house could not be called a public nuisance. "If," he says,

"the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operation but no nuisance or inconvenience whatever, or is but advantageous or pleasurable to those who are more removed from it, it does not, I conceive, come within the meaning of the term "public nuisance."

In the case of *Allen* v. *Lloyd* (2) it was held that the noise made by a tinman which was a nuisance to occupants of three sets of chambers of Clifford's Inn close by, did not constitute a public nuisance, not being sufficiently general in extent to support an indictment. This decision is authority for the contention that where only a very limited number are affected the nuisance does not amount to a public nuisance.

The learned advocate for the prosecution has referred the case of *Lallu Ram* v. *Emperor* (3). This was a case apparently under a Municipal Act affecting people passing along a public thoroughfare and has no application to the facts of the present case. It is not, in my opinion sufficient to say that the complainant and three or four of his tenant represent the people in general who occupy property in the vicinity. To constitute a public nuisance as contemplates by S. 290 the annoyance must actually be caused to people in general occupying property in the vicinity. Because the residents of a single house are annoyed by the noise of a theatre, the house holder is not entitled to prosecute, unless he can show that the noise annoys other people living in the vicinity. There is not sufficient proof of this in the present case. I therefore think that the conviction and sentence should be set aside, the accused acquitted and the fine if paid refunded.

Suhrawardy, J.—I agree with my learned brother, though not without some hesitation. It may be argued that the evidence falls short of establishing an indictable nuisance.

V.B./R.K. *Conviction set aside.*

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(1) [1851] 2 Sim. (N.S.) 133=16 Jur. 326=21 L. J. Ch. 153.

(2) [1802] 4 Esp. 200=170 E. R. 691.

(3) A. I. R. 1924 All. 194=77 I. C. 188=25 Cr. L. J. 332.

A. I. R. 1930 Calcutta 715

SUHRAWARDY AND COSTELLO, JJ.

Anadi Lal Mukherjee and *others*—Petitioners.

v.

Sukh Chand Mandal and *others*—Opposite Parties.

Criminal Revn. No. 788 of 1929, Decided on 9th May 1930.

Criminal P. C., S. 145 — Order under S. 145 presupposes the existing likelihood of breach of peace.

It is necessary for making an order under S. 145 that the Magistrate should be satisfied at the time of drawing up the proceedings that there is then existing a likelihood of breach of the peace arising from the disputes between the parties with regard to the land in question. The making of an order, therefore, some months after the report on which it was purported to be passed, cannot be supported. [P 716 C 1]

Narendra Kumar Bose and *Nalin Chandra*—for Petitioners.

K. N. Choudhury and *Anilendra Nath Roy Choudhury*—for Opposite Parties.

Costello, J.—This is an application under S. 439, Criminal P. C., in respect of an order made by the Sub-Divisional Magistrate of Satkhira on 22nd December 1928 under the provisions of S. 145, Criminal P. C. The proceedings which eventually resulted in making that order were protracted to a most remarkable extent. For it appears that the proceedings out of which the order finally emerged, began by a report made by the police to the Magistrate in question on 18th January of the year 1926 when he reported that there was a likelihood of trouble between the contending parties who were disputing possession to a certain plot of land. Actually before that date some of the parties had been brought before a Court for the purpose of being bound over under the terms of S. 107, Criminal P. C. These proceedings ultimately terminated. But apparently nothing more was done in respect of the proceedings under S. 145 until 9th June 1926 when they were dropped and fresh proceedings with amended boundaries with regard to the properties were drawn up on 27th July 1926 and the lands in dispute were then attached. The matter, as I have said, dragged on from that date until December 1928. The real question which we have to decide is whether or not the learned Magistrate was right in drawing up proceedings in July 1926 which were purported to be based on the police report of January 1926 and upon nothing else.

It has been urged before us that it cannot rightly be said that in July 1926 there was a likelihood of a breach of the peace between the contesting parties by reason of the situation as it had previously existed in January 1926. We are not concerned with the question of the subsequent delay as between July 1926 and December 1928. But one cannot help remarking in passing that this proceeding seems to have taken a course which never could have been contemplated by the terms of S. 145 which after all are designed to secure that a status quo should be preserved and a breach of the peace prevented as between the two disputing parties or sets of disputing parties pending the time one side or the other should have recourse to a civil Court in order that their rights with regard to the land might be finally determined. It is to be borne in mind that by S. 145, sub-S. (1), the Magistrate of the class therein referred to is to make an order in writing if he is satisfied that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof. The condition precedent for making an order of the kind contemplated is that a breach of the peace is likely. The meaning of the word "likely" has been considered in a number of reported cases and on the whole the decisions indicate, I think, that the word "likely" indicates some degree of futurity though it has been said that the word "likely" does not mean imminent or immediately to happen. We may take it for the purpose of this section that the word "likely" is to be treated as if it is synonymous with the word "probable." In the present instance the police reported as far back as January 1926 that a breach of the peace was then likely or anticipated if no steps were taken, and the matter was recorded by the Magistrate as one of emergency; in other words it was considered in January 1926 that the matter was urgent. So that the position was that in January 1926 a dispute likely to cause a breach of the peace existed. I use the

word "existed" advisedly, because the word in the section is "exists." That means that there must be a dispute in existence which is likely to cause a breach of the peace at the time when the order is made. Now there is nothing to show that the state of affairs which existed in January 1926 still existed in July 1926 so far as it appears from the order which the Magistrate made some two years later. We therefore think, from the actual wording of the section itself, that the making of an order some months after the report on which it was purported to be passed, cannot be supported. There are authorities for that view in cases which unfortunately we have not had the advantage of seeing because the reports in which they appear are not available. Apparently it was held in 2 *Criminal Law Review* 85, which is cited in Aiyar's Book of Criminal Procedure Code that if the circumstance was that there was danger in the past, proceedings based on a likelihood of a breach of the peace six months previous to the date of the preliminary order would be illegal. There is also another case *Chhidilal* reported in 2 *P. L. T.* 650, where it appears to have been decided that proceedings cannot be started on the basis of a police report more than three months old, there being no likelihood of a breach of the peace when the Magistrate actually drew up the proceedings. Now that seems to me to be a reasonable interpretation to be put upon the terms of the section. It is necessary for making an order of this description that the Magistrate should be satisfied at the time of drawing up the proceedings that there is then existing a likelihood of breach of the peace arising from the disputes between the parties with regard to the land in question.

Taking that view of the matter we think that this order of the Magistrate must be set aside. That will be without prejudice to the making of any fresh order if this or any other Magistrate is satisfied that there is a likelihood of any breach of the peace existing at the time when the matter comes before him. The rule is made absolute in these terms.

Suhrawardy, J.—I agree.

V.B./R.K. *Rule made absolute.*

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* A. I. R. 1930 Calcutta 716

PEARSON AND JACK, JJ.

Superintendent and Remembrancer of Legal Affairs, Bengal—Appellant.

v.

Benozir Ahmad— Accused — Respondent.

Criminal Appeals Nos. 455, 525, 543 and 590 of 1929, Decided on 28th March 1930, from order of Sess. Judge, Noakhali, D/- 18th May 1929.

*** Criminal P. C., S. 537 — Accused jointly tried under Penal Code Ss. 302 and 304 and other sections—Jury constituted of seven persons only— Judge not considering whether it was not practicable to have jury of nine — Such constitution of jury is illegality not curable under S. 537 — No appeal against acquittal under Ss. 302 and 304 is immaterial.**

Where accused are tried jointly under Ss. 302 and 304 and some other sections, Penal Code, and the jury is constituted only of seven persons, the Judge speaking of nine as the required number, and never considering the question whether it was not practicable to have a jury of 9 persons, the jury is illegally constituted, and the illegality cannot be cured by S. 537, Criminal P. C. The fact that no appeal was preferred against acquittal under Ss. 302 and 304 makes no difference. All the accused are affected by the illegality: *A. I. R.* 1930 *Cal.* 60, *Appl.* [P 717 C 1]

Jogesh Chandra Sinha, B. C. Chatterjee, Suresh Ch. Talukdar and *Mohendra Kumar Ghose* — for Appellant.

D. N. Bhattacharjee—for Respondent.

Judgment.—The nine accused in this case were charged with offences under Ss. 120-B/395, 399, 402, I. P. C, also under Ss. 304/34 and 326/34 and 326/109 in respect of the death of one Idris. In addition, two of the accused namely Shamsul Huda and Benozir Ahmad, were charged under S. 302 with the murder of one Harimohan Roy and another accused Oliulla with abetment of the murder.

The jury found all the accused not guilty of the charges relating to the deaths of Idris and Harimohan. Six of the nine accused were found guilty under Ss. 120-B, 395, 399 and 402, in the case of Oliulla by a majority of 4 to 3, and in the case of the other five unanimously. Benozir Ahmad was found not guilty and acquitted also of the charges under those sections by a majority of 5 to 2. In the case of Benozir Ahmad the Government has appealed against his acquittal of the

charges under Ss. 120-B/395, 399 and 402 and the accused who have been convicted have appealed against their conviction.

It is argued first of all that the trial has been vitiated owing to the defective constitution of the jury, which consisted of only seven persons. Only fourteen jurors were summoned in the case, of whom six were absent when called, one was exempted and one discharged on objection, leaving therefore six empanelled without objection. Another person who was on the list of special jurors and happened to be present in Court was taken in "to complete the number of seven." From the record it would appear that the learned Judge never applied his mind to the question whether nine jurors were not required under the provisions of S. 274 Criminal P. C. He speaks of seven as being the "required number." It does not appear anywhere that it was not practicable to have a jury of nine persons, or that the Judge ever took that question into consideration. The result is that the trial has been held with a jury illegally constituted, and this has been utilized as a ground of appeal not only by the accused appellants but by the Crown appellant. It is true that the Crown is not appealing in so far as the acquittal was on the charges under Ss. 302 and 304, I. P. C., but that can make no difference to the illegality of the trial, and as the accused were tried jointly they are all affected by the illegality. He thinks it is clear that this is not a class of illegality which can be treated as curable under S. 537, Criminal P. C. It is a case where we think that the principle of *Dwarika Malo* v. *Emperor* (1) must be applied.

We accordingly allow the appeals. The verdict of acquittal in Benozir's case is reversed and we direct that he be retried. In the case of the accused appellants we reverse the findings and sentences and direct that they be retried. The retrial in all cases will be limited to the charges under Ss. 120-B/395, 399 and 402, I. P. C.

The accused Benozir Ahmad who is now on bail will remain on the same bail until further orders of the Sessions Judge.

S.N./R.K. *Retrial ordered.*

(1) A. I. R. 1930 Cal. 60=1930 Cr. C. 12=122 I. C. 219=31 Cr. L. J. 377=56 Cal. 1154.

A. I. R. 1930 Calcutta 717

SUHRAWARDY AND COSTELLO, JJ.

Rahim Bux Sarkar — Accused — Appellant.

v.

Emperor — Opposite Party.

Criminal Appeal No. 577 of 1929, Decided on 16th April 1930, from order of Sess-Judge, Pabna, D/- 27th June 1929.

(a) Criminal P. C., Ss. 234 and 222 (2)—Charge under S. 408, Penal Code, specifying gross sums as also items misappropriated in one year is good charge.

Where an accused person is charged under S. 408, I.P.C., with having committed criminal breach of trust in respect of a gross sum of money misappropriated by him within the period of one year and the charge not only specifies the gross sum taken and the dates between which it was taken, but also sets out the items composing such gross sum giving the dates and the amounts alleged to have been misappropriated, the charge comes within the provisions of Cl. (2), S. 222, Criminal P. C., and that if by specifying the items composing the gross sums the charge went beyond what was necessary instead of prejudicially affecting the accused it is to that extent favourable to the accused : 31 *Cal.* 928, *Foll.*; 24 *All.* 254 ; 29 *Mad.* 558 and 33 *All.* 96, *Ref.* [P 719 C 1]

(b) Criminal P. C., S. 303—Offence under S. 408, Penal Code—Wrong charge to jury on items held not prejudicial.

Where in his charge to the jury in a trial for an offence under S. 408, I. P. C., with regard to a gross sum said to have been misappropriated within a year, and composed of items more than three in number, the Judge instead of inviting verdict in respect of charge under S. 408 asked the jury to give their verdict in respect of the charge as laid against the accused on the several items and the jury returned a verdict of guilty as regards some of the items only and not guilty as regards others and the Judge convicted the accused under S. 408.

Held : that though the form in which verdict was asked for and expressed was wrong, proper form being simply to ask jury their verdict in respect of an offence under S. 408, the defect was one of form and did not prejudicially affect the accused. [P 719 C 2]

A. K. Fazutul Huq and *Jogesh Chandra Sinha*—for Appellant.

B. M. Sen—for the Crown.

Costello, J.—In this case the appellant Rahim Bux Sarkar was charged under S. 408, I. P. C., for having committed criminal breach of trust as a servant and he was sentenced to four years' rigorous imprisonment and to pay a fine of Rs. 1,000 in default of payment of which he was to undergo a further term of one year's imprison-

ment. The main point urged before us is that the form of the charge is bad in law as being contrary to the provisions of S. 234, Criminal P. C. The facts are that the accused had been employed as a supervisor under the Pabna Central Bank to which there were affiliated various rural co-operative societies in police stations Pabna and Sujanagar and the charge against him is that between November 1925 and October 1926 he at various places within the jurisdiction of the police stations at Pabna and Sujanagar, being a servant in the employment of the Pabna Central Co-operative Bank, Ltd. and being entrusted as such servant with the duty of realising for and crediting to the said bank the debts due to the said bank from various co-operative societies within the said jurisdiction committed criminal breach of trust in respect of Rs. 7,745-12-0 which he realized from rural societies on behalf of the said Central Bank in various sums as shown in some 38 exhibits and that he wrongly misappropriated the same without crediting the said amounts to the Pabna Central Bank. It appears that on the report of an auditor by name Bhhujanga Bhusan Maitra dated 25th December 1926 the police took up the case but the accused was not to be found until 26th November 1928 when he was arrested in Calcutta. The defence put forward was that the whole matter was a false prosecution, that he never had any written or verbal directions that he should realize money from the village societies and credit the same to the Central Bank, that the exhibits on which the prosecution was based were all forged and that the secretaries of the rural societies combined against him because he enforced certain duties on them. He explained his disappearance by saying that he had gone to Calcutta by reason of some illness. The objection taken by Mr. Huq is, as I have already stated, to the form of the charge and that is the fact that the prosecution specified not only the gross sum said to have been misappropriated but also the items of which that sum was made up. Mr. Huq argues that S. 234, Criminal P. C., controls the provision of S. 222. S. 234 provides :

" When a person is accused of more offences than one of the same kind committed within the space of 12 months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with and tried at one trial, for any number of them not exceeding three."

It is to be observed that that section relates to a number of offences of the same kind whether charged in respect of the same person or not, whereas S. 222 relates specifically to a charge of the kind with which we are now concerned. The object of that section is to ensure that the accused may have as full particulars as possible of the accusations made against him ; and in sub-S. (1) it provides that the charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom or the thing (if any) in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. To put the matter in other words, it provides that all reasonable information shall be given as to enable the accused person to know the nature of the charges he has to answer. Sub-S. (2), which is the one material in the present case, in a sense is a qualification of the general proposition contained in sub-S. (1) because it says that when the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates and the charge so framed shall be deemed to be a charge of one offence within the meaning of S. 234. It is obvious from the language of that section that in a case of charge of the character mentioned in the subsection the necessity for particularity is cut down in that it provides that it is sufficient for the prosecution merely to specify the lump sum without stating the particular items of which it is made up, provided that the lump sum is said to have been misappropriated within the space of one year. In the case now before us the prosecution so far from confining themselves to their exact rights as given in the subsection went out of their way to give more than what the subsection requires. That is to say, not only was

the gross sum specified but also the several items of which it is composed. Mr. Huq argues that that was an embarrassment and would prejudice the accused. It is obvious that so far from that being the case, the giving of particulars was an advantage to the accused and not the reverse. This matter has been before this Court on previous occasion and it was not really open to argument. The case of *Samiruddin Sarkar* v. *Nibaran Chandra Ghose* (1) is exactly in point. The head-note is as follows:

"Where an accused person was charged under S. 408, Penal Code with having committed criminal breach of trust in respect of a gross sum of money misappropriated by him within the period of one year and the charge not only specified the gross sum taken and the dates between which it was taken, but also set out the items 22, in number composing such gross sum giving the dates and the amount alleged to have been misappropriated on each date: *Held*, that the charge came within the provisions of Cl. 2, S. 222, Criminal P. C., and that by specifying the items composing the gross sum the charge went beyond what was necessary and was to that extent favourable to the accused."

This case followed the previous case of *Emperor* v. *Gulzari Lal* (2). The matter has not only been considered by this Court but has also come before other High Courts. In 1906 in the case of *Thomas* v. *Emperor* (3) it was held that S. 222, Criminal P. C., does not apply only to cases where there is a general deficiency and the prosecution is unable to specify the particular items of the deficiency but also the cases where the items may be, but are not, specified. In other words, if the prosecution are in a position to specify the items which show exactly how the gross sum is made up, they can either content themselves by putting the gross sum without any further detail or they can if they wish go beyond what the section requires them to do and specify the items of which the amount is composed. It has been pointed out by the Court in the case just mentioned that

"if the legislature intended only to apply S.222 to cases where there is a general deficiency in an account and the prosecution is unable to specify the particular items of the deficiency, it could have found apt words in which to express the intention. The words used do not contain any such limitation and we are not justified in reading into the section a limitation which its language will not support."

(1) [1904] 31 Cal. 928=8 C. W. N. 807.
(2) [1902] 24 All. 254=(1902) A. W. N. 44.
(3) [1906] 29 Mad. 558=5 Cr. L. J. 139.

The same point was before the Allahabad High Court in 1910 in the case of *Emperor* v. *Ibrahim Khan* (4) where a similar decision was arrived at. It seems to us therefore that the point raised by Mr. Huq is not open to question.

In this particular case it is to be regretted that the learned Judge put his judgment in the form in which we find it. He had previously asked the jury what their verdict was in these terms:

"What is your verdict in respect of the charge under S. 408, I. P. C., and laid against the accused on the 38 items set forth in the charge?"

Thereupon the foreman said:

"Our unanimous verdict is that the accused is not guilty in respect of 3 items viz., Exs. 25 (6), 25 (7) and 25 (8), but that he is guilty under S. 408, I. P. C., in respect of the remaining 35 items."

And then the learned Judge in passing the sentence in respect of the 35 items which he mentioned says:

"the accused Ibrahim is convicted under S. 408, I. P. C., and sentenced to rigorous imprisonment for four years. The accused stands acquitted in respect of the 3 items Exs. 25 (6), 25 (7) and 25 (8)."

The form in which that was expressed seems to suggest that the misappropriation of each item constituted a separate offence. It is perhaps by reason of that that Mr. Huq was able to light upon what might be a good point of attack in this appeal. At first sight that may seem to be covered by S. 234. But it is obvious from an examination of the whole case that that is merely a question of form and not of substance because the charge against the accused was primarily of misappropriation of the total sum of Rs. 7,745-12-0. The right way of looking at it is that the prosecution charged him with having misappropriated a specified sum of money. It would have been sufficient for the Judge to have asked the jury "what is your verdict in respect of the charge under S. 408? Is the accused guilty or not," without requiring the jury to specify the items for which they convicted him. However it is clear to us that it in no way prejudiced the accused; and we are satisfied that there is nothing in the suggestion made. The summing up is perfectly clear and quite

(4) [1911] 33 All. 36=11 Cr. L. J. 442=7 I.C. 186.

intelligible to the jury. That being so, this appeal must be dismissed.

Suhrawardy, J.—I agree.

V.B./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 720

CUMING, J.

Abdul Sattar—Petitioner.

v.

Moti Bibi—Opposite Party.

Criminal Revn. No. 1622 of 1929, Decided on 30th January 1930.

(a) Penal Code, S. 448—Entry by decree-holder accompanied by officer of Court in execution of decree for possession is not criminal trespass.

Entry into a house by a decree-holder accompanied by officers of the Court deputed to make over possession of the house does not constitute an offence of criminal trespass.

(b) Penal Code, S. 323—Removing by force a person other than judgment-debtor in decree for ejectment and possession is assault within meaning of S. 323.

Removing by force a person other than a person against whom a decree for ejectment from house and possession is obtained, is punishable under S. 323, I. P. C. [P 720 C 2]

N. K. Bose and *Nurul Huq Chowdhury*—for Petitioners.

N. N. Bose—for Opposite Party.

Judgment.—In the case out of which this rule arises the petitioners Abdul Sattar and Abdul Hamid have been convicted under S. 448 and S. 323, I. P. C., and sentenced under S. 448 to pay a fine of Rs. 250 each. No separate sentence was passed with regard to the conviction under S. 323, I. P. C. The case for the prosecution was that the two petitioners went with a Naib Nazir of the civil Court and some peons to execute a decree for ejectment from a house in Dacca which they had obtained against their sister's husband Muhammad Ali. On their arrival the delivery of possession was opposed by the complainant in the case on the ground that the house belongs to her and that she was not a party to the decree. It is alleged that in the absence of Mohammad Ali the complainant's husband, the petitioners and other persons forcibly dragged the complainant out of the house. The case for the defence was that they went to execute the civil Court decree and that they had not assaulted the complainant.

On the facts as found by both the lower Courts it is quite clear that the conviction under S. 448, I. P. C., cannot stand. It is clear from the facts found that the two petitioners went to the house with civil Court officers and entered the house not for the purpose of intimidating, insulting or annoying any person or to commit any offence, but to execute a civil Court decree which they had obtained against one of the occupants of the house. It does not seem to be suggested that the decree was obtained by fraud. The Naib Nazir had to make over possession to them, and to do that they could enter the house with him as they did and receive possession from him. In such circumstances no conviction for criminal trespass can possibly stand.

So far as regards the charge of assault is concerned the learned Judge has found that the petitioners dragged the complainant who happens to be their sister out of the house. O. 21 R. 35, provides that

"where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged or to such person as he may appoint to receive delivery on his behalf, and, if necessary by removing any person bound by the decree who refuses to vacate the property."

The complainant was not a party to the decree and therefore the two petitioners were not entitled to forcibly remove her. The proper procedure so far as she was concerned no doubt would have been by way of an application under O. 21, R. 98; therefore by forcibly removing the complainant from the house they were clearly guilty of assault. The conviction under S. 323, I. P. C, must therefore stand. As far as can be understood from the evidence the assault was not a very serious one. No doubt she alleged that they kicked her and beat her. The learned Judge found that they merely removed her forcibly from the house. I think the ends of justice will be met by sentencing the petitioners to pay a fine of Rs. 20 each under S. 323, I. P. C., and I order accordingly. In default of payment of fines they will undergo simple imprisonment for one week. The fines, if realized, will be given to the complainant as compensation.

The convictions and sentences under S. 448, I. P. C., are set aside and the fines, if paid, must be refunded.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 721 (1)

PAGE AND PATTERSON, JJ.

(*Mt.*)*Radharani Dassaya*—Appellant.

v.

Purna Chandra Sarkar—Respondent.

Appeal No. 1481 of 1929, Decided on 10th July 1929.

(a) Civil P. C., S. 80—Suit against receiver for accounts is not maintainable without notice.

No suit for accounts against a receiver appointed by the Court can be maintained without service of the notice as contemplated by S. 80: 53 *I.C.* 747; *A.I.R.* 1924 *Cal.* 145 and 41 *Mad.* 792, *Foll.* [P 721 C 1]

(b) Civil P. C., O. 6, R. 17—Plaint cannot be amended in second appeal.

Plaintiff asked for permission in second appeal to amend the plaint by converting a suit for accounts against a receiver into a suit for damages for conversion.

Held: that it was neither right nor reasonable to allow the amendment at such a late stage of the proceedings. [P 721 C 1]

Gunada Ch. Sen, *Prakash Ch. Pakrasi* and *H. K. Pramanick*—for Appellant.

Upendra Lal Roy and *Subodh Chandra Roy Chowdhury*—for Respondent.

Page, J.—In my opinion this is a clear case. The only question is whether this suit is one which must fail because there was failure to give notice as provided in S. 80, Civil P. C. The suit was brought against a receiver appointed by the Court, and on referring to the prayers set out in para. 17 of the plaint it is clear that the suit is one for accounts. It is not a suit for damages for conversion. Under those circumstances, in my opinion, the case is governed by the rulings in *Beni Madhab Sukul* v. *Upendra Chandra Singha* (1), *Dakshina Ranjan Ghose* v. *Omar Chand Oswal* (2), and *Koti Reddi* v. *P. Subbiah* (3). The learned advocate for the appellants urged that in any event they might be given an opportunity to amend their plaint so that they might convert the suit into one for damages for conversion. In my opinion it would not be right or reasonable at this stage to allow such an amendment of the proceedings. In my opinion the decree appealed from was correct and the appeal should be dismissed with costs.

Patterson, J.—I agree.

K.N./R.K. *Appeal dismissed.*

(1) [1920] 53 I.C. 747.
(2) A.I.R. 1924 Cal. 145=75 I.C. 173=50 Cal. 992.
(3) [1918] 41 Mad. 792=46 I.C. 86.

* A. I. R. 1930 Calcutta 721 (2)

SUHRAWARDY AND COSTELLO, JJ.

Purna Chandra Dutta and *others*—Petitioners.

v.

Sheikh Dhalu—Opposite Party.

Civil Revn. No. 20 of 1929, Decided on 9th May 1930, from appellate order of District Judge, Dacca.

*** (a) Criminal P. C. (5 of 1898), S. 439—Revision against order under Ss. 476, 476-A and 476-B, by civil Court does not lie under S. 439 — In such matters High Court can only interfere under Civil P. C. (5 of 1908), S. 115 or Government of India Act (1919), S. 107.**

Revision application against order passed under Ss. 476, 476-A and 476-B, Criminal P. C., by civil Court does not lie under S. 439 of the Code as it is not a matter connected with any proceedings before any inferior criminal Court within the meaning of S. 435 of the same Code. In such matters the High Court can only interfere under S. 115, Civil P. C., or S. 107, Government of India Act, and the order can therefore only be challenged for wrong, illegal or irregular exercise of jurisdiction : 40 *Cal.* 477, *Rel. on.* [P 722 C 2]

(b) Criminal P. C. (as amended by Act 18 of 1923), S. 476 — Words "such Court" in S. 476 include "successor to office."

A Court of law does not consist of the particular individual or individuals who may be presiding over the proceedings therein at any particular moment but it is a permanent institution and therefore any judicial officer who sits in the Court is just as competent to deal with the matters coming before the Court as any other incumbent of the office. Therefore the words "such Court" in S. 476 includes the successor of the office : 10 *I. C.* 66 ; *A. I. R.* 1922 *Lah.* 479 and *A. I. R.* 1925 *Rang.* 195, *Rel. on.* [P 726 C 2]

*** (c) Criminal P. C. (as amended by Act 18 of 1923), S. 476 — It is not prudent in every case to hold preliminary enquiry before making complaint under S. 476.**

In each individual case the Court has to decide whether in the interests of justice a preliminary investigation is necessary. In a case where an offence has been committed outside the Court and not in the presence of the Judge it would certainly be judicious if not incumbent upon the Court to hold a preliminary enquiry in order to find out for itself whether such an offence was really committed. But where an offence is committed in the presence of the Court or from a perusal of the record, it is of opinion that it is necessary in the interests of justice that a further enquiry into the matter should be made in the criminal Court, it may make a complaint to that effect to the nearest Magistrate without making any preliminary enquiry. But it cannot be laid down as a proposition of law that in every case it is prudent to hold a preliminary enquiry before making a complaint under S. 476. Each case must be judged on its own facts and there may be a case where the revising authority may think that an action under S. 476 was too has-

tily taken and that there should be further investigation in the matter : 20 *Cal.* 349 ; 10 *I. C.* 66 ; 37 *Cal.* 642 ; 37 *I. C.* 469, *Rel. on.* ; *A.I.R.* 1930 *Cal.* 282, *Diss. from.* [P 724 C 1]

(d) Criminal P. C. (as amended by Act 18 of 1923), S. 476 — S. 476 contemplates action on part of Court of its own initiative and it cannot be held that because application is made irregularly that of itself debars Court from taking action in the matter.

Per *Costello, J.*—Under the wordings of S. 476 there is no restriction made as to the person or persons by whom an application can be made to the Court and therefore even if the pleader is in one sense an unauthorized person, he is nonetheless competent to make an application to the Court if he chooses. He does nothing more than to bring the matter to the attention of the Court. The section definitely contemplates action on the part of the Court of its own initiative and it cannot be held that because the application is made irregularly that of itself debars the Court from acting in the matter at all. [P 727 C 1]

(e) Criminal P. C. (as amended by Act 18 of 1923), S. 476—Matters under S. 476 cannot be held to be mainly matters inter partes.

Per *Costello, J.*—It is very much to be deprecated that the idea should become prevalent that matters under S. 476 are mainly matters inter partes. Whether a matter of this kind comes before a Court upon a complaint or whether the Court acts of its own motion, the Court ought to deal with it not so much as a piece of litigation between private parties but as a matter of public duty undertaken for the purpose of vindicating and ensuring the purity of the administration and public justice. [P 727 C 1, 2]

(f) Criminal P. C., Ss. 476 and 439—Discretion about withholding enquiry should not ordinarily be interfered with.

Per *Costello, J.*—The High Court ought to be reluctant to interfere with the Court's discretion to hold or not to hold an enquiry before making a complaint under S. 476. [P 727 C 2]

(g) Civil P. C. (5 of 1908), O. 3, R. 4 — Vakalatnama.

Per *Suhrawardy, J.*—Vakalatnama filed in a suit remains in force in all the different stages of the case. [P 724 C 2]

Camell, Nanda Gopal Banerjee and *Gopal Chandra Mukherjee* — for Petitioners.

Sures Chandra Talukdar and *Sachindra Kumar Roy*—for Opposite Party.

Suhrawardy, J.—This is an application in revision by six persons against an appellate order of the District Judge of Dacca affirming an order of the Munsif of that place passed under S. 476, Criminal P. C., lodging a complaint against the petitioners under Ss. 209 and 120-B, I. P. C., and Ss. 210 and 511 and 120-B, I. P. C. Before proceeding to deal with the merits of the case I should like to make one observation with regard to the scope of the rule issued by this Court. This application in revision does not lie under S. 439, Criminal P. C., inasmuch as it is not a matter connected with any proceedings before any inferior criminal Court within the meaning of S. 435, Criminal P. C. By an order made by the Chief Justice the Bench taking criminal matters is authorized to receive and hear appeals and revision applications against orders passed under Ss. 476, 476-A and 476-B, Criminal P. C., by civil Courts. If the revision application is not entertainable under S. 439, Criminal P. C., in such matters this Court can only interfere under S. 115, Civil P. C., or S. 107, Government of India Act : *Emperor* v. *Har Prasad Das* (1). This rule being under S. 115, Civil P. C., is very much limited in its scope and we have not the freedom which we generally assume in dealing with criminal matters under S. 439, Criminal P. C. The order of the lower Court passed in appeal under S. 476-B, therefore can only be challenged for wrong, illegal or irregular exercise of jurisdiction. I refer to this matter as this feature of these cases is not generally kept in view when dealing with them along with cases under S. 439, Criminal P. C.

The facts out of which this matter arises are that the first petitioner Purna brought a suit for money against the opposite party Dhalu in the Munsif's Court at Dacca. The other petitioners were examined as witnesses in the case. The Munsif who heard the suit was of opinion that the bond on which the suit was brought was a forgery. An application was made by Dhalu inviting the Munsif who had disposed of the suit to take action under S. 476, Criminal P. C. The Munsif refused to pass any final order on that application on the ground that an appeal was then pending from his decree. After the disposal of the appeal affirming the decree of the trial Court that the bond was a forgery Dhalu again applied to the successor of the Munsif who had disposed of the suit for action under S. 476, Criminal P. C. The learned Munsif apparently went through the record of the case and made a complaint under S. 476, Criminal P. C. On appeal that order was affirmed by the District Judge.

(1) [1913] 40 Cal. 477=19 I.C. 197=14 Cr. L.J. 197.

Mr. Camell who appears for the petitioners has urged three points not one of which in my judgment is a point covered by S. 115, Civil P. C. The first point which has been strenuously pressed is that the Munsif not being the officer who had decided the suit should have held a further enquiry into this matter before making a complaint under S. 476, Criminal P. C. The section itself does not show that a further enquiry before making a complaint is imperative under the law. The section as it originally stood before its amendment in 1923 read :

"After making any preliminary enquiry that may be necessary."

These words even were construed as making it discretionary with the Court to hold or not to hold an enquiry before making a complaint : *Chowdhuri Mahomed Izharul Huq* v. *Queen Empress* (2). The law has now been made clearer by the amendment of 1923 and the section now reads as :

"after such preliminary enquiry, if any, as it thinks necessary."

So that as a matter of law the Court is not bound to make any enquiry before making a complaint. But it is argued that in a case when the officer making the complaint is not the officer who has decided the case :

"It is prudent that he should make an enquiry."

That of course is not a question which comes within the purview of S. 115, Civil P. C. Reliance has been placed on some observations made in the judgment in *Sarat Chandra Bhattacharji* v. *Hari Charan Dey* (3). The facts of that case were that after the suit was dismissed and the order of dismissal upheld by the High Court one of the defendants applied to the Munsif who had tried the suit for action under S. 476, Criminal P. C. That application was dismissed. Another defendant, a week after, made a similar application and that application was granted by the Munsif. On appeal the learned District Judge summarily rejected it under S. 41, R. 11, Civil P. C. Against that order of the appellate Court a rule was obtained from this Court. It was held that the District Judge was not right in summarily rejecting the appeal under O. 41, R. 2, Civil P.C., but that he should have heard it under S. 476-B, Criminal P. C. After disposing of the case on this ground the learned Judges went into the merits of the case and they were of opinion that the order made by the Munsif for an enquiry by the criminal Court against the petitioner was not justified on the facts of the case, and they accordingly set aside the complaint made by the Munsif. I take it that when a matter comes up to this Court and this Court thinks that in the interest of justice the order of the lower Court should be set aside it can do so in its supervising jurisdiction. But in the judgment of that case some observations have been made which seems to me to be in the nature of obiter dicta and from which I most respectfully dissent. It is there said :

"It is true that under the provisions of S. 476, Criminal P. C., a preliminary enquiry may not be legally necessary. But it has been laid down ever since the enactment of the present S. 476, Criminal P. C., that although a preliminary enquiry may not be legally necessary it should in common prudence be held by every Court before it passes an order under S. 476, Criminal P. C. That, as we understand, is the present case law in this Court."

We asked Mr. Camell to place before us any case where the practice referred to in the above observation has been followed or insisted upon, but we were not referred to any such case. On the other hand we have a weighty decision of this Court in *Darpa Narayan Bera* v. *Bepin Behari Mitra* (4). where the facts were ver y similar to those in the case before us. The learned Judges, Mookerji and Teunon, JJ., held, following the Full Bench decision in *Shaikh Bahadur* v. *Eradatulla* (5), that the power to direct prosecution under S. 476, Criminal P. C., was conferred not upon any particular individual as for instance the trying Judge, but on the "Court" which might be at the time when the order was made presided over by another officer. The learned Judges further held that the successor of the officer before whom the original trial took place was not bound to hold any independent investigation before making an order under S. 476, Criminal P. C., that the holding of a preliminary enquiry in a proceeding under S. 476 was discretionary and that the person against whom an order was passed

(2) [1893] 20 Cal. 849.
(3) A.I.R. 1930 Cal. 282=1930 Cr. C. 362.
(4) [1911] 12 Cr. L. J. 209=10 I. C. 66.
(5) [1910] 37 Cal. 642=11 Cr. L. J. 407=6 I. C. 801.

without such an enquiry could not complain unless he was prejudiced by the omission. Mr. Camell has not pointed out any circumstance in this case which would go to show that his clients have been prejudiced in any way by the Munsif not holding a preliminary enquiry before making the order under S. 476, Criminal P. C. He has argued the case upon the general principle that in every case it is prudent if not necessary that a preliminary enquiry should be held before a complaint is made under S. 476, Criminal P. C. I am unable to accept this view of the law as flowing from the statute or even as reasonable for practical purposes. The true rule of law seems to me to be as observed in *Darpa Narain Bera's* case, that the Court has to decide in each individual case whether in the interests of justice a preliminary investigation is necessary. In a case where an offence has been committed outside the Court and not in the presence of the Judge it would certainly be judicious if not incumbent upon the Court to hold a preliminary enquiry in order to find out for itself whether such an offence was really committed. But where an offence is committed in the presence of the Court or from a perusal of the record it is of opinion that it is necessary in the interests of justice that a further enquiry into the matter should be made in the criminal Court, it may make a complaint to that effect to the nearest Magistrate without making any preliminary enquiry. What in short is the view which I entertain in the matter is that it cannot be laid down as a proposition of law that in every case it is prudent to hold a preliminary enquiry before making a complaint under S. 476, Criminal P. C. Each case must be judged on its own facts and there may be a case where the revising authority may think that an action under S. 476, Criminal P. C., was too hastily taken and that there should be further investigation in the matter. In the case before us the learned Munsif .though he did not try the case went through the record and in the concluding portion of his order says :

"Now, it appears to me on a careful examination of the record that a prima facie case has been made out that all the opposite parties above named have committed an offence punishable under S. 209/120-B, I. P. C., and also under S. 210/511/120-B of the said Code."

It is difficult to see what further investigation in the matter the Munsif could have made. Nor do I think any useful purpose would have been served if the Munsif had examined the petitioners over again and probably taken some more evidence of the same kind. The suit was filed upon a bond and it was supported by the evidence of not less than six witnesses. The Munsif who had decided the suit went thoroughly into the matter, and from the circumstances and evidence in the case was clearly of opinion that the bond was a forgery. That decision was upheld by the appellate Court. I do not think that the petitioners were in any way prejudiced by the Munsif not making a further investigation in the matter.

The second ground urged by Mr. Camell is that the pleader who moved this petition on behalf of the opposite party before the Munsif was not authorized by a fresh vakalatnama by the party and therefore the action taken by the Munsif on that petition was ultra vires. There is no substance in this contention as under S. 476, Criminal P. C., the Court may take action of its own motion and what the pleader did on behalf of the opposite party was to bring the matter to the notice of the Court. Further, the rule is that a vakalatnama filed in a suit remains in force in all the different stages of the case. The objection, even if there is any substance in it, is highly technical and ought not to be given effect to.

It is lastly argued that the judgments of the Courts below did not contain sufficient materials for making the complaint against petitioners 2 to 6. What the Munsif held was that a false suit was brought in his Court as the result of a conspiracy between the plaintiff in that suit and his witnesses. Though the false suit was brought by the first petitioner the other petitioners helped him in prosecuting it in the Court. Some of these petitioners, all of whom were witnesses in the suit, spoke to the execution of the bond by Dhalu; some others spoke to the fact that they went to Dhalu and made demand for the payment of the debt covered by the

bond and Dhalu admitted the debt and applied for time for payment. When the matter will be tried before the criminal Court these petitioners will have an opportunity of showing that they did not conspire with the plaintiff in bringing a false suit. Matters, as they now stand, justify the order passed by the Munsif that all these persons had conspired to make a false claim in a Court of justice. These are all the grounds urged before us and all of them having been overruled, the Rule is discharged.

Costello, J.—I entirely agree with what has fallen from my Lord. I think however that I ought to add a few words of my own with regard to this matter, because reliance has been placed upon the case of *Sarat Chandra Bhattacharjee* v. *Hari Charan Dey* (3) from some of the observations in which I respectfully dissent. I cannot altogether accept the view of the case law which seems to be enunciated in the judgment of C. C. Ghose, J. With the greatest respect to him and all due deference to his experience in matters of this kind, I cannot help in coming to the conclusion, that the proposition laid down on p. 49 of the report is far too wide. The passage to which I refer reads as follows:

"But it has been laid down ever since the enactment of the present S. 476, Criminal P.C., that though a preliminary enquiry may not be legally necessary, it should in common prudence be held by every Court, before it passes an order under S. 476, Criminal P. C. That as we understand, is the present case law in this Court."

If that statement really represents the present case law on this point, I can only say that personally I think the case law goes considerably further than the words of the statute themselves warrant. It is to be observed in the first place that there are a number of decisions (to some of which my brother Suhrawardy has already referred) which unquestionably make it clear that even under the old corresponding section of the Criminal Procedure Code a preliminary enquiry was in no sense obligatory. The previous words of the section were "such Court after making any preliminary enquiry that may be necessary." So even under that phraseology it was not a necessary condition precedent to the making of an order under S. 476, that there should be any preliminary enquiry at all. The section did not say so, and therefore to hold that there was any rigid rule of law on the point, is to my mind to go beyond the words of the section. The section says "that may be necessary," thus assuming that there were cases in which an enquiry might be necessary and cases in which an enquiry might not be necessary. It follows therefore that an order made under the terms of the old section was not necessarily bad, because no enquiry at all had in fact been made before the Court concerned made an order.

Now when one looks at the words of the present section one can only take the view, in my judgment that a fortiori no preliminary enquiry is necessary as a matter of law, because the words of the section now run thus on this point: "Such Court may, after such preliminary enquiry, if any, as it thinks necessary." It follows from the form of the words used that it is entirely a matter for the discretion of the Court concerned whether any enquiry is necessary or not. It is quite true that the circumstances of a case may require as a matter of caution, or to use the words which my brother C. C. Ghose used in the judgment to which I have referred "as a matter of prudence" that, the Court in dealing with the matter should hold some kind of enquiry before making an order under S. 476. But as my brother Suhrawardy has already pointed out it cannot be necessary, or even a matter of prudence, that any enquiry should be held in cases where for example all the facts which are material to the charge which is to be made have already come out in the course of the hearing of the case itself or where they have already been brought to the notice of the Court in such a form that the Court can rely on the information before it. In this connexion, I refer to a judgment of this Court in the case of *Taru Babu* v. *Emperor* (6), in which Sanderson, C. J., said this:

"It may be that in a case where the Judge is trying the case, and all the facts which are material to the charge have been brought to the notice of the learned Judge, or have come out during the course of the hearing of the case, it would be mere waste of time and

(6) [1917] 18 Cr. L. J. 117=37 I. C. 469.

quite unnecessary to hold a preliminary enquiry because the learned Judge is already in possession of all the material facts on which it is necessary for him to form the judgment."

The learned Chief Justice went on to say with reference to the facts of the case then before him :

"But in such a case as this, where the incident took place outside the Court, and as to which the learned Judge himself could have no knowledge, and as to which evidence must be called for, in my judgment, unless he does hold such a preliminary enquiry as may be necessary to enable him to determine whether or not there is any case, fit to be sent to the Magistrate, he has no jurisdiction to send the accused under S. 476."

I respectfully agree with what the learned Chief Justice said, and it seems to me that his observations draw a resonable line of demarcation between cases where an enquiry is not necessary and cases where the enquiry is at any rate prudent if not altogether necessary. If we were to hold that in all cases, an enquiry, if not absolutely necessary is at any rate desirable as a matter of common prudence, we should in my opinion, be travelling a very long way outside the scope of the words of the section itself and at the same time we should be opening the door to a flood of unfounded and unwarranted applications to this Court on matters arising out of orders made by virtue of the terms of S. 476.

With regard to the actual case, now before us, I ought to add one or two observations. This case manifestly falls within the class of cases referred to by Sanderson, C. J., where all the facts material to the making of the decision as to whether there should be a complaint or not, were before the learned Munsif to whom the application was made. It is true that the particular Munsif who made the order which is now impugned, was not the Munsif who had heard the case out of which the charge arose, but he had before him the official record of the proceedings from which he could see that his predecessor in office in that particular Court, and also the District Judge to whom an appeal had been taken, had both come to the conclusion that the document on which the plaintiff's case was based, was not a genuine document and that the persons against whom the complaint was made were all jointly implicated in putting it forward in the course of the case if not actually fabricating it, for the purpose. Therefore the learned Munsif before whom the application was made, in my opinion, could not do otherwise than to accept the records as being correct and they set forth the considered opinion of the two judicial officers who had heard and considered the whole of the evidence and had come to a finding upon the facts as presented in course of the case.

A point was sought to be made by Mr. Camell on behalf of the present petitioners that it was not competent to the learned Munsif who made the order to deal with the matter in the way he did because in fact he was not the Munsif who had heard the original case. My learned brother has already referred to one authority, *Durpa Narayan Bera* v. *Bepin Behary Mitter* (4) where it was held that the successor of the officer before whom the original trial took place is not bound to hold an independent investigation before making the order under S. 476, Criminal P. C., for the reason that the power to direct a prosecution under that section is conferred on "the Court" and not merely on the individual judicial officer who happens to hold office at the time of the original trial. In other words, as I pointed out in the course of the argument before us, it is not a question of the particular incumbent in office at the time when the application is made, but it is a question of the particular Court to whom the application is made. In this connexion I would refer to the case of *Tara Chand* v. *Emperor* (7), where it was held that the Court of a Subordinate Judge is a permanent Court; therefore a Subordinate Judge is competent to continue an enquiry under S. 476, Criminal P. C., begun by his predecessor: see also *Maung Shwe Phe* v. *Ma Me Hmoke* (8). A Court of law does not consist of the particular individual or individuals who may be presiding over the proceedings therein at any particular moment, but it is a permanent institution and therefore any judicial officer who sits in the Court is just as competent to deal with the

(7) A. I. R. 1922 Lah. 479=67 I. C. 728=23 Cr. L. J. 451.

(8) A. I. R. 1925 Rang. 195=85 I. C. 244=26 Cr. L. J. 500=3 Rang. 48.

matters coming before the Court as any other incumbent of the office. Therefore the words in the section "such Court" include the successor to the office: cf. *Grish* 42 *C.* 667 *at p.* 670).

One other point I desire to refer to and it is this: Mr. Camell sought to make something of the fact that the application in this proceeding was made to the learned Munsif by a pleader who is said not to have been properly authorized by any client to make the application which he did. My learned brother has already dealt with one aspect of that matter. I may also add that under the wording of the section itself there is no restriction made as to persons by whom an application can be made to the Court under S. 476, Criminal P. C., and therefore, even if the pleader is in one sense an unauthorized person, he is none the less competent to make an application to the Court if he so chooses. He does nothing more than to bring the matter to the attention of the Court. Clearly in my opinion it is then open to the Court, if it thinks fit in the interests of justice, to take action in the matter in the same way as it might take action suo motu without any application at all, as the section definitely contemplates action on the part of the Court of its own initiative. It seems to me impossible to hold that because the application is made irregularly that of itself debars the Court from acting in the matter at all. If the Court can act on its own motion, the Court cannot be prevented from acting merely because it was prompted to take action by some application which might be said to have been irregularly made. What is overlooked, I am afraid, in connexion with matters arising under S. 476, Criminal P. C., is that all the offences referred to, that is to say, offences mentioned in S. 195, Criminal P. C., are offences against public justice and therefore I think any Court which, from any source acquires knowledge that there is a probability that one of such offences has been committed, ought then as a public duty in suitable cases to make a complaint as contemplated under S. 476, Criminal P. C. To my mind it is very much to be deprecated that the idea should become prevalent that matters under S. 476 are mainly matters inter partes. In the particular case with which we are now concerned, I observe that the learned Munsif treated the applications before him as if they were contests as between two private contesting parties and the applications were accordingly denominated as Miscellaneous Cases Nos. 61 and 62. It may be that for the purpose of record it is necessary that all applications should be described in some form or other, but all the same I do not think that they ought to be treated as if in fact they were merely matters of private litigation between individual parties. One of the objects of S. 476 is to prevent a private person who happens to be an unsuccessful and disappointed litigant, from captiously retaliating upon his successful opponent by instituting or seeking to institute criminal proceedings against him. Whether a matter of this kind comes before a Court upon a complaint or whether a Court acts of its own motion, the Court ought to deal with it not so much as a piece of litigation between private parties but, as I have already said, as a matter of public duty undertaken for the purpose of vindicating and ensuring the purity of the administration for public justice. It is quite true that in S. 476 a right of appeal is given not only to persons against whom an order is made but also to persons who make an application for an order to be made, and whose application has been refused. To that extent undoubtedly the matter must be dealt with in one sense as being one of private litigation, but I do not think that anything should be done unnecessarily to encourage that view of the matter. With that in mind I think this Court ought to be very reluctant to interfere with the discretion which is undoubtedly conferred upon a Court when making a complaint under S. 476.

In the particular case before us, as my learned brother Suhrawardy says, it is quite obvious that there is not the slightest justification for putting forward the matter as one arising under S. 115, Civil P. C. For the reasons I have given, I agree that the rule must be discharged.

P.N./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 728

PEARSON AND PATTERSON, JJ.

Aswini Kumar Pal — Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 670 of 1929, Decided on 27th January 1930.

Penal Code, S. 486—Proper test is whether ordinary unwary purchaser would be deceived.

In a case under S. 486 the proper test is not whether a purchaser if literate would be deceived if he had the two articles side by side, but the matter should be considered from the point of view of the ordinary unwary purchaser. [P 728 C 1]

P. C. Chatterjee and *Bireshwar Chatterjee*—for Appellant.

A. K. Basu and *Santosh Nath Mukerjee*—for the Crown.

Judgment.—The appellant has been convicted of an offence under S. 486, I. P. C., and sentenced to pay a fine of Rs. 500. The charge against the accused was that he had in his possession for sale or purposes of trade certain tins of corn-flour bearing a trade-mark or property mark which was a counterfeit of the mark of Messrs. C. & E. Morton Ltd. Of the marks forming the subject matter of the charge only one described as "Matrons" has been held by the learned Chief Presidency Magistrate to be a counterfeit under the section, but although this is so, it is nevertheless relevant in the present case to observe that at the search which resulted in the prosecution certain other brands of this commodity were found in the accused's possession in which he also traded, bearing different labels, namely "Nortons" "Motor" "Leton's" and "Newtons." "Nortons" has been the subject of injunction proceedings in the High Court and as the Magistrate notes is a closer counterfeit than the others. The conviction, as already stated, is only in regard to "Matrons." We have had an opportunity of comparing the tins and labels for ourselves. As the learned Magistrate observes, no one could possibly mistake them if he were in the least on the alert, and knew the original at all well. It is equally clear that the purchaser (if literate) would not be deceived if he had the two tins side by side. But that is not the proper test; it must be considered from the point of view of the ordinary unwary purchaser. There are no doubt, as has been pointed out to us, a large number of differences, chiefly in deail; among these may be mentioned the fact that the offending label states that the goods are "made in Calcutta" whereas the complainant's tins are embossed at the foot "Manufactured in Eagland:" other considerable differences may be noted in the colour, or rather in the shade of colour used, and the price at which the articles were sold, Rs. 13-4-0 per ℔ as opposed to Rs. 7-8-0 per ℔. The resemblances in the get-up are also fairly numerous, the chief ones being the name G. & I. Mations as against C. & E. Mortons, the shape and size of tin, the "Eagle" or "bird" brand in a white oval forming a prominent part of the label design, and the general similarity of get-up in the mixture of red and green employed on the label. We are satisfied that upon the whole there is ground to support the finding of the learned Magistrate, that the resemblance is such that a person might be deceived thereby, and the presumption is that the accused intended thereby to practise deception or know it to be likely that deception would thereby be practised. This presumption under S. 28, I. P. C., the accused contends, is rebutted by the fact that he purchased the rights in the offending label and design with dies, etc., at a receiver's sale in 1924, and he relies on that to show that he "acted innocently" under S. 486 (c), I. P. C. This may help him as far as it goes, but the other circumstances in the case, and particularly the possession of "Nortons," would rather go to show that the accused is concerned to see how near the line he can go in trading on the reputation of another manufacturer. A further point was taken that S. 15, Merchandise Marks Act, was a bar to the prosecution as having been commenced more than three years after the commission of the offence. This however is of no substance: that part of this section is designed to prevent stale claims from becoming the subject-matter of criminal prosecution, and cannot apply to a case such as this where the offence is a continuing one.

The appeal is accordingly dismissed and the conviction and sentence upheld.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 729

PANCKRIDGE, J.

Wilson-De-Roze—Petitioner.

v.

Wilson-De-Roze—Respondent.

Matrimonal Suit No. 19 of 1929, Decided on 5th August 1929.

Divorce Act (4 of 1869), Ss. 8 and 14, Proviso—Petition for dissolution of marriage — Wife driven desparate by husband's cruelty, adultery and desertion, adopting life of prostitute— Petition should be allowed.

A husband cannot rely upon misconduct of wife to which he has conduced.

A treated his wife with great brutality and deserted her, leaving her and her child of the marriage wholly unprovided for. The wife being driven desperate by her poverty adopted the life of a prostitute to provide for herself and her child. After saving a little money she gave up that mode of living. Having discovered her husband who was living in a most dissolute manner, she petitioned for dissolution of the marriage on the ground of her husband's cruelty, adultery and desertion, stating all the facts frankly.

Held : that under the circumstances it was a fit case for exercising the discretion in favour of the petitioner by granting a decree for dissolution : *Tickner* v. *Tickner*, (1924) *P.* 118 and *Symons* v. *Symons*, (1897) *P.* 167, *Foll.*; *Burdon* v. *Burdon*, (1901) *P.* 52, and *Pretty* v. *Pretty*, (1911) *P.* 83, *Ref.* [P 731 C 1]

R. C. Bannerjee and *Sikhar K. Bose*—for Petitioner.

Judgment.—In this case, I made a formal decree nisi for dissolution of marriage on Friday, but, inasmuch as the circumstances raise questions of some public importance, I intimated that I would deliver a considered judgment today.

The petition is a wife's petition for dissolution of marriage, on the ground of the respondent's adultery, cruelty, and desertion. The facts can be briefly stated. The parties, who are domiciled in British India, were married on 3rd October 1916 ; there have been two children of the marriage, a son born in December 1917, who is still surviving, and another child who was born in 1919 and died in infancy. The petitioner complains that not only did her husband treat her with great brutality, but, from the very outset, he neglected to maintain her or her children. She was compelled, as early as 1918, when her elder child was ill, to seek the hospitality of her sister Mrs. Cove. After the child recovered she was willing to return to her husband, but he refused to take her back and from the middle of 1919, he absented himself and has not contributed an anna to the petitioner's support. The second child was born shortly after his departure in October 1919. I hold, in the circumstances, that the respondent's conduct amounts to desertion. I also accept the petitioner's evidence as to cruelty. She says her husband frequently assaulted her, especially when he was drunk, and in this she has been corroborated by her sister, Mrs. Cove, and her sister-in-law, Mrs. Spry.

The important part of her story is the sequence of events following the desertion. It is quite obvious that the petitioner's family has little or no means, and I believe her when she says that her parents are penniless and are supported by what their children can allow them.

After the birth of the second child, the petitioner found it necessary to seek employment, but the best situation she could obtain was one in a shop on a salary of Rs. 25 a month : this she found insufficient for her needs and she got into debt. Shortly after the death of the second child, she met a woman, who suggested to her that, if she would become a prostitute, she would make money. She says she felt desperate, as well she might, left her employment and became an inmate of a brothel in Marsden Street, conducted, as I understand, by the woman, who made the suggestions referred to above. After about a year, she migrated to a similar establishment in Karaya Road. She states that, in 1927, having saved some money, she gave up a life of prostitution after notifying the police of her intention. She says that, from 1920 to 1927, she regularly supported her surviving child, spending about Rs. 100 a month on his account. Receipted bills from the school, where the child was being educated, have been shown me, which bear out her story in this respect. Since 1927, she has been making a small income by dealing in second-hand furniture and by dress-making, with which she has supplemented the savings she accumulated while she was leading the life I have described. Early in this year, on the suggestion of a Catholic priest, she wrote to her husband,

proposing a reconciliation. She has not kept a copy of the letter, but his reply has been put in, in which he declines to have anything to do with the petitioner, on the ground that his marriage has been a failure and he goes on to tell her that, since they parted, he has frequently misconducted himself. After receipt of this letter, the petitioner discovered the respondent's whereabouts, and, in May of this year, in the company of Mrs. Spry, she was successful in tracing him to a house in Wellesley 2nd Lane, where she found him in the company of a prostitute, in circumstances which leave no doubt that adultery was committed. Thereafter, these proceedings were circulated. The petitioner has given her evidence with the utmost candour and I have not the slightest hesitation in accepting her statements, which have besides been corroborated on the important points. I, therefore, find that the respondent has been guilty of cruelty and of adultery. I also find that he deserted the petitioner in 1919, but, in view of the wife's conduct in 1920, it is difficult to say that he has been guilty of desertion, without reasonable excuse, for two years and upwards.

Now adultery and cruelty are matrimonial offences, which combined prima facie entitle a wife to a decree of dissolution. However, the proviso of S. 14, Divorce Act, is as follows :

"Provided that the Court shall not be bound to pronounce such decree if it finds that the petitioner has during the marriage been guilty of adultery."

Section 178, Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. V. c. 49), which reproduces S. 31, Matrimonial Causes Act, 1857 (20 & 21 Vict, c. 85), is in similar terms. The provisions of S. 8, Divorce Act, 1869, render it necessary that I should consider the principles on which the Divorce Division of the High Court of Justice exercises the discretion conferred by the proviso.

Now it is clear that since the year succeeding 1857, the standard which the English Court applies in affording relief to a guilty spouse has tended to become less rigid. That this is so is specifically recognized by Duke P., in *Tickner* v. *Tickner* (1) and in that case the learned President, though invited so to do by the King's Proctor, expressly declined to lay down a system of classification and contented himself with observing :

"Two limitations suggest themselves, for which there is authority. As between parties a petitioner may not claim divorce on account of misconduct to which the petitioner has conduced; and on the same principle, as was explained in *Symons* v. *Symons* (2), a respondent may not rely upon misconduct of a petitioner to which the respondent has conduced."

The passage just cited shows that, in considering the case of a guilty petitioner, the conduct of the respondent has to be taken into account and that is so whether or not the respondent appears. Applying this test, I have no doubt that, although the respondent did not cause the petitioner's misconduct, in the sense of coercing her into a life of prostitution, his cruelty, his desertion and above all his neglect to maintain their child contributed and conduced in a very large measure to her adopting the means she did to get a living.

In *Burdon* v. *Burdon* (3) Gorell Barnes, J., exercised his discretion in favour of a wife, who, although originally forced to lead the life of a prostitute by her husband, continued to do so for some time after the coercion had been removed.

The Court further is disposed to look with more favour on a petitioner, who is frank and candid than on one who is guilty of concealment. This appears from the judgment of Bargrave Deane, J., in *Pretty* v. *Pretty* (4), where that learned Judge observed :

"I must put aside the feelings of indignation with which I naturally regard the petitioner owing to her having committed perjury. Some people seem to think that it is not a matter to be surprised at that people who have sinned should also commit perjury. There can be no greater mistake. In this Court perhaps above all other Courts, honesty is the best policy; and where the honest and straightforward course is pursued, this Court is always willing to recognize the weakness of the sex."

The same Court in *Hampson* v. *Hampson* (5) reluctantly gave relief to an adulterous wife who had been guilty of perjury. Now, in this case, as I

(1) [1924] P. 118.

(2) [1897] P. 167.
(3) [1901] P. 52.
(4) [1911] P. 83=104 L. T. 79=27 T. L. R. 163=80 L. J. P. 19.
(5) [1914] P. 101=110 L. T. 992=58 S. J. 474=30 T. L. R. 392=83 L. J. P. 53.

have already observed, no attempt has been made either in the petition or in the evidence which the petitioner has given to keep material facts from the Court. She has, therefore, this in her favour: that her mode of life from 1920 to 1927 was one for which the respondent's behaviour is largely responsible and in the proceedings themselves her candour has been beyond criticism. I think too, the fact that she has maintained her child in a way which is perfectly satisfactory, considering the position in life of the family, is entitled to some weight. She is now living a respectable life and has, I am told, made proper arrangements for the future education of the boy.

From the moral aspect, I do not consider that her conduct compares unfavourably with that of the petitioner in *Tickner* v. *Tickner* (1) in whose favour the Court exercised its discretion, although having been compelled to leave her husband in 1909, she formed an adulterous connexion with her employee in 1910, which was still subsisting when the petitioner was heard in 1923.

After consideration of all the circumstances, I am prepared to exorcise my discretion in the petitioner's favour. I do not think that either the welfare of those directly or indirectly concerned or the interests of morality demand the preservation of the matrimonial tie in this case, and I, therefore, pronounce a decree nisi for dissolution with costs.

R.M./R.K. *Petition allowed.*

A. I. R. 1930 Calcutta 731

GRAHAM AND MITTER, JJ.

Kedar Nath Poddar—Plaintiff—Appellant.

v.

Gaya Nath Poddar and *others*—Defendants—Respondents.

Appeal No. 207 of 1928, Decided on 16th April 1930, from appellate decree of 2nd Sub-Judge, Pabna and Bogra D/-13th June 1927.

(a) Will—Construction—Life estate only held to have been intended.

A portion of a will read as follows: "My daughter and her one son are alive. On the strength of this will, the said daughter and her son shall possess and enjoy the immovable properties set forth in the will. If they have to transfer in any way by gift, sale or otherwise, they shall have to do so only in favour of my brother's son Gaya Nath Poddar. That alone shall be valid. On the other hand upon hindrance to (in the event of the death of) the said daughter and her son, according to the terms of my this will, the title of my brother's son Gaya Nath Poddar shall accrue to all my immovable properties set forth in my this will. He shall acquire full and complete title to the said properties and my said brother's son shall have power to transfer the properties in every way by gift or sale."

Held: that the intention of the testator was to bequeath only a life estate and not an absolute estate in the property. [P 732 C 1,2]

(b) Succession Act (39 of 1925), S. 138—S. 138 is applicable only to absolute bequests—Restraint upon alienation does not arise when bequest is of life estate.

In order to make S. 138 applicable it must be made clear that the fund is bequeathed absolutely. The word "absolutely" qualifies not only the first part, namely, the word "bequeathed" but also the latter part consisting of the words "for the benefit of any persons" Restraint upon alienation therefore arises only when the property is absolutely bequeathed and by implication there would be no such restraint where the demise is merely of life interest: *Brandon* v. *Robinson*, (1811) 18 *Ves. Jun.* 429, *not Foll.* [P 732 C 2]

(c) Interpretation of Statutes—Recourse to English authorities cannot be taken when there is no legislative omission.

When the case is not one of legislative omission, the Court cannot take recourse to English authorities for determining the intention of the legislature. [P 734 C 1]

(d) Will—Power—Testator can exercise his volition in any way so long he is not restrained by any law.

A testator is free to exercise his volition in any way provided in the exercise of such volition he is not restrained by any provision of law. [P 734 C 1]

Brojolal Chakravarti and *Krishna Kamal Moitra*—for Appellant.

Sarat Chandra Basak and *Dwijendra Krishna Dutt*—for Respondent.

Graham, J.—This is an appeal by the plaintiff from a decision of the Subordinate Judge, 2nd Court, Pabna, affirming a decision of the Munsif, Second Court, Pabna and arises out of a suit for a declaration of title to and recovery of possession of certain lands described in the plaint.

The plaintiff's case was that Mohim Chandra Poddar, who owned the properties in dispute, died on the 7th Falgoon 1325 B. S. corresponding to the 19th February 1919 leaving as his heirs defendants 2 and 3 who are his daughter's sons. Plaintiff 1 purchased the properties from them on the 18th of Pous 1327 corresponding to 2nd January 1921 in the name of his son plaintiff 2 since deceased and possessed the suit properties until Falgoon 1327 when according to the plaintiff, defendant 1 dispossessed him therefrom. The plain

tiff further alleged that after the purchase of the properties from defendants 2 and 3, defendant 1 propounded a will which was said to have been executed by the aforesaid Mohim Chandra Poddar and obtained probate thereof from the District Judge of Pabna as executor. Mohim Chandra Poddar, however, bequeathed an absolute right in the properties to defendant 2 by that will and defendant 1 had no right to dispossess the plaintiff. The suit was contested by defendant 1 alone, the main contention being that the will conferred only a life-estate on defendant 2 and his mother, who predeceased Mohim Chandra Poddar, and that defendants 2 and 3 had no right to sell the properties in question to the plaintiff who therefore, it was pleaded, acquired no title by his purchase.

The trial Court dismissed the suit holding that the will conferred only a life estate upon defendant 2 and his mother who predeceased that testator, that the restriction on alienation imposed by the will was legal, and that in consequence the plaintiff had acquired no title by his purchase. Against that decision an appeal was preferred to the District Court and the learned Subordinate Judge who heard the appeal concurred with the view which had been taken by the Munsif and dismissed the appeal. The plaintiff has now perferred this second appeal.

Two main points arise for decision in the appeal: firstly whether Mohim Chandra Poddar bequeathed only a life estate or an absolute interest in the properties in suit to defendant 2 by his will ; and secondly whether plaintiff 1 has acquired any title to the properties in suit by his alleged purchase. With regard to the first point I do not think that there can be any doubt upon a true construction of the terms of the will that the intention was to bequeath a limited interest or an interest for life only and not an absolute interest. Para. 1 of the will which is the material portion reads as follows :

"My daughter and her one son are alive. On the strength of my this will, the said daughter and her son shall possess and enjoy the immovable properties set forth in the will. If they have to transfer in any way by gift, sale or otherwise they shall have to do so only in favour of my brother's son Gayanath Poddar. That alone shall be valid. On the other hand, upon hindrance to (in the event of the death of) the said daughter and her son, according to the terms of my this will, the title of my brother's son Gayanath Poddar shall accrue to all my immovable properties set forth in my this will. He shall acquire full and complete title to the said properties and my said brother's son shall have power to transfer the properties in every way by gift or sale."

This passage seems to indicate clearly that the intention of the testator was to bequeath only a life-estate and not an absolute interest in the properties.

With regard to the second point, namely, as to whether plaintiff 1 has acquired any title to the properties the answer depends npon the view which is taken of S. 138, Succession Act. That section reads as follows :

"Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction."

The learned advocate for the appellant has construed the first part of this section in a manner which seems to me to be very doubtful. In order to make this section applicable it must be clear that the fund is bequeathed absolutely. The learned advocate had placed reliance upon the portion of the section consisting of the words "or for the benefit of any person." As I understood his argument he sought to draw a distinction between this and the preceding part of the sentence, namely the words "bequeathed absolutely." As I read the section the word "absolutely" qualifies not only the first part, namely the word "bequeathed," but also the latter part consisting of the words "for the benefit of any person." In other words the opening part of the section reads virtually as if it had been expressed thus :

"Where a fund is bequeathed absolutely to or absolutely for the benefit of any person,"

etc. The fact that there is no comma after the word "to" seems to me to lend support to this view. If this construction is correct then restraint upon alienation would arise only where the property is absolutely bequeathed and by implication there would be no such restraint where there is a demise not of an absolute interest but merely of a temporary or life interest. Some English cases were referred to by the learned advocate for the appellant some of which certainly lend some support to the contrary view, and I am bound to say that there is a good deal to be said in favour

of the view that conditions restraining alienation by a tenant for life ought also to be deemed to be void inasmuch as the power of alienation may be said to be as much incident to that kind of interest as it is to an absolute interest : *Brandon* v. *Robinson* (1). Whatever the English authorities may be on the point however in this country we have the statute and are to be guided by it. On the whole it appears to me that the conclusion arrived at by the Court below is correct.

There was an alternative prayer in the plaint, that in the event of the sale being held to be invalid the sum of Rs. 500 which was paid as consideration for the purchase of the properties should be refunded. We think that that prayer ought to be granted in the circumstances. We therefore discharge the decrees of the Courts below and in lieu thereof direct that a sum of Rs. 500 only with interest at the rate of six per cent per annum from the date of the decree of the trial Court be paid to the plaintiffs by defendant 2 to be realized out of the disputed properties belonging to him in the hands of defendant 1. The plaintiffs will get their costs of this appeal only, the said costs to be realized in the aforesaid manner.

Mitter, J.—I agree with my learned brother in the order which he has made in this case. The question in this appeal turns on the validity of a certain clause in the will of the testator Mohim Chandra Poddar. The plaintiff in this suit claims to have purchased the properties in dispute from defendant 2 for a consideration of Rs. 500. It appears that the properties originally belonged to the maternal grandfather of defendant 2 who executed a will so far back as the year 1905 by which he gave the life interest in these properties to the daughter, that is the mother of defendant 2, who is now dead, and to defendant 2. There was a clause in this will by which the two holders of estates for life were restrained from alienating the properties by gift, sale or otherwise except in favour of the testator's brother's son Gaya Nath Poddar who is defendant 1 in the suit and in whose favour there is an ultimate bequest in the will, for it is stated in the will that after the determination of the life interest created in favour of the daughter of the testator and the daughter's son who is defendant 2, Gaya Nath shall acquire full and complete title to all the immovable properties and that he shall have power to transfer the properties in every way by gift or sale.

(1) [1811] 18 Ves. Jun. 429.

The question raised in the Courts below by defendant 1 was that this restraint on alienation by the clause in the will to which I have referred was valid and operative and consequently the plaintiff had not acquired any title by his purchase of the disputed properties from defendant 2. This contention of the defendant was accepted by both the Courts below and the question in this appeal is whether this conclusion of the Courts below is right or not. The determination of this question really turns on an interpretation of the provisions of S. 138, Succession Act. It is contended on behalf of the appellant that the conclusion arrived at by the Courts below is wrong seeing that S. 138 is not only applicable to the case of absolute bequest, but also to the case of a bequest creating a life interest in favour of defendant 2 and in support of this contention reference has been made by Mr. Brajalal Chakrabarti, who appears for the appellant, to several English cases. He contends that according to the English authorities conditions restraining alienations by a tenant for life either of real or of personal property have been held to be void and refers to the cases which are collected in Jarman's well-known Text-book on Wills, Edn. 6, p. 1495. It appears to me however that these English cases are of little assistance and we have to consider the particular section of the Succession Act. S. 138 runs as follows :

> "Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction."

It appears clear from the plain language of this section that restraints against the mode of enjoyment is held to be operative only in a case where the bequest is an absolute bequest either to a particular person or for the benefit of any particular person. It was not the intention of the legislature to make a restraint against any alienation operative in a case where the bequest is not

an absolute bequest, or in other words where a bequest is as in the present case limited to the life of any particular legatee. It is not a case of legislative omission so that we may have recourse to English authorities for the purpose of determining the intention of the legislature. A testator is free to exercise his volition in any way he chooses provided in the exercise of such volition he is not restrained by any provision of law. S. 138 imposes no such restraint as it is limited in the case of absolute bequests, and it is conceded by Mr. Brajalal Chakrabarti that the bequest in the present case is not an absolute bequest but a bequest limited to the life of defendant 2. S. 138 therefore does not assist the appellant in the present case. It seems therefore that the Court below have taken the right view as regards the operative character of the restraint against alienation. If the transfer is invalid it does not mean, as there is no clause of forfeiture, that the property should pass to defendant 1 by reason of the transfer at the present moment. The effect of the invalid transfer is that the properties still remain with defendant 2. In these circumstances, as defendant 2 has received a large consideration by the sale of these properties to the plaintiff which turns out to be invalid having regard to the construction of the will which has been accepted by us it is only equitable that he should refund this sum which forms the consideration for the deed of sale. It is also equitable that this sum should be realized out of the properties which were sold by defendant 2 and of which defendant 1 is in possession as executor.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 734

SUHRAWARDY AND COSTELLO, JJ.

Chitpore Golabari Co. Ltd.—Defendants—Appellants.

v.

Hari Mohan Ghose and *others*—Plaintiffs—Respondents.

Appeals Nos. 1946 to 1949 of 1927, Decided on 26th February 1930, against appellate decrees of Dist. Judge, 24-Parganas, at Alipur, D/- 6th April 1927.

Bengal Tenancy Act (8 of 1885), S. 50—S. 50 provides that in suits under Bengal Tenancy Act presumption shall apply, while in suits under general law, it may apply.

The object of the legislature in providing for the presumption as to fixity of rent mentioned in S. 50 is to provide in suits or proceedings under the Act, that is, suits arising between landlord and tenant, that the presumption shall apply on necessary facts being proved; in cases arising under general law the Court may apply the similar presumption: 10 *I. C.* 325 and *A. I. R* 1927 *Cal.* 174, *Ref.* [P 735 C 2]

Sarat Chandra Basak and *Gour Mohan Dutt*—for Appellants.

Amarendra Nath Bose and *Hemanta Kumar Bose*—for Respondents.

Costello, J.—These appeals (Nos. 1946 to 1949 of 1927) are from a decision of the District Judge of 24 Parganas confirming a decision of the Subordinate Judge, 2nd Court, Alipur. They arise out of one judgment. The plaintiffs in the suits out of which these appeals arise were suing for ejectment of the defendants from four holdings. The plaintiffs' case was that the lands with which the suits are concerned appertained to a putni in Touzi No. 343 of the 24 Parganas Collectorate belonging to Hari Mohan Ghose plaintiff 1 and his brother Harihar Ghose in equal shares. Harihar Ghose executed a trust deed appointing the other plaintiffs as trustees and they were in possession of the half-share which belonged to him. The plaintiffs averred that the lands in question were situted within Mouza Pujali within the plaintiffs' mahal and were held under them as appertaining to tenancies which are ticcagar kayemi and non-transferable, and rents were paid to the plaintiffs by the occupiers of the lands in the names of the recorded tenants. The plaintiffs further stated that the tenancies had been sold without the plaintiffs' knowledge and consent to the present defendants by the occupiers who abandoned the tenancies without making any arrangement for payment of rent and that accordingly the defendants were in possession of the land as trespassers. They therefore claimed the ejectment of the defendants from the land and the right to hold the taluk in khas possession. The real defence set up by the defendants was that the disputed tenancies were heritable and transferable and that they had been held at a uniform rate of rent from time immemorial and that the plaintiffs were estopped from denying that position by their acts and conduct

and accordingly they were not entitled to recover possession. It appears that the holdings had been leased out to certain recorded tenants. After a time these recorded tenants had ceased to pay rents and the plaintiffs had continued to receive rents in their names from other persons as sarbarakars. In the case of four of these tenancies the sarbarakars sold their rights to the defendants in 1919, and in the fifth case they sold the rights to defendants in 1921. It was contended on behalf of the plaintiffs that the sales by the sarbarakars being transfers of entire non-transferable occupancy holdings had in fact constituted abandonment and on this ground they claimed possession. The case for the defence on the other hand was that whether they were tenants or not the sarbarakars had acquired a transferable right in the land. With the exception of the lands with which Suit No. 135 was concerned it is not disputed that the holdings were in fact agricultural tenancies. The learned District Judge came to the conclusion that in the circumstances of these cases the sarbarakars that is to say the vendors to the defendants were in fact the tenants of the plaintiffs. And he further came to the conclusion that the onus was on the tenants to show that the occupancy holdings were transferable. The main contention put forward on behalf of the defendants in the lower appellate Court was that the presumption arising under the provision of S. 50, Ben. Ten. Act, ought to have been applied to the consideration of these cases, and that contention was the one mainly relied upon in the argument put forward before us in the course of these appeals. In order to arrive at a right determination in the matter it is necessary to consider the precise nature of the suits with which we are concerned and to observe the way in which the plaintiffs' claim was in fact framed. The language of S. 50 is perfectly plain in that it lays down that the presumption therein mentioned shall only arise if :

"it is proved in any suit or other proceeding under the Act (Bengal Tenancy Act) that either a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the 20 years immediately before the institution of the suit or proceeding."

There is no doubt whatever that the provision was intended to mean and in fact does mean that the presumption shall only arise where the suit is one brought under the provisions of the Bengal Tenancy Act. One would scarcely have thought that it would be necessary for any judicial decisions upon that point in order to put that proposition beyond doubt. But actually there is a long line of cases in which it has been categorically laid down that the object of the legislature in providing for the presumption as to the fixity of rent mentioned in S. 50, Ben. Ten. Act, was to provide in suits or proceedings under the Act, that is, suits between landlord and tenant as such, a speedy determination of the rights of the parties. I only need give the bare references to one or two cases in which that has been decided, namely the cases of *Buzlul Karim* v. *Satish Chandra Giri* (1) and *Santosh Kumar Roy* v. *Rakhal Chandra Kazra* (2).

All these cases show that sub-S. 2, S. 50 has no application to suits which are not suits under that Act but are suits under the general law. In the present suits the plaintiffs brought their cases upon the footing that the defendants were trespassers upon the lands in question. The plaintiffs proved to the satisfaction of the Court below that the lands were in fact part of their estate and that therefore prima facie, unless the defendants could show that they were entitled to be upon the land by reason of some right vested in them, the plaintiffs were entitled to recover possession. The defendants apparently succeeded in showing that the rent paid in respect of the lands in question had not been changed for a period of 20 years. Upon that it was contended on their behalf that the presumption under S. 50 (2) did arise and that it was incumbent upon the plaintiffs to rebut that presumption. Having regard to the terms of the section itself and the authorities to which I have referred above the proof by the defendants that rent had not been changed for 20 years did not raise a presumption such as was contended. All these authorities and others do however show that the Court may, even in the case of a suit brought under the ordinary law, if it

(1) [1911] 10 I. C. 325.
(2) A. I. R. 1927 Cal. 174=94 I. C. 740.

thinks fit, apply the presumption similar to that provided for by the statute. I cannot do better than quote the language which Mookerjee, J., used at p. 784 of 43 *C. L. J.* with reference to S. 50 :

"It has been repeatedly pointed out that the presumption mentioned in S. 50 applies only to cases arising out of suits or proceedings under the Bengal Tenancy Act."

He then went on to say :

"But it has sometimes been held that even in cases where S. 50 is not directly applicable the Court may act on a similar presumption if the facts justify the necessary inference."

To put it concisely the matter comes to this that in suits under the Bengal Tenancy Act the Court shall presume whereas in cases arising under the general law as in the present cases the Court may presume. In other words, if the Court chooses, it may draw an inference that because rent had been uniform for 20 years therefore it must have been uniform since the date of the Permanent Settlement. It has been argued by the learned advocate for the appellant that the learned District Judge did not apply the presumption in the present cases. What I have said however is sufficient to indicate that it was entirely a matter for the learned Judge whether or not in the facts and circumstances as proved before him he would be justified in applying the presumption in such a manner as to shift the onus back from the defendants on the plaintiffs. It appears from the judgment of the learned District Judge that there was no serious attempt on the part of the defendants to show that the tenancy originated as far back as the Permanent Settlement or that the rent has not been changed for a period much longer than 20 years. He said:

"There is no evidence with regard to the origin of the tenancy. The plaintiffs have produced a number of papers which have been called for from the Collectorate' etc.'

and then he sums up the position in these words;

"It therefore comes to this that the defendants have proved that there had been no change of rent for the last 20 years. Whereas they have failed to prove that there has been no change of rent since the Permanent Settlement and that the plaintiffs have shown that it is probable that these tenancies were not in existence then."

It is clear from his judgment that he took into account the possibility of applying the presumption which might have arisen by reason of payment of fixed rent for 20 years and he evidently came to the conclusion that in these suits the application of the presumption was not warranted. It has further been argued on behalf of the appellants that the Courts below erred in that they seem to have taken into account certain papers which had been called for from the Collectorate the papers which were filed in the Collectorate for the purposes of Decennial and the Permanent Settlement. The learned District Judge thought, and we also do not think that they were good evidence in a case of this description and that it was possible to infer from those papers that the tenancies were not in existence at the time of the Permanent Settlement. The appellants have argued that the Courts below ought not to have taken those papers into account at all. I think it is not necessary for us to decide for the purposes of these appeals one way or other whether the Courts below were or were not right in so doing because once the suits had arrived at the stage where the onus was on the defendants and they had produced apparently no other evidence than that with regard to the payment of fixed rent unless the presumption of the kind provided in S. 50(2) was to be applied it is clear that the defendants had not discharged the onus which lay upon them and therefore irrespective of the question whether the plaintiffs produced any further evidence or not at that stage of the suit the defendants had entirely failed to show that they had any right whatever to remain upon the lands in question; and therefore the taking into account by the Courts below of those papers did not in my judgment affect the result of the suits one way or the other.

The only other matter which was put forward on behalf of the defence was that the learned District Judge was wrong in not giving consideration to the question whether or not the lands in dispute were by custom transferable. Apparently at a late stage of the case the defendants had sought before the learned Subordinate Judge who tried the cases to raise an issue on the question of transfer by custom. But it does seem that it was admitted on behalf of the defendants that no such issue was raised by them in their written statement. Therefore it was clearly a matter of discretion with the learned Subordinate Judge as to whether or not he

should allow such an issue to be framed having regard to the late stage in which it was sought to be raised. The learned District Judge upheld the Court of first instance on this point; and we think that as it was a matter of discretion for the Judge who tried the case the lower appellate Court was right in so doing. We therefore take the view that there is nothing in the judgment of the learned District Judge which calls for an interference on the part of this Court. The appeals are therefore dismissed with costs.

Suhrawardy, J.—I agree.

Costello, J.—There is a further series of appeals (Second Appeals Nos. 451 to 455 of 1928) from a decision of the First Additional District Judge 24 Parganas confirming a decision of the Munsif, 3rd Court, Alipur. All these appeals arise out of suits in which the parties were the same as in the previous series of suits. The matters in dispute in the suits out of which these appeals arise were for all intents and purposes similar to those of the four previous appeals which I have already dealt with. These four suits were tried together as a matter of convenience and the points in controversy are substantially the same in all of them. It appears to be conceded on behalf of the appellants that although one or two minor points have been urged before us they for all practical purposes are covered by the decision in the first four appeals. In some of these suits decision was given in favour of the defendants in the lower appellate Court and against this decision the plaintiffs have not appealed. Having regard to the submission made on behalf of the defendants all that we need say is that we affirm the decision of the lower appellate Court. These appeals are likewise dismissed with costs.

Subrawardy, J.—I agree.

V.B./R.K. *Appeals dismissed.*

A. I. R. 1930 Calcutta 737

RANKIN, C. J., AND C. C. GHOSE, J.

(*Sm.*) *Radharani Dassya* and *others*—Plaintiffs—Appellants.

v.

Purna Chandra Sarkar and *another*—Defendants—Respondents.

Privy Council Appln. No. 30 of 1929, Decided on 13th January 1930, against judgment of Page and Patterson, JJ., in Appeal No. 1481 of 1929, reported in *A.I.R.* 1930 *Cal.* 721 (1).

(a) Civil P. C., S. 80—Suit against receiver in respect of acts done in course of duty—Notice is necessary.

A suit against a receiver in respect of acts done in the course of his duty, even if it is brought after discharge, cannot be brought without a notice under S. 80. [P 738 C 1]

(b) Civil P. C., S. 110—Valuation—Low valuation in suit with knowledge—No increase in valuation or payment of additional court-fee at subsequent stage—Plaintiff will not be allowed to do so at time of leave for appeal to Privy Council.

Where plaintiff's valuation of the claim in suit is low to the knowledge of the plaintiff and the plaintiff neither increases that valuation nor pays additional court-fee at subsequent stages of the suit, he will not be permitted to change the valuation at the time of leave to appeal to His Majesty in Council. [P 738 C 1]

Prakash Chandra Pakrashi—for Appellants.

Upendra Lall Roy—for Respondents.

Rankin, C. J.—This is an application for a certificate that the case is a fit one to be taken on appeal to His Majesty in Council. The defendant is sued for negligence and for improper intromission with property in the course of his duties as receiver in a certain suit. The position is that an order has been passed for the discharge of the receiver in that suit. He has filed certain accounts; but these accounts have not yet been passed. The present plaintiffs applied in that suit for relief of the kind which they now seek. It was held against them that such relief could be more properly got by instituting a separate suit. We are in no way concerned with the correctness of that decision. A separate suit was brought, but no notice under S. 80, Civil P. C., was given to the defendant. For this reason, the suit has been dismissed in all the Courts. It is now contended before us that a certificate should be given that the case may be taken to His Majesty in Council on the ground that, whereas, if a suit is brought against a receiver before an

order for discharge is passed, the receiver is a public officer and notice is required if the suit is brought challenging his acts in the course of his public duties; nevertheless, if the plaintiff only waits and brings his suit after the order of discharge is made, the protection intended to be given to the receiver by S. 80, Civil P. C., is no longer given. In my opinion, that is not a reasonable construction of the section read with the definition of "public officer" in S. 2 of the Code. For this reason alone, it appears to me that the point of law now taken is not substantial.

There is however a further point. It appears that, after certain scrutiny had been made of these accounts, a large sum was found by the Head Clerk to be due to the plaintiff on the receiver's account, but the plaintiff still brought this suit valuing his claim to the relief at Rs. 2,500; at no stage up to the present has he increased that valuation or paid any more court-fee. In my judgment, the attempt now made to say that the suit should be treated as involving over Rs. 10,000, is one that cannot be maintained.

For these reasons, it appears to me that this application should be dismissed with costs, hearing-fee five gold mohurs.

C. C. Ghose, J.—I agree.

V.B./R.K. *Application dismissed.*

A. I. R. 1930 Calcutta 738

GUHA, J.

Rajendra Nath Chandra and *another* —Plaintiffs—Appellants.

v.

Dinu Prodhan and *others*—Defendants—Respondents.

Appeal No. 1665 of 1928, Decided on 20th May 1930, from appellate decree of 3rd Sub-Judge, Midnapur, D/- 15th February 1928.

Transfer of Property Act (1882) S. 72—Tenants settled by mortgagee—Mortgage deed not precluding mortgagee from such settlement—On redemption tenant cannot be evicted as trespasser—Transfer of Property Act, S. 62.

Ordinarily a mortgagee in possession for a limited period is not entitled to create an interest which is to continue after the termination of the period of possession; but where the mortgage deed does not prevent the mortgagee from settling tenants in the land and there is no stipulation for keeping the land in khas possession during the period of the mortgage, the tenants so settled cannot be evicted on redemption without recourse being had to the provisions of law applicable to the eviction of a tenant in occupation: 20 *Cal.* 708, *Rel. on.* [P 738 C 2; P 739 C 1]

Gopendra Nath Das—for Appellants.

Santosh Kumar Pal and *Sukumar Hazra*—for Respondents.

Judgment.—The Courts below have agreed in their decision on the question of the plaintiffs' title to the lands in suit; they have differed however on the question as to whether the plaintiffs were entitled to khas possession. The plaintiffs' suit as laid was resisted by defendant 1 and so far as claim for khas possession was concerned it was pleaded that he had acquired right of occupancy in the lands, and was not therefore liable to be evicted as a trespasser. An issue was definitely raised on the question of khas possession, namely Issue 5. The trial Court mainly on the interpretation of the mortgage deed, Ex. 1 in the suit, came to the conclusion that the plaintiffs who have stepped into the shoes of the mortgagors were entitled to such khas possession as the mortgagors themselves were entitled to, under the terms of the document. The Court of appeal below, on a reading of the document, has held that it could not be said that by the terms of the mortgage bond, Ex. 1, there was no right in the mortgagee to establish tenant on the land. In that conclusion I agree. The document did not prevent the mortgagee from settling tenants in the land; and there was no stipulation for keeping the land in his khas possession during the period of the mortgage. It may be accepted as a general proposition that a mortgagee in possession for a limited period is not entitled to create an interest which was to continue after the termination of his period of possession; but the position in the present case being that the mortgage deed, Ex. 1, did not stand in the way of tenants being settled on the land, the tenant so settled whose interest in the the land was well defined under the law, could not be evicted without re course being had to the provisions of law applicable to the eviction of a tenant in occupation. If the tenant on the land had obtained possession from a person who was himself in possession of the land at the time when the tenant was so settled, and there was no absence of good faith in the settlement, the

claim for khas possession could very well be resisted on the strength of the principle enunciated in *Binad Lal Pakrashi* v. *Kalu Paramanik* (1) and the tenant on the land would be protected from eviction as a mere trespasser.

The above is the footing upon which the case appears to have been argued in the lower Court, and that is the aspect of the case that has been presented in the grounds of appeal to this Court. On the interpretation of the mortgage bond, Ex. 1, the position is abundantly clear that defendant 1 was not a trespasser on the land and was not liable to eviction as claimed in the suit. He is a person who lawfully came to be in possession as a tenant under the mortgagee for a term, and there was nothing to support the position that he was to be ejected on the redemption of the mortgage. The clear recitals in the document would not lend support to such a contention as is advanced on behalf of the plaintiffs.

It has further been argued that the provisions contained in S. 60 and S. 62, T. P. Act, would entitle the plaintiffs to a decree for khas possession as claimed in the suit. It need only be stated that the mortgagor may be entitled to possession under the law, but there is nothing contained in any of the provisions referred to above, which in any way militates against the position that the mortgagor was in the present suit, entitled to such possession as the land was capable of, in view of the fact that in accordance with the terms of the mortgage, there was tenant on the land, as against whom there could not under the law be any decree for ejectment on the ground of his being a trespasser. As I have indicated already, I agree with the view taken by the Court of appeal below that it could not be said that by the terms of the mortgage bond, Ex. 1, there was no right to settle tenants on the land, and the tenants so settled have acquired rights, which rights have to be respected when the mortgagor or person claiming through the mortgagor asserts his right to recover possession. Khas possession may not be possible in a case like the present; the plaintiffs to get possession by realization of rent from defendant 1.

A question relating to the good faith in the matter of settling defendant on the land was raised by the learned advocate for the appellants. There is nothing to show want of good faith in the present case on the terms of the document, Ex. 1, and where the defence was that the tenant was in possession even before the settlement by the mortgagee.

I have no hesitation in coming to the conclusion that the view taken by the Court of appeal below in the case is correct. The appeal therefore fails and is dismissed with costs.

V.B./R.K. *Appeal dismissed.*

(1) [1893] 20 Cal. 708.

A. I. R. 1930 Calcutta 739

GRAHAM AND MITTER, JJ.

Secy. of State—Appellant.

v.

Bhupalchandra Ray Chaudhuri — Respondent.

Appeal No. 1110 of 1927, Decided on 13th June 1929, from appellate decree of Dist.-Judge, Dinajpur, D/- 2nd February 1927.

(a) Deed—Construction—*Hat* leased for a term for aggregate rent, control resting with lessees subject to certain restrictions and reservations in favour of lessors—Transaction amounts to transfer of interest and rent payable is rent assessable under S. 6, Bengal Cess Act (9 of 1880), S. 6.

If where the land of the *hat* is leased for a term and an aggregate rent is payable in respect of the same, and the control of *hat* is in the lessees subject to certain restrictions and reservation in favour of the lessor, it amounts to a transfer of interest in the land and, therefore the sum payable by the lessor, call it jama or call it license fees, is rent payable to the lessor, so that cess could be assessed and collected thereon from the lessor, more so where the lessee in his kabuliyat agrees to pay the cess if levied : *A. I. R.* 1929 *Cal.* 197, *Rel. on* ; 35 *Cal.* 82 and 28 *Cal.* 637, *Dist.* [P 743 C 2]

(b) Deed — Construction—If holder gets exclusive rights of occupation with reservation as to purpose for which land is to be used, transfer amounts to demise of land.

If the effect of the instrument is to give the holder an exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself: *Glenwood Sember Co. Ltd.* v. *Phillips* (1904) *A. C.* 405, *Foll.* [P 743 C 1]

(c) Bengal Cess Act (9 of 1880), S. 6—Test to determine whether jama on account of *hat* is profit assessable under S. 6.

The test to determine whether the particular jama or rent in respect of a *hat* is profits derived from the land so as to be assessable under S. 6, is to find whether the transferor has granted sufficient control over the land of the *hat* so as to make the instrument a demise and not a mere license. [P 742 C 2]

Surendranath Guha and *Nasim Ali*—for Appellant.

Brajalal Chakravarti and *Jatindramohan Chaudhuri*—for Respondent.

Graham, J.—This is an appeal by the defendant, the Secretary of State for India in Council, against a decision of the District Judge of Dinajpur confirming a judgment and decree of the Subordinate Judge of Dinajpur. The suit was for a permanent injunction restraining the defendant from the assessment and collection of cesses in respect of the plaintiff's income derived from certain *hats*, ferries, and khutagaries, and for a refund of the sum of Rs. 1,032 and odd annas already realised by the defendant on these accounts together with interest thereon.

The plaintiff's case was that the collections made from these sources are not liable to pay cess, and that the assessment was ultra vires.

The defendant on the other hand pleaded that, having regard to the terms of the kabuliyats, which were put in evidence, read with the provisions of the Cess Act (Bengal Act 9 of 1880) the assessment was valid and lawful. He also contended inter alia that the suit was barred by limitation.

The trial Court found that the assessment was illegal, granted the injunction prayed for, and partially decreed the claim for refund.

On appeal by the defendant that decision was affirmed by the District Judge. The Secretary of State has now preferred this second appeal.

Both the Courts below have found in favour of the plaintiff on the issue of limitation, and no argument has been addressed to us upon that point. The question which arises for decision is whether it has been rightly held that these collections are not liable to pay cess. In order to decide the matter reference is necessary to the relevant sections of the Cess Act and to the kabuliyats in question.

Dealing first with the Act, the preamble makes it clear that the cess is to be levied on immovable property. Ss. 5 and 6, which deal with the method of assessment, read as follows :

"5. From and after the commencement of this Act in any district or part of a district, all immovable property situate therein, except as otherwise in Ss. 2 and 8 provided, shall be liable to the payment of a road cess and a public works cess."

"6. The road cess and the public works cess shall be assessed on the annual value of lands and on the annual net profits from mines, quarries, tramways, railways and other immovable property ascertained respectively as in this Act prescribed.

'Immovable property' is defined in S. 4 of the Act in these terms : 'immovable property' includes lands and all benefits to arise out of land . . . . . but does not include crops of any kind, or houses, shops or other buildings."

'Annual value' is thus defined : 'annual value of any land, estate, or tenure' means the total rent which is payable, or, if no rent is actually payable, would on a reasonable assessment, be payable, during the year by all the cultivating raiyats of such land, estate or tenure, or by other persons in the actual use and occupation thereof."

"Tenure" is defined as including every interest in land, whether rent paying or not, save and except an estate as defined in the Act.

Coming now to the kabuliyats reference may first be made to Ex. A-1 of which a translation has been placed before us. This document is described as a meyadi ijara kabuliyat (i. e., for a fixed term) executed in favour of Bhupalchandra Ray Chaudhuri (plaintiff in this case) in respect of a *hat*, and the executant binds himself to pay Rs. 190 annually as land tax (rent) for the land of the *hat*, and Rs. 3,260 annually as license fee for realizing tolls of the *hat*, i. e., to pay a total jama of Rs. 3,450 per annum. Certain conditions are then stated, breach of any of which will entail the right of the lessor to re-enter into possession of the land. The liability of the lessee to pay the fixed road cess of the *hat* as per valuation is mentioned, and schedules are annexed giving the boundaries of the land, and the instalments of the rent payable.

We are informed that a number of kabuliyats were filed in the case, and that the one just referred to above (Ex. A-1) is peculiar in this respect that it is the only one in which any distinction has been made between the amount payable as rent of the land, and the amount paid as annual license fee for realizing tolls. In the other kabuliyats, we are informed, the total jama has been given as a lump sum without any such distinction being made. This apparently was the form of kabuliyat, which had hitherto been

used, an example of which is Ex. A, executed at the settlement of 1920, in which the total annual jama is stated to be Rs. 3,400.

It may be mentioned here that, so far as the ferries and khutagaries are concerned, the case is not pressed on behalf of the appellant. It is necessary therefore to consider only the question of the *hat*.

It is contended on behalf of the appellant that having regard to the terms of the kabuliyats and to the relevant sections of the Cess Act, and in particular to S. 6 of the Act, the appellant is entitled to levy cess upon these collections, both under the first part of S. 6 as well as under the second part thereof. The kabuliyats, it is argued, clearly indicate that they give a right to the use and occupation of the land, and the assessment should therefore be upon that basis. The distinction made in Ex. A-1 between the annual rent and the license fees is, it is urged, merely a device for the purpose of evading the tax. In any view, however, even if the first part of S. 6 does not apply, the appellant, it is contended, is entitled to realize the cess under the second part of the section, as these are profits derived from the land.

In support of these contentions, reliance has been placed on a recent decision of this Court, *Secy. of State* v. *Sati Prasad Garga* (1), which was decided about a year after the decision of the Court of appeal below in this case. In that case, where the facts were similar except that the total jama was stated as in Ex, A without any differentiation between the rent and license fees, it was held inter alia that, if any right to a piece of land is granted, and a *hat* is held thereon, the income of the *hat* is liable to be assessed with cesses, but that in the case of a mere license to hold a *hat* on a piece of land. the said income is not so assessable. Further, that where *hats* are periodically held on lands of which possession is given to ijaradars, who have executed kabuliyats in favour of the landlords promising annual jamas, payable to the latter for the same, the income of such *hats* is liable to be assessed with cesses.

So far as the sum of Rs. 190 mentioned in Ex. A-1 as rent of the land is concerned it was only faintly argued before us on behalf of the respondent that this could be treated as free from any liability to pay cess, and it was conceded that this item is covered by the decision of this Court referred to above, which is binding upon us.

It was argued however that that decision is erroneous and ought not to be followed on the. ground that it is in conflict with a previous decision of this Court, *Secy. of State for India* v. *Karuna Kanta Chowdhry* (2), which followed an earlier decision *Umed Rasul Shaha Fakir* v. *Anath Bandhu Chowdhri* (3). These two cases have been referred to and relied upon in the judgment of the Subordinate Judge in this case, *Sati Prasad Garga's* case (1) not having, as already stated, at that time been decided. It is clear that these two earlier cases are distinguishable from the third case decided by B. B. Ghose and Cammiade, JJ. Both of those cases related to a mela, which was held upon the land only for a period of about one month in the year, whereas here the land is taken on lease for the purpose apparently of holding a permanent *hat* on one day or more per week. Again, in *Umed Rasul Shaha Fakir's* case (3) it was found that income-tax had been paid on the profits derived from the mela, and the case proceeded upon that footing, while in *Karuna Kantha's* case (2) there was an intermediate tenancy which was liable to pay the cess.

Both these cases were considered by B. B. Ghose, J., in his judgment in *Secy. of State* v. *Sati Prasad Garga* (1).

The real question, as stated by that learned Judge, was whether the grant in question was a mere license, or a lease of property, and the same question arises here. The learned advocate for the respondent would have it that the ijaradars, as their name implies, are mere licensees, and that they cannot be assessed at all events in respect of the Rs. 3,260 representing license fees. But the matter cannot be deter-

(1) A. I. R. 1929 Cal. 197=115 I. C. 185=55 Cal. 1328.

(2) [1907] 35 Cal. 882=6 C. L. J. 342=11 C. W. N. 1053.

(3) [1901] 28 Cal. 637=6 C. W. N. 128.

mined merely by reference to the expressions used in the kabuliyats. Looking to the substance of the matter, and upon a true construction of these documents, there seems to me to be no doubt that they come within the purview of the first part of S. 6, Cess Act. That indeed was the conclusion of both the learned Judges in *Secretary of State for India* v. *Sati Prasad Garga* (1), although it was held that the second part of the section would also apply. That decision, as I have already said, is binding upon us.

With regard to the kabuliyat Ex. A-1, I do not think that the distinction, which is sought to be made therein between the portion of the money paid as rent and the portion paid for license fees, can make any difference, since it seems to be reasonably clear that this is merely a device for the purpose of evading payment of the cess. On a true construction of the kabuliyats, it seems plain that they are in fact leases of the land with the object of using it for holding a *hat* thereon, and further that the amount realized, which is described in most of these documents as the annual jama or rent, is profit derived from the land, and as such is liable to pay cess.

In the result the appeal succeeds in part and the assessment in respect of the income derived from the *hat* must be held to be valid and legal. The judgment and decree of the Court of appeal below, in so far as it has granted an injunction restraining the realization of cesses from the defendant upon income derived from this source, are accordingly set aside. The amount of the refund, which has been decreed, viz. Rs. 450-12-0, will also be modified in accordance with this decision, and the plaintiff will obtain a refund only of such portion of this sum as has been paid on account of the ferries or ghats, and the khutagaries.

The Secretary of State for India is entitled to his costs throughout in proportion to his success.

Mitter, J.—I agree with my learned brother that this appeal should be allowed to the extent indicated in his judgment. The matter in controversy turns on the question whether the kabuliyats, of which Ex. A (which is most favourable to the respondent) is a type, is to be regarded as a lease or demise of the *hat* or a mere license to collect tolls. I have no doubt, on the construction of Ex. A, that, so far as the sum of Rs. 190 is concerned, it is distinctly stated that it is rent for the *hat* and it has not been seriously disputed that that sum is assessable to cess. The larger sum of Rs. 3,260 has been stated as license fee for realizing tolls of the *hat*. Whatever the form of the statement may be, what is the substance of it? It is nothing less than the jama or rent paid for the occupation of the *hat*. That is apparent from the document itself which, after differentiating between land tax or rent for the land of the *hat* and the license fee, proceeds to describe the aggregate sum as "total jama of Rs. 3,450 per annum," and further proceeds to state that

> "the jama proposed by me being the highest one, you have made settlement of the said *hat* to me for a term of three years, i. e., from 1330 B. S. to 1332 B. S., fixing the annual jama at Rs. 3,450. I on my part execute this kabuliyat and agree to pay the jama fixed as per kists given below at the sadar kachari of the estate."

It is therefore abundantly clear that, notwithstanding the differentiation between rent and license fee, the aggregate of the two has been regarded as the jama or rent. The true test in cases of this kind is to find out whether the respondent has granted sufficient control over the land of the *hat* so as to make the instrument (kabuliyat) a demise and not a mere license. It is argued for the respondent that sufficient reservations have been made in favour of the respondents, which shows the respondents did not part with the real control of the *hat*; but notwithstanding such restrictions or reservations I think the executant of the kabuliyat (Ex. A) has sufficient control over the *hat* during the period of the lease so as to make him a lessee in the real sense of the term. I refer to the following provisions of the kabuliyat which justifies this view: (1) I shall pay the aggregate jama of Rs. 3,450; (2) I shall maintain the boundaries of the *hat* as of old; (3) I shall keep the entire area of the *hat* always clean at my own cost; (4) I shall not be competent to raise any plea for the abatement of

the jama or to escape from the duty of payment of rent and relinquish the ijara mehal during the fixed term. (5) After the expiry of the term I shall hand over possession of the *hat* to you without any objection ; (6) I execute this meyadi ijara patta for this *hat* out of my own free will. The restrictions referred to are that the lessee would not be able to make alterations in the position or place of temporary shopkeepers of the *hat* without the lessor's permission and not to interfere with the rent of any permanent shop, plot or for the lands of permanent tenants, which shall be realized separately by the lessor. Notwithstanding these restrictions I am of opinion that the position of the executant of the kabuliyat was that of a lessee. I am supported in this view by a decision of the House of Lords in the case of *Glenwood Sumber Co., Ltd.* v. *Phillips* (4). The following observations are pertinent to the present controversy :

"In the so-called license itself it is called indifferently a license and a demise, but in the Act it is spoken of as a lease, and the holder of it is described as the lessee. It is not however a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of the land though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."

I also agree with my learned brother that the kabuliyat in the present case falls within the purview of the decision of B. B. Ghose and Cammiade, JJ., in *Secretary of State* v. *Sati Prasad Garga* (1). It is not necessary to decide in the present case whether the cess is leviable under the second part of S. 6, Ben. Act 9 of 1880. In other words it is not necessary to decide whether profits from the *hat* are profits from immovable property within the meaning of the second part of S. 6. Indeed B. B. Ghose, J., one of the learned Judges who decided the case of *Secretary of State* v. *Sati Prasad Garga* (1) refused to express a final and definite opinion upon it.

It has however been contended that this decision (1) of B. B. Ghose, J. is inconsistent with the decision of the Full Bench in the case of *Secretary of State* v. *Karuna Kanta Chowdhry* (2). I think there is no efficacy in this contention, for an examination of that case will show that all that was granted to the fakirs by the landlords was the right to hold the fair annually within the limits of the estate of the landlord. It will show that the fakirs or their ijaradars had no exclusive interest in the land on which the fair was held, the land having been admittedly included in the holding of occupancy raiyats. The following observations from the judgment of Ashutosh Mookerjee, J., in the Full Bench case will at once bring into prominence the distinction between that case and the present case or the case of *Secretary of State* v. *Sati Prasad Garga* (1) :

"In determining whether a transaction was a lease or a mere license, the substance of the agreement must be considered more than the words : *Smith* v. *Overseers of St. Michael, Cambridge* (5). If we apply these principles to the facts of the case before us, what is the position of the parties ? The lands on which the fair was held during 20 days in the year were all comprised in the holdings of agricultural tenants. The legal possession was in them. The fakirs could not acquire by any grant from the landlord an interest in the lands in supersession or limitation of, or derogatory to, the interest of the cultivators. The zamindar granted them a right to hold the fair. This right they could not exercise, if the agricultural tenants objected. Substantially, they did not and could not acquire any right to the possession of the land. They could hold the fair only by consent or acquiescence of the cultivators. It is therefore impossible to say that they acquired any interest in the lands. Much less can it be said that the persons who attended the fair and sold animals, goods or articles of merchandise, were in any sense tenants of the ijaradars. They had obviously no interest in the land. They occupied or erected stalls or booths to store their goods and to sell them, and paid what was nothing more or less than a toll to the ijaradars of the fakirs, and the amounts paid in respect of the shops could not fall within the description of annual value of the land."

It is obvious that the facts of the present case are essentially different. Here the land of the *hat* is leased for a term ; an aggregate rent is payable in respect of the same ; the control of the *hat* was in the lessees subject to certain restrictions and reservations in favour of the lessor. There was in the present case a transfer of an interest in land and therefore the sum payable to the lessor call it jama or call it license fee was "rent" payable to the lessor.

(4) [1904] A. C. 405 = 73 L. J. P. C. 62 = 90 L. T. 741=20 T. L. R. 581.

(5) [1860] 3 E. & E. 383.

In this connexion I may also refer to the provision in the kabuliyats by which the lessee agreed to pay the cess if levied. I refer to this only to show that the justice of the case lies on the side of the appellant.

V.B./R.K. *Appeal partly allowed*

A. I. R. 1930 Calcutta 744

PANCKRIDGE, J.

Nishi Kanta Ghose and *another*—Petitioners.

v.

Barda Kanta Basu and *others* — Opposite Parties.

Civil Revn. No. 1270 of 1929, Decided on 12th February 1930, against order of Offg. Sub-Judge, Dacca, D/- 22nd December 1928.

Calcutta High Court Appellate Side Rules, Chap. 2, R. 1—Single Judge cannot in revision deal with order passed in suit of more than Rs. 1000.

A Judge sitting singly has no jurisdiction to deal in revision with orders passed in suits of the value of more than Rs. 1,000 although the order itself is concerned with a sum less than Rs. 1,000. [P 745 C 1]

Hemendra Narain Bhattacharji—for Petitioners.

Asita Ranjan Ghose — for Opposite Parties.

Judgment.—Thisis a Rule granted by the Chief Justice calling upon the opposite party to show cause why a certain order should not be set aside or otherwise varied. The order in question concerns certain receivers who were appointed receivers of a joint business during the pendency of Suit No. 47 of 1924 in the Court of the 4th Subordinate Judge at Dacca. By various orders culminating in an order of 22nd December 1928 the applicants before me were ordered to pay a certain remuneration to an auditor who had been appointed—the remuneration amounting to Rs. 343-4-9. The receivers then preferred an appeal against this order to the District Judge who dismissed it on the ground that it was not maintainable. Thereupon they applied for the Rule with which I am now dealing, which was granted to them on 28th August last year. The application to this Court was presented out of time but the petitioners say that they had good excuse inasmuch as they were bona fide pursuing their remedy in a Court which it transpired had no jurisdiction and that if the interval between the making of the order complained of and the dismissal of the appeal before the District Judge be deducted, their application to this Court is in time.

A preliminary point was taken that the Rule was issued without jurisdiction inasmuch as it is not a Rule which is competent for a Judge sitting singly on the appellate side of this Court to issue and it is not competent for me sitting in similar circumstances to deal with it. This argument involves a consideration of the Rules of the appellate side of the Court. R. 1, Chap. 2, provides that:

"A Division Court for the hearing of appeals from decrees or orders of the Provincial Civil Courts shall consist of two or more Judges as the Chief Justice may think fit."

To that rule there is a proviso which makes it competent for one Judge to hear appeals and applications in all matters specified in the schedule to the rule. It is however provided that a Judge may send any particular case to be disposed of by two Judges. The schedule includes among matters with which a Judge sitting singly is competent to deal applications for revision under S. 115, Civil P. C., in cases up to the value of Rs. 1,000. Now it is admitted that the value of the suit in which the order complained of is made is above the sum I have mentioned. But it is said that inasmuch as the order is concerned with a sum of Rs. 343 there can be no objection to my dealing with it. I have come to the conclusion though with some hesitation that the preliminary objection must succeed. It is true that the words used are "in cases". But at the same time I do not think that when one talks of an order being made in a case one merely means the order made on an application without regard to the rest of the suit. It is noticeable that S. 115 also uses the word "cases" and not "suit." I think the reason for this is that it must have been intended that S. 115 and para. (3) of the schedule to which I have referred contemplated legal proceedings which are not suits in the strict sense, but which are governed by the provisions of the Civil Procedure Code. I think too that note to paragraph 3 of the schedule, namely: "Every application for revision shall state the value of the suit to which the application relates" can only be explained on the ground that before a

Judge sitting single can decide whether he is competent to deal with the matter before him he must have information not only as to the amount at stake in respect of a particular order that is sought to be revised but also he must have information as to the value of the subject matter of the suit in which that order is made. This being so I come to the conclusion that a Judge sitting singly has no jurisdiction to deal with this order made as it was in a suit admittedly of the value of more than Rs. 1,000. I discharge the rule on that ground with costs. Hearing fee one gold mohur.

S.N./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 745

MITTER AND PATTERSON, JJ.

Chhota Murari Mohan Panda—Plaintiff—Appellant.

v.

Protap Narain Panda and *others*—Defendants—Respondents.

Appeal No. 1723 of 1928, Decided on 5th June 1930, from appellate decree of Second Sub-Judge, Midnapore, D/- 26th March 1928.

Bengal Tenancy Act, S. 170—*A* purchasing non-transferable occupancy holding in execution of mortgage decree against tenant—On landlord proceeding to execute rent-decree by sale of holding *A* depositing decretal amount—Withdrawal of deposit by landlord—Acceptance of deposit even under protest held to amount to recognition of *A's* tenancy—Evidence Act, S. 115.

A purchased a non-transferable occupancy-holding in execution of a mortgage decree against the original tenants. The landlord of the holding obtained a rent decree against the original tenants and proceeded to sell the holding in execution of the decree. *A* put in an application praying to deposit the decree-holder's dues under S. 170. The Court after making a remark, "Heard pleaders on both sides" permitted the deposit. The landlord withdrew the deposit, but after *A* instituted a suit for declaration of his title contended that the withdrawal was made under protest and did not amount to recognition by him of *A's* tenancy.

Held : that the fact of the withdrawal of the deposit by the landlord amounted to a recognition by him of the tenancy of *A*. [P 746 C 2]

Held also ; that from the remark of the Court, "Heard pleaders on both sides"; it could not be assumed that the withdrawal had been made on protest. [P 746 C 2]

Held further : that assuming there was a protest by the landlord the acceptance of the deposit by him amounted to recognition of tenancy on the principle of estoppel : 6 *C. L. J.* 601 ; 7 *I. C.* 477 ; 28 *I. C.* 343, *Rel. on.* ; 30 *I.C.* 83 and *A. I. R.* 1926 *Cal.* 1215, *Dist.* [P 746 C 2]

Brojolal Chakravarty and *Gopendra Nath Das*—for Appellants.

Bankim Chandra Mukerji and *Santimoy Mozamdar*—for Respondents.

Mitter, J.—The suit in which this appeal arises was brought by the plaintiff for declaration of his title to the ka schedule properties on the allegation that he had purchased a non-transferable occupancy-holding in execution of a mortgage-decree against the original tenants. In the suit the plaintiff asked for a further declaration that he is entitled to a declaration of his title to an eight anna superior maliki interest in the lands of schedule ka and kha. There was also a prayer for an injunction restraining defendants 1 to 4 from executing the rent decree obtained by them in respect of the lands of schedules ka and kha. The defence in the suit was with regard to the first part of the claim that as the holding was a non-transferable occupancy-holding no right passed to the plaintiff by the sale held in execution of the mortgage decree. With regard to the second part of the claim the defence was that the landlord's interest was in the defendants and that defendant 5 who is said to be the vendor of the plaintiff, had no share in it. Both the defences prevailed in the Court of first instance with the result that the plaintiff's suit was dismissed.

On appeal the lower appellate Court has ultimately affirmed the decision of the Court of first instance. It is not necessary for the purpose of this appeal to narrate the history of the intermediate proceedings culminating in the final decision of the lower appellate Court which is now the subject-matter of the present appeal.

In second appeal by the plaintiff Mr. Brojolal Chakravarty has not seriously contested the finding of the Courts below with regard to the claim in respect of the superior maliki interest in the eight annas share in schedules ka and kha and consequently nothing need be said further with regard to this part of the claim.

The point in controversy in the present appeal relates to the claim about the plaintiff's purchase in execution of the mortgage decree and the 16 annas interest of the tenants in schedule ka of the plaint land. It appears that defen-

dants 1 to 4 obtained a decree against the tenants for rent and in execution of that decree they proceeded to sell the holding in question. The 18th November 1920 was fixed for the sale of the defaulting jote. On 17th November the present plaintiff put in an application praying to deposit the decree-holder's dues under S. 170, Ben. Ten. Act, to save the jote from sale on the ground that he was an auction-purchaser of the land which was put up to sale. The Munsif directed that that application be put up on the next day, that is, on 18th November, in the presence of the pleaders of both parties. On 18th November 1920 the order recorded by the Munsif is as follows :

"Heard pleaders on both sides. The applicant is permitted to deposit the decree-holder's dues. Put up on 26th November 1920 awaiting the challan."

On 26th November the challan was received and the money was deposited and the case was ordered to be dismissed on full satisfaction. On 7th December 1920 the payment order of Rs. 41-5-6 was granted to the decree-holder through his muktear. It appears clear from these facts that the decree-holder withdrew the money in satisfaction of the rent decree, and it is on this fact, as narrated in the order-sheet to which I have referred, that the argument is built on behalf of the appellant that there has been a recognition by defendants 1 to 4 of the plaintiff as a tenant in respect of the non-transferable occupancy-holding. The Subordinate Judge who dealt with the appeal eventually came to the conclusion that this withdrawal by the landlord had not the effect of recognition by defendants 1 to 4 of the tenancy, as the withdrawal was made under protest. The basis of the Subordinate Judge's finding that the protest was made on behalf of the landlord is based on nothing else but as he himself states on the statements in the order sheet of 18th November 1920, namely "Heard pleaders on both sides." This statement to my mind is quite consistent with the other position, namely that there might have been no objection on the side of the landlord. There was no evidence on the record from which the Subordinate Judge could come to the conclusion from the mere use of the words " Heard pleaders on both sides " that as a matter of fact the landlord raised the protest with reference to this deposit. On the other hand, from the subsequent orders and subsequent conduct of defendants 1 to 4 allowing the money to be deposited and in receiving payment by the payment order shortly after, namely 7th December 1920, it would seem and the inference would be legitimate that there was no protest on behalf of the landlord. It was a great assumption to make on the part of the Subordinate Judge when he stated that from the words " Heard pleaders on both sides," it must be assumed that the landlord objected to the deposit of the money. On this view we think that the fact of the acceptance of the deposit amounted to a recognition by defendants 1 to 4 of the tenancy of the plaintiff. If any authority is needed for this proposition reference may be made to a series of decisions beginning from the case of *Thomas Barclay* v. *Syed Hossein Ali Khan* (1). There are later cases to which reference may also be made. In the case of *Jugal Mohini Dasi* v. *Srinath Chatterjee* (2) the same view was adopted as also in the case of *Motookdhari Shukal* v. *Jugdip Narain Singh* (3). Assuming however, for the sake of argument, that there was a protest on the part of defendants 1 to 4 against the deposit being made by the plaintiff, the preponderance of opinion is in favour of the view that notwithstanding the protest if the money is accepted by the landlord that amounts to a recognition of the tenancy on the principle of estoppel. The question arose directly in the case of *Motookdhari Shukul* v. *Jugdip Narain* (3) to which I have already referred where Digambar Chatterjee, J., and Walmsley, J., reviewed the authorities and said that the acceptance of rent under protest would operate in favour of the payer as a waiver of any forfeiture incurred. They quoted a passage from the case of *George Henry Davenport* v. *The Queen* (4) which may be quoted with appositeness on the present occasion. Their Lordships of the Judicial Committee in that case said this :

" Where money is paid and received as rent under a lease a mere protest that it is accepted

(1) [1907] 6 C. L. J. 601.
(2) [1910] 7 I. C. 477.
(3) [1914] 28 I. C. 343.
(4) [1877] 3 A. C. 15.

conditionally and without prejudice to a right to a prior forfeiture cannot countervail the fact of such receipt."

It is pointed out in this case that the protest under which the plaintiff received the amount deposited by the mortgagee of a non-transferable occupancy-holding did not make the receipt less a receipt of rent from the mortgagee and in this view it was held that the mortgage was recognized by the plaintiff who was not entitled to a decree for ejectment. In *Jugal Mohini Dasi* v. *Srinath Chatterjee* (2) also Asutosh Mookerjee, J., considered the question and held that it made no difference in the application of the principle of estoppel if the deposit was made under protest. There also the deposit was made under protest under the provisions of S. 170, Ben. Ten. Act, as it stood before the amendment of 1928. The learned advocate for the respondent has, however, relied on a decision of Woodroffe, J., in the case of *Bhata Ram Das* v. *Kshitish Chandra Lahiri* (5). It may be observed that in that case the deposit was made after the holding had been sold in execution of a rent decree. That is a circumstance which distinguishes it from the facts of the case in *Motookdhari Shukul* v. *Jugdip Narain Singh* (3). There was nothing to prevent defendants 1 to 4 from refusing to take the money which was deposited in Court. It might be, if they intended to refuse to recognize the transferee, the plaintiff in the present suit, they might have brought a suit in ejectment immediately after the deposit was made. It was suggested in the petition on which the orders were made by the Munsif in the proceedings under S. 170, Ben. Ten. Act, that they were purchasers of the entire holding in execution of the mortgage decree. There was therefore nothing to prevent the landlord if he wanted not to recognize the transferee from bringing the suit in ejectment on the ground that they were trespassers on the land. It is suggested, however, that the facts found in this case show that the tenant was in possession of a portion of the holding. If he was in possession he was in possession as a trespasser, for he had no right to remain on the land after his holding had been sold in execution of the decree.

It is next contended by the learned advocate for the respondent that there are observations or dicta in some of the later decisions which throw doubt on the accuracy or correctness of the decisions of which *Thomas Barclay* v. *Syed Hossein Ali Khan* (1) is a type. He refers in particular to the case of *Suckchand* v. *Giridhari Das* (6). An examination of that case, however, will show that there the deposit was made by a trespasser for it is pointed out in that case that the deposit was made by a person who had not acquired the tenancy at the time when he deposited the decretal amount. That case is distinguishable from the present case. Reliance has also been placed upon the obiter dictum of the learned Chief Justice in the case of *Fazoo Mia* v. *Sultan Ahamad Chaudhury* (7). The learned Chief Justice does not express any final opinion and says:

"It is doubtful whether a mere acceptance or withdrawal of a deposit operates to oblige the landlord to recognize the depositor as a tenant."

We were referred to the earlier decisions, and it seems to us that the preponderance of the judicial opinion is in favour of the view that under circumstances like the present the acceptance of the deposit will have the effect of recognition of the tenancy. We think therefore that the claim of the plaintiff on the basis of his purchase of the occupancy-holding in execution of his mortgage-decree in respect of the ka schedule properties must be allowed and the decrees of the Courts below in so far as they dismissed the claim in respect thereof must be discharged.

As the appellant has not succeeded with regard to the other part of his claim we think the proper order to make with regard to costs is that each party will bear its own costs throughout.

The plaintiff will be entitled to make the deposit of rent due under the decree of the landlord

Patterson, J.—I agree.

R.M./R.K. *Appeal allowed.*

(5) [1915] 30 I. C. 83.

(6) A. I. R. 1926 Cal. 97 I. C. 1016.

(7) A. I. R. 1927 Cal. 817=106 I. C. 143=55 Cal. 103.

A. I. R. 1930 Calcutta 748

S. K. GHOSE, J.

Krishnadhan Laha and *another*—Plaintiffs—Appellants.

v.

Brojendra Nath Das and *others*—Defendants—Respondents.

Appeal No. 1031 of 1927, Decided on 7th January 1930, against appellate decree of 3rd Additional District Judge, 24-Parganas, D/- 20th December 1926.

(a) Limitation Act, Art. 142—Suit for recovery of possession or declaration impeaching alienation by person other than natural guardian, must be brought within 12 years of transfer.

A suit for recovery of possession on declaration of title, impeaching the transfer (lease) by a person other than natural guardian of the minor, the transaction not being for legal necessity or benefit of the minor, is not barred by limitation if brought within 12 years of the transfer. [P 749 C 2]

(b) Practice — Appeal—Parties—Non-contesting defendant left out in appeal by contesting defendants — Plaintiff in second appeal does not implead them as respondents —Appeal is not incompetent.

Where in an appeal by contesting defendants non-appearing defendants against whom proceedings were ex parte were left out, the subsequent appeal by the plaintiff is not incompetent by reason of the fact that such defendants were not impleaded as parties respondents. [P 749 C 1]

(c) Minor—Alienation—Ratification.

A subsequent acceptance of rent does not amount to ratifying an alienation ab initio void: 3 *All.* 852, *Ref.* [P 749 C 2]

Prokas Chandra Pakrasi—for Appellants.

Kalikinkar Chakravarty for *Hiralal Chakravarty*—for Respondents.

Judgment.—Plaintiffs sue for recovery of possession of the disputed land on a declaration of their title thereto. It appears that there were two brothers, Trailokya Laha and Gobinda Laha. Trailokya the elder died in 1312 B. S. leaving a son Ashu defendant 8. Gobinda died in 1314 B. S. leaving two sons Krishna, plaintiff 1 and Netai, plaintiff 2. It appears that in 1301 Gobinda acquired mourashi right to the land in suit by a document Ex. 2. On 23rd Jaistha 1318, corresponding to 6th June 1911, defendant 8, purporting to act as guardian of the minors plaintiffs 1 and 2 and alleging that they had four annas share each and he had the remaining eight annas share in the land in suit, granted a permanent lease to one Tarini by the document which is marked Ex. C. Tarini's heirs, defendants 6 and 7, conveyed the lease-hold to defendants 1 to 5. Plaintiff's case is that the disputed land was acquired by Gobinda Laha alone after he had separated from his brother Tarini in 1290 B. S. that defendant 8 was never the guardian of the plaintiffs and was not entitled to grant mourashi pottah to Tarini, that the aforesaid pottah is a mere paper transaction and that the plaintiffs were not benefited by it. Hence the plaintiffs sue for a declaration that the pottah in question was null and void and for recovery of possession of the disputed land from the defendants. The suit is contested by defendants 4 and 5. Their defence is that Gobinda and Trailokya never separated in 1290 B. S. as alleged by the plaintiffs, that separation between Ashu defendant 8 and the plaintiffs took place only in 1322 B. S., that Ashu was de facto guardian of the plaintiffs during their minority and he granted the pottah in suit for the benefit of the minors' estate, and that the pottah conferred good title on Tarini. The learned Munsif held that Trailokya and Gobinda separated in 1290 B. S. that the property in the suit was acquired by Gobinda alone in 1301 B. S.; that the pottah in suit was not a bona fide nor valid transaction and that it was not for necessity or benefit to the estate of the minors. He accordingly decreed the suit.

On appeal by defendants 4 and 5 the learned Subordinate Judge held that Tarini never separated from Gobinda and that the disputed land was the joint property of the two brothers. He therefore found that Ashu had eight annas share and the plaintiffs had the remaining eight annas share in the property. He further found that Netai plaintiff 2, on attaining majority in 1323, accepted rents from the lessee and thereby ratified the lease to the extent of his share. He also held that as the suit had not been brought within three years of Netai's attaining majority the suit with regard to him was barred by limitation and so the lease to the extent of Netai's four annas share must stand good. With regard to the remaining four annas share of plaintiff 1, Krishna, he held that the pottah was not for pressing necessity nor for the benefit of the minor and therefore it was liable to be set aside. He accordingly decreed the suit in part

for four annas share of plaintiff 1. The present second appeal is preferred by the plaintiffs.

There is a preliminary objection that the appeal is incompetent because defendants 1, 2 and 3 have not been made parties respondents. These defendants have never appeared to contest and the suit was decreed as against them ex parte with costs. The contesting defendants 4 and 5 in para. 6 of the written statement pleaded that defendants 1, 2, 3, 6 and 8 were not necessary parties and that because of them the suit was bad for misjoinder of parties. In their appeal before the lower appellate Court also these contesting defendants left out the other defendants whom they alleged to be unnecessary parties. It does not therefore lie in their mouth now to take the point in this Court that the appeal is incompetent because these very same persons are not impleaded as parties respondents. So far as the plaintiffs-appellants are concerned, they are content to leave these defendants out and let the decree of the lower appellate Court remain untouched with regard to them. Therefore it cannot be said that the present appeal is incompetent because these defendants have been left out.

Coming to the merits, the point is whether the learned Subordinate Judge was right in holding that the suit as regards plaintiff 2 is barred by limitation. He has taken this view evidently relying upon Art. 44, Lim. Act. It is contended by the learned advocate for the appellants that that article would not apply unless it could be shown that Ashu defendant 8 was either the natural guardian, or testamentary guardian, or guardian appointed by a competent Court in respect of the two minors. This view is supported by the decision of this Court in appeal from appellate decree 2362 of 1922 in which the learned Judges followed the case of *Matadin* v. *Ahmad Ali* (1). The learned Munsif took the correct view in holding that Ashu was not the natural guardian in view of his relationship towards the minors: see for instance the case of *Kristo Kisor Neogy* v. *Kadermoyee Dassee* (2). In the case to which I have already referred the de facto guardian was an uncle, while in the present case Ashu is an uncle's son, and the present case is also rather worse, because it has been concurrently found that the lease was not for legal necessity nor for the benefit of the minors. In this view the learned advocate for the appellants has contended that Art. 44 did not apply and that the proper article would be Art. 142, Lim. Act, according to which the suit would be within time from the date of the lease to Tarini. The learned advocate for the respondents concedes that Art. 44 does not apply, but he contends that in any case Art. 91 would apply. This contention cannot be accepted because Art. 91 is a residuary article and it has also no reference to a case or suit for recovery of possession. I must hold therefore that the learned Munsif is correct in deciding that the suit is not barred by limitation, the plaintiffs having come within 12 years from the date of the pottah of 1318.

The next point is whether plaintiff 2 can have the pottah set aside with regard to his four annas share. The learned Subordinate Judge has taken the view that he has ratified the lease on attaining majority. It is contended by the learned advocate for the appellants that the lease was void ab initio because Ashu was not an authorized guardian and therefore he had no authority to make any transfer of the minor's shares, and it has been found that there was no benefit to the minor's estate. It is contended on the other side that, even though Ashu was not the guardian, still he was in the position of a karta of the joint family. But that would not give him authority to alienate the minor's share, without having first taken the Court's sanction as guardian. The alienation was thus void ab initio and subsequent acceptance of rent by plaintiff 2 did not have the effect of ratification: see for instance the case of *Mauji Ram* v. *Tara Singh* (3). In this view the pottah is liable to be set aside with regard to four annas share of plaintiff 2.

It is further contended by the learned advocate for appellants that the learned Subordinate Judge was wrong in reversing the Munsif's finding that Ashu had no share at all in the disputed property.

(1) [1912] 34 All. 213=13 I.C. 976=39 I.A. 49=15 O.C. 49 (P.C.).
(2) 2 C.L.R. 583.
(3) [1881] 3 All. 852.

But on this question the matter is concluded by the findings of fact arrived at by the learned Subordinate Judge. No doubt, in his judgment, the learned Judge has not considered in detail all the points mentioned by the learned Munsif; still the judgment shows that the evidence and the circumstances were considered and the findings of fact are there. On this point therefore the appeal must be dismissed.

The result is that the appeal will succeed with regard to four annas share of plaintiff 2 and the suit would be decreed in respect of that share. The appeal is thus allowed in part with proportionate costs in all the Courts.

V.B./R.K. *Order accordingly.*

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* A. I. R. 1930 Calcutta 750

SUHRAWARDY AND COSTELLO, JJ.

Haripada Maity—Defendant 3—Appellant.

v.

Annada Prosad Haldar and *others*—Respondents.

Appeal No. 2087 of 1928, Decided on 7th July 1930, from appellate decree of Addl. Dist. Judge, 24 Parganas, D/- 5th June 1928.

*** (a) Transfer of Property Act, S. 59—Definite and affirmative proof that Sub-Registrar affixed his signature in presence of executant is necessary to constitute him an attesting witness**

Where a party relies on the signature in the registration endorsement of the Sub-Registrar for the purpose of proving valid execution of a mortgage deed, as the signature of one of the attesting witnesses as required by law, it must be affirmatively and definitely proved that he had affixed his signature in the presence of the executant: *A. I. R.* 1929 *Cal.* 123, *Foll.*; *A.I.R,* 1928 *Cal.* 154, *not Foll.* [P 752 C 1]

(b) Transfer of Property Act, S. 59—Executant signing document—Scribe signing it just after him—Other witnesses signing it after scribe—Scribe is attesting witness.

Where a scribe, who was called by the plaintiff as an attesting witness to prove valid execution of a document and deposed in his evidence that the executant signed the deed first, then he signed it and then the other witnesses signed it.

Held: that in this case the scribe was not only functioning as the writer of the document but that he in fact put his signature to it in, order tobear testimony to the fact that it had been executed by the executant and that therefore he may properly be described as an attesting witness. [P 752 C 2]

Aitsaranjan Ghose—for Appellant.

Hiralal Chakravarty — for Respondents.

Costello, J.—In this case the suit was brought by the plaintiffs to recover a sum of money said to be due on a mortgage bond dated 3rd Pous 1322 B.S. alleged to have been executed by defendant 1. The bond was said to be given as security for repayment of the sum of Rs. 498 and there was an agreement to repay that loan in six yearly instalments of Rs. 83 in Falgoon every year from 1323 to 1328 and in default of payment of any one instalment interest was to run on the entire amount at half an anna per rupee per month. The plaintiffs' case was that the defendants had paid nothing at all on the bond. Defendants 2 and 3 are said to be subsequent transferees and the remaining defendants were brought into the suit as having an interest in a prior mortgage. The suit was contested by defendants 1 and 3 and the defences which they raised were to the effect that the bond had not been duly executed and attested and alternatively that defendant 1, that is to say the mortgagor, was not of sound mind at the time he executed the bond; further that the plaintiffs had taken advantage of defendant 1's mental condition and had improperly obtained execution of the bond. There was a further defence set up by defendant 3 to the effect that he had purchased the property and to redeem the prior mortgage he deposited the money due under it, but that the plaintiffs had not taken that money and so he had been obliged to bring a redemption suit against them and that the present suit was brought out of malice and without any cause of action.

The main points discussed in the case were three: (1) Was the bond duly executed and attested? (2) Was there any consideration given for the execution of the bond? (3) What was the mental condition of defendant 1 and was execution obtained by undue influence? The learned Subordinate Judge who tried the case found all these issues in favour of the defendants and accordingly he dismissed the suit. These findings were reversed on appeal by the learned Additional District Judge and he made a decree in favour of the plaintiffs. He also took upon himself to go into the question whether the rate of the interest charged in the bond was reasonable or not and he took the

view that it was excessive and he assessed what he considered to be the proper rate of interest at Re. 1-9-0 per cent per month. The only question which has been argued before us is whether or not the mortgage bond was properly attested. With regard to this the learned Subordinate Judge said that as regards attestation he thought that the plaintiffs had not succeeded in proving that the document was properly attested. He said:

"They have examined the scribe Brojomohan Bhandari who spoke everything except his attestation of the bond."

A perusal of his evidence had led him (the Subordinate Judge) to conclude that he wrote the bond and signed his name as the scribe but he did not appear to have seen the execution of the bond nor the attestation thereof by the other two witnesses. One of the alleged attesting witnesses Bhabendranath Teli was called and he said that he merely put his signature on the bond at the behest of the plaintiffs when neither defendant 1 nor any other attesting witness, not even the scribe, was present. Accordingly the learned Subordinate Judge said that Bhabendranath Teli could not be said to be an attesting witness. The other attesting witness Rati Kant Sarkar was not called. It has been said before us that the reason why he was not called was that he was ill at the time. It was obvious that if we take the view taken by the learned Subordinate Judge it would be right to come to the conclusion that this document was not properly attested. As against that the learned Additional District Judge thought that as the bond was admittedly registered and defendant 1, that is the mortgagor, had admitted execution of the bond before the Sub-Registrar, that was in itself sufficient to constitute the Sub-Registrar as an attesting witness and that the Court ought to take judicial notice of the attestation. With regard to the other alleged witness, the learned Additional District Judge said that as regards attestation the learned Subordinate Judge found that the bond was not properly attested because of the two attesting witnesses one Ratikanta Sarkar was not examined and the other Bhabendranath Teli stated that he merely put his signature on the bond at the behest of the plaintiff when the defendant was not there. The learned Additional District Judge then went on as follows:

"Further the scribe read out the bond and then read it over to the defendant; then the defendant signed it; and then the scribe signed it. This is clearly sufficient attestation within the meaning of Act 26 of 1926 read with Act 27 of 1927."

All this amounts to this that the lower appellate Court came to the conclusion that it ought to be held that the two attesting witnesses required by law were provided in the persons of the Sub-Registrar and the scribe. We have had frequently to consider a point similar to that which we have now to decide and in particular to deal with the position of the Sub-Registrar in circumstances such as the present case. With regard to this we have only to say that we accept and respectfully endorse what has been said by the learned Chief Justice in the case of *Abinash Chandra* v. *Dasarathi Nalo* (1). At p. 1232 (of 32 *C.W.N.*) the learned Chief Justice referred to the case which has been relied upon on behalf of the appellant before us, namely, the case of *Radhamohan Dutt* v. *Nripendra Nath Nundy* (2), and commenting on that case the learned Chief Justice said:

"In that case, as in the present, the mortgagor at the time of registration admitted the execution of the mortgage deed and the Sub-Registrar by his signature and seal acknowledged or asserted on the document that execution had been admitted by the mortgagor. Accordingly in the case to which I am now referring it was held that the Court would take judicial notice of that signature and seal and that the Sub-Registrar was a good attesting witness as required by law."

The learned Chief Justice then continued as follows:

"It appears to me that the learned Judges in that case may not have paid sufficient attention to the circumstances that by Act 27 of 1926 and indeed apart from that Act it is necessary that each of the witnesses should have signed the instrument in the presence of the executant. It does not appear that there was any evidence before the learned Judges that the Sub-Registrar had affixed his signature or seal in the presence of the mortgagor. But in the case before us now it is quite clear that there is no such evidence at all."

The learned advocate who has appeared for the appellant before us in the present case has said that the same observations may be properly made with regard to the case which we are now dealing. No doubt it is admitted by

(1) A. I. R. 1929 Cal. 128=114 I. C. 84.
(2) A. I. R. 1928 Cal. 154=105 I. C. 422.

the learned advocate for the respondent that it is in fact the case that there is no evidence that the Sub-Registrar did in fact sign the document in the presence of the executant. It is clear from the judgment of the learned Chief Justice, which I have just quoted that he and Mukherjee, J., were of opinion that the case in *Radhamohan Datt* v. *Nripendra Nath Nandy* (2) ought not to be followed in matters of this kind. In our opinion, it is obvious that if the Sub-Registrar has to be brought into the matter as constituting an attesting witness it must be affirmatively and definitely proved that he had affixed his signature in the presence of the executant. In that view of the case we are bound to reject the conclusion arrived at by the learned Additional District Judge that the Sub-Registrar might be taken as one of the two necessary attesting witnesses.

We have now to consider whether on this aspect of the case it can still be said that the document was properly executed. S. 68, Evidence Act, provides that if a document is required by law to be attested, it shall not be used in evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness living and subject to the process of the Court and capable of giving evidence. By Act 31 of 1926 a proviso was added to that section whereby it was enacted that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provision of the Registration Act of 1908, unless its execution by the person by whom it purports to have been executed is "specifically denied." In the present case the common ground is, at any rate, it is not disputed, that the mortgage bond in question was in fact registered in accordance with the provision of the Registration Act of 1908. That being the case, it would not be necessary for the plaintiff to call one of the attesting witnesses unless its execution by defendant 1 is "specifically denied." It was argued by the learned advocate who appears for the plaintiff-respondent before us that there was no specific denial of the execution of this particular mortgage bond. That is a proposition which we are unable to accept because it seems clear from the pleadings, whatever may have been the precise language employed, that the defence put forward was in substance that the defendant denied that the mortgage bond was duly executed and attested; and there was an alternative defence that even if it were executed it was executed by defendant 1 either when he himself was not of sound mind or when he was improperly influenced by the plaintiff. It cannot be argued therefore that there was anything in the nature of an implied admission of the de facto execution of the document merely because defendant 1 choose to add the word "duly" in front of the word "executed" or that he has not denied its execution "specifically."

Taking the view that there was a denial of attestation it follows that it was necessary for the plaintiff to call, to prove the document, at least one person who might properly be described as an attesting witness. Upon an examination of the evidence given by the person who has been referred to as the scribe we find that he said that defendant 1 signed first and then he put his signature and then the other attesting witnesses. In this case therefore we are disposed to take the view that this man was not only functioning as the writer of the document but that he in fact put his signature to it in order to bear testimony to the fact that it had been executed by defendant 1. Therefore he may properly be described as an attesting witness. We think that in this case this particular scribe was just as much an attesting witness as the other persons who are said to have put their signatures on the document. It follows that the plaintiff has sufficiently complied with the requirements of S. 68, Evidence Act, as amended by S. 2, Act 31 of 1926. And therefore even if we reject the Sub-Registrar's signature put upon the document there is sufficient testimony that this document was properly executed and attested. We accordingly dismiss this appeal with costs. The cross-objection is not pressed and is therefore dismissed.

Suhrawardy, J.—I agree.

K.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 753

PANCKRIDGE, J.

Krishna Gobinda Chatterji — Petitioner.

v.

Mt. Kishoribala Debi — Opposite Party.

Criminal Revn. No. 257 of 1930, Decided on 2nd May 1930.

Civil P. C. (1908), O. 39, R. 2—Injunction cannot be granted for not pursuing remedy in criminal Court under Criminal P. C., S. 488.

A civil Court has no jurisdiction to restrain a party by an injunction from pursuing her remedy, under S. 488, Criminal P. C. in a criminal Court. [P 754 C 1]

Panchanon Ghose and *Sitangsu Bhusan Bose* – for Petitioner.

Mrityunjoy Chatterji, Debabrata Mukerji and *Bhola Nath Roy*—for Opposite Party.

Judgment.—This is a rule obtained by the petitioner Krishna Gobinda Chatterji calling upon the District Magistrate of Bankura and also on the opposite party Kishoricala Debi, the petitioner's wife, to show cause why an order under S. 488, Criminal P. C., directing the petitioner to pay a monthly maintenance of Rs. 18 to the opposite party for a certain time and thereafter to pay a monthly maintenance at a reduced rate should not be set aside. An appeal was filed against this order before the Sessions Judge of Bankura and was dismissed by him. It appears that subsequent to the application for an order under S. 488, Criminal P. C., the petitioner instituted a suit in the Munsif's Court seeking restitution of conjugal rights. While the application was still pending he obtained an order from the Munsif restraining the opposite party from proceeding with her application. In spite of the injunction the Magistrate was of opinion that he had jurisdiction to entertain the opposite party's application and male the order to which I have referred. The learned Sessions Judge took the same view.

The ground on which the rule has been granted is that the Sessions Judge erred in holding that the Sub-Divisional Magistrate had jurisdiction to make the order he had made. I have read the judgment of the Sessions Judge which has dealt with the matter at some length. It is clear to me that in itself it is unsatisfactory as a justification of the order made by the Magistrate. It is conceded that the injunction granted by the Munsif was a temporary injunction, but the learned Judge has founded his decision upon a consideration of Chap. 10, Specific Relief Act, which is only concerned with perpetual injunction, as is indicated by S. 53 of the same Act. The law as regards temporary injunction is to be found not in the Specific Relief Act but in the Civil Procedure Code. The relevant order of that Code is O. 39. It is conceded that R. 1 of that order has no application, but it is said that this injunction was made in the exercise of the jurisdiction which the Munsif had by reason of R. 2. The petitioner I think rightly says that neither the Magistrate and Sessions Judge nor this Court sitting in criminal revision can question the propriety of the injunction provided it was made with jurisdiction. In my opinion however on the face of it the injunction is one which the Munsif had no jurisdiction to grant and must be treated as a nullity. My attention has not been directed to any provision of law by which the injunction can be justified if it does not fall within the purview of R. 2, sub-R. 1. Now the suit in which the temporary injunction is granted must according to that subrule be a suit for restraining the defendant from committing a breach of contract or other injury of any kind. I am extremely doubtful whether on the widest interpretation of the language the suit whereby the plaintiff seeks to enforce his conjugal rights against the defendants can be held to be a suit of the nature contemplated by the subrule.

But on the assumption that it can be considered as a suit of such a nature I do not think that the injunction granted by the Munsif is such an injunction as the subrule contemplates, for the injunction must be one to restrain the defendant from committing breach of contract or injury complained of or any breach of contract or injury of a like. kind arising out of the same contract or relating to the same property or right. In my opinion that does not cover in the circumstances of the case an injunction restraining the de-

fendant from proceeding with her application under S. 488, Criminal P. C. I do not think that the presumption of such an application is a breach of the matrimonial contract or that it is covered by the other words of the sub-rule to which I have referred in detail. To my mind the Munsif had no jurisdiction to restrain the opposite party by an injunction from pursuing her remedy in the criminal Court ; and I am of opinion that the Magistrate and the Sessions Judge were right in treating the order made by the Munsif as anullity. The Rule is discharged.

B.V./R.K. *Rule discharged.*

A. I. R. 1930 Calcutta 754 (1)

PEARSON AND JACK, JJ.

Emperor

v.

Sashi Kanta De—Accused.

Death Ref. No. 4 of 1930, and Criminal Appeal No. 218 of 1930, Decided on 14th May 1930, from order of Addl. Sess. Judge, Mymensingh.

Criminal P. C. S. 297—Dying declaration as foundation for prosecution story — Caution should be given to jury as to its weight and efficacy.

Where the foundation for the prosecution story is dying declaration of the deceased a caution should be given to the jury as regards the weight and efficacy to be given to a dying declaration and their attention should be drawn to the question of how far the other facts and surrounding circumstances proved in evidence must be said to support the truth or otherwise of that declaration. [P 754 C 2]

A. K. Dhar—for Accused.

Lalit Mohan Sanyal—for the Crown.

Judgment.—This case comes before us under S. 374, Criminal P. C., with regard to the trial of a man named Sashi Kanta De alias Sashi Barai in which the charges against the accused were under S. 302 and 397 I. P. C. The jury have arrived at a unanimous verdict of guilty, and the learned Judge agreeing therewith passed the sentence of death subject to confirmation by this Court.

We have had the charge to the jury placed before us. The case was one in which it is alleged that the accused had murdered and robbed one Ram Golam Thakur as he was on his way home at about 8 o'clock one evening. It appears that the fatal blow was on the back of his head. The evidence of the prosecution shows that when he was struck he called out with the result that certain persons came upon the scene and the deceased made a statement to them in the nature of a dying declaration mentioning who it was who had done him the injury. He was then removed to the house of Mahi Kanta Majumdar and he made a further statement to him. In these circumstances it is pretty clear that the foundation for the prosecution case is the dying declaration of the deceased. It has been pointed out to us that in the charge there is no caution given to the jury as regards the weight and the efficacy to be given to a dying declaration of this character. Some such caution should undoubtedly have been laid before them, and their attention should have been drawn to the question of how far the other facts and surrounding circumstances proved in evidence might be said to support the truth or otherwise of that declaration. It would not be fitting for us to lay down any more detailed directions having regard to the order that we propose to make. But so far as the case now before us is concerned the verdict of the jury and the sentence must be set aside and the case must go back for retrial by some other learned Judge.

It is particularly regrettable that this course is necessary having regard to the time that had elapsed between the commission of the offence and the conclusion of the trial. Let the record be sent down at once and let the case be disposed of as early as possible.

V.B./R.K. *Case remanded.*

A. I. R. 1930 Calcutta 754 (2)

RANKIN, C. J. AND PATTERSON, J.

Nanoram Goenka—Petitioner.

v.

Fulchand Jaypuria—Opposite Party.

Criminal Revn. Nos. 1018 and 1019 of 1929, Decided on 14th August 1929, from order of Fourth Presy. Magistrate, D/- 2nd August 1929.

Criminal P. C. (1898), S. 208—Cross-examination of prosecution witnesses must be allowed before determining whether case should be committed to Sessions.

It is a clear right of the parties to cross-examine prosecution witnesses before the committing Court makes up its mind as to whether there is a case to be committed. In addition to that there is the right to call evidence for the defence. [P 755 C 2]

S K. Sen, *Prabodhchandra Chatterji* and *Satindranath Mukerji*—for Petitioner.

B. C. Chatterji and *Anilchandra Ray Chaudhuri*—for Opposite Party.

Rankin, C. J.—In this case, it appears to me that the order of commitment must be quashed. The case is one in which certain persons are said to have been entrusted with certain bales of cotton yarn. It is said that, having been entrusted with these goods they have, in fact, committed criminal breach of trust by entering into a conspiracy with certain other people to make away with the goods. We are concerned with two matters. One is a rule obtained by the accused Nanooram and the other is an application for a rule by the accused Piramul and Gobardhan Das. So far as Nanooram is concerned, we have had discussed before us the question, whether, on any of the charges on which the Magistrate has committed the accused, there is prima facie evidence to justify the order of commitment; and taking the evidence carefully as recorded, we have come to the conclusion that we are not prepared to say that there is insufficient evidence to justify that commitment.

Then there comes another objection to this commitment order, which applies to the accused in both the cases before us, because it is said that, if the case of Nanooram is somewhat touch and go as to whether there is any evidence to warrant a commitment at all, both his case and the case of the other petitioner cannot be judged at the present stage for the purpose of showing whether the commitment is right or wrong, because the course taken by the Magistrate has deprived all these petitioners of their right, first of all, to cross-examine the prosecution witnesses so as to show that there is no case for commitment and, secondly, to call any evidence that they might desire.

In my judgment, on the second ground the case is completely made out. It appears that this prosecution started first of all as a prosecution in an ordinary warrant case, but that the Magistrate made up his mind, in view of the suggestion that there was a case exclusively triable by the Court of Session, to deal with the case from the beginning as though it were to end in a commitment, and it is said that, at the time the Magistrate so decided, he explained that no prejudice would accrue to these petitioners, because, instead of calling upon them at once, as in a case that was going to be committed to cross-examine each witness as his evidence was given for the prosecution, he would permit counsel to reserve the cross-examination the idea being that, if it afterwards turned out that the Magistrate was not trying a warrant case in the ordinary course, counsel would then have an opportunity to cross-examine.

What happened in fact is this: The defence did not decline to cross-examine but from the Magistrate's own writing we find that the cross-examination was reserved. It could only be reserved with the Magistrate's permission and it is clear to my mind that the story in the petition before us is correct. The Magistrate himself says, as may well be true, that he has no recollection that he assured the defendant's advocate that the accused would have an opportunity to cross-examine the witnesses. But he says:

> "I might have said so; but as the case is going to the High Court Session, I reject the defendants' prayer on that point."

With great respect to the Magistrate, if the Magistrate acted as he is said to have acted, he cannot possibly commit the case to the Sessions without keeping his promise. It is a clear right of the parties to cross-examine prosecution witnesses before the committing Court makes up its mind as to whether there is a case to be committed. In addition to that, there is the right to call evidence for the defence. Those rights given under Chap. 18 of the Code have in effect been taken away from these petitioners. In the same way, if this case were to be dealt with as a warrant case, it is evident that the accused would have the right to cross-examine, whether before or after the charges were framed. I am satisfied that the question whether there is sufficient evidence is a somewhat narrow question, a question in which there is some little difficulty. It is quite impossible for this Court to permit people to be committed to the Sessions, when the Magistrate fails to comply with the law, so as to see that the accused get an opportunity to satisfy him that there is no case

which requires commitment. On that ground, the commitment of the petitioners cannot be supported. The commitment will be set aside and the cases must go back to be tried in accordance with law. The defence must be given an opportunity to cross-examine the prosecution witnesses and to adduce any evidence they desire before there can be any question of a recommitment to the High Court. On the other hand, if, as a result of the evidence, the Magistrate does not any longer think it necessary to commit, he can proceed with the cases as warrant cases.

Patterson, J.—I agree.

B.V./R.K. *Revision allowed.*

A. I. R. 1930 Calcutta 756

SUHRAWARDY AND PATTERSON, JJ.

Mokshed Sheikh and *another* — Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 103 of 1930, Decided on 12th August 1930.

Evidence Act, S. 33— Verbal application is not sufficent ground for admitting evidence under S. 33—Omission to object does not dispense with legal requirements.

It is necessary that under S. 33 the Judge must be satisfied that the evidence is admissible on the materials before him, namely, on the ground that the witness whose disposition is attempted to be put in was not or could not be found or had been won over by the adverse party or otherwise incapable of giving evidence.

A verbal application made by the Public Prosecutor for admission of evidence of a particular witness under S. 33, Evidence Act, is not by itself a sufficient ground for admitting that evidence : 20 *W. R.* 69 *Cr.* and 41 *Cal.* 601. *Ref.*

The fact that no objection was taken to the reception of evidence of a particular witness on the mere verbal application by the Public Prosecutor by the defence, does not dispense with the requirements of S. 33, Evidence Act: 39 *Mad.* 449 and *A.I. R.* 1929 *Lah.* 542, *Rel. on.*

[P 757 C 1]

Probodh Chandra Chatterji and *Durga Charan Mitter*—for Appellants.

Monindranath Mukherji — for the Crown.

Judgment.—In this appeal it is objected on behalf of the appellants that the learned Judge has misread the evidence in some portions and has wrongly admitted the evidence of a certain witness under S. 33, Evidence Act. This is the only important point taken before us. It appears that the dacoity with which the accused were charged was committed after midnight of 6th July 1929. The information was lodged at the thana the following morning by a man named Sobhan. He did not name any of the dacoits nor did he say that some of them had been recognized. The first information was recorded by a Sub-Inspector of the name of Abdul Jabbar Chaudhury. The evidence shows that on the night of 7th July 1929 another Sub-Inspector by the name of Birendra Nath Pal took over the investigation from Abdul Jabbar Chaudhury. Abdul Jabbar was not examined in the committing Magistrate's Court because he had died before the case was heard. Birendra Nath Pal was examined by the committing Magistrate. He was not examined before the Sessions Judge but his evidence was admitted by the learned Judge under S. 33, Evidence Act. There is nothing on the record to show in what circumstances or on what ground this evidence was admitted. In the order sheet we find under order dated 14th January 1930 the following notes:

"Then the evidence of Babu Birendra Nath Pal (P. W. 10) in the lower Court put in by the prosecution under S. 33, Evidence Act."

There is no order by the Judge admitting the evidence on the ground that he was satisfied under that section that the witness was not available for examination before him. In the charge the learned Judge has expressed himself thus:

"In the morning at 9 a. m. Sovan (P. W. 6) went to the thana and lodged F. I. R. Ex. 5., The daroga who recorded it is not available and his evidence in the lower Court has had to be put in and used here as evidence."

In this sentence the learned Judge has been guilty of a number of inaccuracies. The first information report is not Ex. 5 in the case but Ex. 2. Ex. 5 is the search report which was prepared and signed by Birendranath Pal. Then the statement that the Daroga who recorded it (meaning Birendra) is not available is not correct because the daroga who recorded it was Abdul Jabbar who is dead. Then the learned Judge proceeds to say: "The daroga went to Rakhal's house on 7th July." If by this daroga he means Birendranath Pal the evidence shows that Birendra went to his house on 8th July. The charge is there-

fore vitated by a confusion which has been made by the learned Judge in describing the incidents shortly after the dacoity. But the greater defect is with regard to the learned Judge's admission of the evidence under S. 33 Evidence Act. The record does not show that there were such materials before him as to satisfy him that the presence of withness Birendranath Pal could not be secured. It has been held from early times that in order to enable a Court to admit the deposition of a witness under S. 33, Evidence Act, the ground for its admission should be stated fully and clearly to enable the Hight Court to judge of its propriety.

Queen v. *Mowjan* (1): It is necessary that under S. 33,Evidence Act, the Judge must be satisfied that evidence is admissible on the materials before him, namely on the ground that the witness whose deposition attempted to be put in was not or could not be found or had been won over by the adverse party or otherwise incapable of giving evidence. In *Emperor* v. *Kangalmali* (2), the learned Judges refused to admit evidence though certain witnesses had sworn that the witness could not be found and that a warrant was issued on the witness. In their opinion this evidence before the Judge did not lay sufficient foundation for the reception of the evidence. The warrant was not produced and there was no evidence on the record to show that attempt was made to get the witness and therefore there was no evidence to show what was done to find out the man. That was a much stronger case than the present in which there is no material on the record not even an application to show that the witness could not be found. It is possible that a verbal application was made by the Public Prosecutor but that is no sufficient ground as has been held in *In Re Annavi Muthuryan* (3). It appears however that in this case no objection to the reception of the evidence was taken by the defence but that does not dispense with the requirements of S. 33: see *Golam Haider* v. *Emperor* (4) and the Madras case above referred to. We are accordingly of opinion that the learned Judge was not right in admitting the evidence of this witness Birendranath Pal and placing it before the jury. The evidence of identification in this case consists of the evidence of a woman named Katyani and the approver. The approver has contradicted the witness Katyani in several points. The learned Judge in his charge has referred to the evidence of the witnesses and says:

"In my opinion there is no genuine corroboration of an independent kind. You have seen that the approver's evidence is in many respects inconsistent with the woman Katyani; that of course may be due to mistake on the part of either. But that only confirms my opinion (which you are not bound to accept) that in this case there is no corroboration of the approver's implication of Mokshed and Doulat. There is no point in saying that if you believe Katyani's evidence it corroborates the approver. That is arguing in a circle.

On this evidence the accused were convicted by the jury, who were divided in the proportion of 3 to 2, under S. 395, I. P.C., and sentenced to rigorous imprisonment for five years each. We are of opinion that the trial has been vitiated by the defect in the learned Judge's charge. The question arises whether in the circumstances of this case there should be an order for retrial. Having gone through the evidence and the learned Judge's comment upon it we think that it is not a case where there should be a fresh trial. Accordingly we allow the appeal and direct that the accused be acquitted and set at liberty.

K.N./R.K. *Appeal allowed.*

(1) 20 W. R. 69 Cr.
(2) [1914] 41 Cal. 601=15 Cr. L. J. 713=26 I. C. 161.
(3) [1916] 39 Mad. 449=16 Cr. L. J. 294=28 I. C. 518.
(4) A. I. R. 1929 Lah. 542 = 1929 Cr. C. 85= 116 I.C. 329=30 Cr.L.J. 623=10 Lah.897.

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* A. I. R. 1930 Calcutta 757

GRAHAM AND S. K. GHOSE, JJ.

Calcutta Steam Navigation Co., Ltd.—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 482 of 1930, Decided on 28th August 1930.

*** Criminal P. C. (1898), S. 133—S. 133 deals with trades in themselves injurious to health.**

Section 133 deals only with occupations or trades which are in themselves injurious to health and has nothing whatever to do with trades which in themselves are harmless but in course of which a public nuisance might be committed.

There was rivalry between two steamer companies who vied with each other in attracting passengers. It was alleged that their prac-

tices of taking up passengers from the boats and of taking passengers from places other than the recognized jetties caused backwash and involved danger to the public.

Held: that S. 133 did not apply.

Per *S. K. Ghose, J.*—Section 133 is not confined to trades which are injurious in themselves It applies on the contrary to the cases of trades which become injurious by reason of conduct of them. [P 758 C 1, 2]

Suresh Chandra Taluqdar and *Haridas Gupta*—for Petitioner.

B. M. Sen—for the Crown.

Graham, J.—This rule was issued calling on the District Magistrate of Midnapore to show cause why certain proceedings drawn up against the petitioners under S. 133, Criminal P. C, should not be quashed, or such other order made as this Court might deem fit and proper upon grounds 2, 3 and 5 in the petition to this Court. The first of these grounds is that the proceedings in question are bound to cause irreparable mischief to the lawful and legitimate trade of the petitioners, and as such proceedings are not contemplated by the criminal law. The next ground is that the Courts below have erred in law in construing S. 133, Criminal P. C., and that upon a proper interpretation of the section they ought to have held that it has no application whatsoever to the facts and circumstances of the case. The third and last ground is that the procedure adopted by the Court below has been illegal and without jurisdiction and has operated to the serious prejudice of the petitioners.

It appears that these proceedings have had their origin in rivalry which had arisen between two steamer companies, namely, the Calcutta Steam Navigation Co. Ltd., and the Ghatal Steam Navigation Co. Ltd. There was evidently keen competition between these companies and their agents have been vying with one another in trying to attract passengers for their respective companies. In the order which has been drawn up by the learned Magistrate three matters have been specified for the purpose of justifying the order under S. 133, Criminal P. C. Firstly, the alleged practice of taking up passengers from boats; secondly, the allegation that the petitioner company is in the habit of taking up passengers from places other than the recognized jetties ordinarily used for the purposes; and thirdly, that as a result of these practices backwash is caused and that this involves danger to the public. The broad question is whether, having regard to the facts and circumstances of this case, the provision of S. 133, Criminal P. C. have been rightly applied. In my judgment that section has no application whatever to the facts and circumstances of a case such as the present. It is to be observed that Chap. 10, in which this section is included, deals with public nuisances, and it would certainly be a straining of language to hold that the acts which have been described above constitute a public nuisance. The only part of the section which could be deemed to apply is para. 3, which is in the following words:

> "That the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated."

In my opinion this section deals only with occupations or trades which are in themselves injurious to health and has nothing whatever to do with trades which in themselves are harmless, but in the course of which a public nuisance might be committed. I have no doubt whatever that the section was never intended to apply to the facts and circumstances of a case such as the present.

The result, therefore, is that this rule must be made absolute and the proceedings in question quashed. This order will not interfere with the discretion of the Magistrate or prevent him from taking any other steps under any other section of the law which may be considered to be applicable.

S. K. Ghose, J.—My own view is that by the amendment in para 3, S. 133, Criminal P. C., that section has been amplified, so that its scope has been widened. It seems to me that it can no longer be said that the section is confined to trades which are injurious in themselves; on the contrary it applies to cases of trades which become injurious by reason of the conduct of them. It will be noticed that the words "conduct" and "regulate" occur for the first time in the amended section. But having regard to the facts and circumstances of the case, I agree with my

learned brother that the rule should be made absolute.

R.M./R.K. *Rule made absolute.*

A. I. R. 1930 Calcutta 759

PEARSON AND JACK, JJ.

Superintendent and Remembrancer of Legal Affairs, Bengal—Petitioner.

v.

Khagendra Nath Das Gupta—Opposite Party.

Criminal Misc. Revn. No. 81 of 1930, Decided on 29th May 1930.

(a) Contempt of Court—Power of High Court to commit for contempt of itself is inherent in Court.

The power of the High Court to commit for any contempt of itself is inherent in the Court and arises from the fact that it is a Court of Record. The power is one that is ancillary to the exercise of the various jurisdictions of the High Court, and it may be expedient to exercise it in or in relation to any one of those jurisdictions. [P 760 C 1]

(b) Crown Side Rules, Chap. 37, R. 2—Rule issued to show cause against committal for contempt—Party need not appear through advocate instructed by attorney.

Where a rule is issued by the Bench of a High Court upon a party to show cause why he should not be committed to prison, or otherwise dealt with for the contempt of itself, it is not necessary that the party, if represented, must appear through an advocate instructed by an attorney: 4 *I. C.* 297 and 41 *Cal.* 173, *Dist.* [P 760 C 1]

Susil Kumar Sen—for Incorporated Law Society.

Narendra Kumar Basu—for Bar Association.

Pearson, J.—In this matter a rule was issued by us upon the opposite party to show cause why he should not be committed to prison or otherwise dealt with for the contempt of this Court and of the Court of Akshoy Kumar Bose, Deputy Magistrate of Jalpaiguri, in printing and publishing and allowing to be published certain articles on 6th March 1930 entitled "The Sedition Case of Jalpaiguri" and "Bichar" and why he should not pay the costs.

The articles related to the trial of certain accused persons under S. 124-A, I. P. C., which started in November 1929, and went on until February 1930. On 28th February they were found guilty and sentenced, and on 7th March they appealed to this Court. The articles in question were published at Jalpaiguri on 6th March, and the opposite party is resident there.

The Chief Justice has directed that we should exercise the jurisdiction vested in this Court by the Contempt of Courts Act 1926, but when the Rule first came on for hearing, the point was raised by Mr. Sen, appearing as representing the Incorporated Law Society, that the matter was one of such a nature that the party must be represented by an advocate of the Court instructed by an attorney, which was not the case. We directed notice to be given to the Bar Association, and Mr. N. K. Basu has now appeared in their interests.

In so far as the contempt of a subordinate Court is concerned the matter is now governed by the provisions of the Contempt of Courts Act 1926, enacted, as the preamble states, because doubts had arisen as to the powers of a High Court to punish contempts of subordinate Courts. S. 2 (1) of the Act, so far as material, provides that:

"The High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of Courts subordinate to them as they have and exercise in respect of contempts of themselves."

Mr. Sen has referred in aid of his argument to the decision of the Special Bench in the case of *Re Barristers and Vakils* (1), which however only decided actually that where a Magistrate had committed an accused for trial to the High Court under the provisions of the Criminal Law Amendment Act 1908, barristers would have the exclusive right of audience before the Special Tribunal at the trial of such cases in the High Court. The reasons for the decision are not given. Mr. Sen also referred to the provisions of Cls. 22, 23 and 24, Letters Patent of 1865, as to the criminal jurisdiction of their Court, and to R. 2, Crown Side Rules, laid down in Ch. 37 of the Rules and Orders, as regards the trial of cases at the Crown Side under the extraordinary original criminal jurisdiction. He also referred to Ch. 2, R. 4, of the rules and orders regarding the exclusive right of audience in any matter on the original side.

Mr. Basu on the other hand has argued that the Court has power to dispose of the matter in its criminal appellate jurisdiction, though it may be the Crown side would also have jurisdiction

(1) [1909] 10 Cr.L.J. 553=4 I.C. 297.

to deal with it. Even under Ch. 37, R. 2, if the matter is one within the extraordinary criminal jurisdiction, he points out that applications for its exercise are to be heard and disposed of at the appellate side.

The matter is one that is by no means free from difficulty. The power of the High Court to commit for any contempt of itself is inherent in the Court and arises from the fact that it is a Court of Record. The power is one that is ancillary to the exercise of the various jurisdictions of the High Court and it may be expedient to exercise it in or in relation to any one of those jurisdictions. As regards the nature of such proceedings taken in contempt, I do not consider it necessary or desirable to lay down any general rule that such proceedings must necessarily and exclusively fall under any particular one of the different jurisdictions conferred on the Court by its Letters Patent; though it may be that the Court on its Crown side would have the power to deal with such a matter as the present: see per Jenkins, C. J. in *Legal Remembrancer* v. *Motilal Ghose* (2), at p. 215. On the other hand I am not satisfied that that must be the exclusive way of dealing with such a matter as an application in contempt. Upon the whole I am not prepared to uphold the contention that in this case the party, if represented, must appear through an advocate instructed by an attorney.

Jack, J.—I agree.

V.B./R.K. *Order accordingly.*

(2) [1914] 41 Cal. 173=14 Cr. L. J. 321=20 I. C. 81.

A. I. R. 1930 Calcutta 760

CUMING, J.

Ghuraram Kahar—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1414 of 1929, Decided on 21st January 1930, from order of Hon. Presy. Mag., Calcutta, D/- 4th October 1929.

Penal Code, S. 341 — Essential element in wrongful restraint is that person restrained must have right to use thing complained of.

Before convicting a person of wrongfully restraining the other from making use of a particular place or thing it is necessary for the Court to determine if that other person has right to use it. [P 760 C 2]

Sures Chandra Talukdur — for Petitioner.

Judgment. — This rule has been issued on two grounds : first of all that the conviction and sentence are bad in law inasmuch as the mandatory provisions of S. 342, Criminal P. C., were not followed, and secondly that the facts do not constitute an offence under S. 341, I. P. C., inasmuch as among others the complainant had no right to use the rain water passage as a urinal. The petitioner has been convicted under S. 341, I. P. C., for wrongfully restraining the complainant from going to a certain urinal. The complainant is apparently a tenant of the petitioner and they have fallen out. The complainant's case was that he was not allowed to go to a certain urinal in the house. The learned Magistrate has come to no finding as to whether the complainant had any right whatever to use the aforesaid urinal. This urinal apparently consisted of a couple of bricks put over a rain-water pipe. In order to hold the petitioner guilty under S. 341, I. P. C., it would be necessary to determine that the complainant had a right to use the urinal. That the Magistrate has not done. Therefore there is no alternative but to set aside the conviction and sentence and to send the case back for retrial. The retrial should be held by some Magistrate other than Mr. Rustomji. The Magistrate trying the case should bear in mind the point I have stated above.

The rule is made absolute in these terms.

V.B./R.K. *Rule made absolute.*

A. I. R. 1930 Calcutta 761

SUHRAWARDY AND COSTELLO, JJ.

Rajani Kanta Sutradhar—Petitioner.

v.

Surendra Mohan Ray and *others*—Opposite Parties.

Civil Revn. No. 255 of 1930, Decided on 28th March 1930, from order of Third Munsif, Habiganj, D/- 13th November 1929.

(a) Civil P. C. (1908), S. 73 and O. 21, R. 72 (2)—Decree-holder applying for rateable distribution — Order under O. 21, R. 72 (2) is incompetent.

Whenever a decree-holder applies for a rateable distribution under S. 73, the Court is not competent to pass an order under O. 21, R. 72 (2). [P 762 C 1]

(b) Civil P. C. (1908), S. 73 and O. 21, R. 72 (2)—Decree-holder purchasing property with permission paying off poundage fee and praying set off—Another decree-holder in another Court applying for rateable distribution before but order communicated after set-off was allowed—Purchase money with decree-holder held to be assets realized by executing Court.

A decree-holder was allowed to purchase the property of his judgment-debtor in execution of his decree. On purchasing the same he paid the poundage fee in the Court and prayed for the amount being set off against the amount of his decree. Another decree-holder who had obtained a similar decree against the same judgment-debtor in another Court applied for rateable distribution to the Court which passed the decree in his suit before the set-off was allowed in the Court that held the assets. The Court communicated this order to the Court that held the assets after the set-off was allowed.

Held: that the purchase money in the hands of the decree-holder purchaser must be regarded as assets realized by execution Court in execution of the decree although such money was not paid by him in Court: 16 *Bom.* 91, *Rel. on.* [P 762 C 1, 2]

Priyanath Dutta—for Petitioner.

Nikunja Behari Ray—for Opposite Party 1.

Suhrawardy, J.—The circumstances of this case are that the petitioner obtained a money decree against the judgment-debtor and executed it in the Court of the Fourth Munsif at Habiganj who had jurisdiction to try suits up to the value of Rs. 1,000. Opposite parties 1 and 2 also got money decrees against the same judgment-debtor in the Court of the Third Munsif at Habiganj who had jurisdiction up to Rs. 2,000 and in whose Court the suits brought by the opposite parties lay. The petitioner took out execution of his decree in Execution Case No. 106 of 1929 of the Fourth Munsif's Court and some properties of the judgment-debtor were sold on 9th August 1929. One lot was purchased by a stranger for Rs. 500 and that amount was put in. The petitioner as decree-holder purchased two other lots for Rs. 600. On the day of the sale only the poundage fee of Rs. 12-8-0 was accepted from the petitioner. This was done at the request of the petitioner to accept only the poundage fee and allow him to set off the purchase money against his decree, but no formal order was passed to that effect. On 6th September opposite party 1 applied to the Fourth Munsif to order the petitioner to deposit the amount for which he had purchased the property, i. e., Rs. 600 in the Court for rateable distribution. On 7th September the petitioner filed an objection to the application by opposite party 1 and applied for setting off the sale proceeds against his claim. The Fourth Munsif thereupon passed the following order:

"Decree-holder files a petition for setting off the sale proceeds from claim. Let all the petitions be put up before the pleader."

Before the matter could be heard the District Judge ordered the Fourth Munsif to transfer the assets held by him to the Court of the Third Munsif for rateable distribution. No formal order was passed on the petitioner's above petition. It appears that before the sale of the judgment-debtor's properties opposite party 1 had applied on 25th July for rateable distribution with the petitioner, the decree-holder in Execution Case No. 106 of the Fourth Munsif's Court. The order passed thereupon was "call for the record from the fourth Court after stay in that Court." We have observed that under the orders of the District Judge the assets were sent from the Court of the fourth Munsif to that of the Third Munsif. The assets held by the Fourth Munsif at that time were Rs. 500 in cash which was sent to the Third Munsif. The opposite party thereupon applied to the Munsif, Third Court, claiming rateable payment to them out of the sale proceeds i. e., Rs. 600 for which the petitioner had purchased the property from the judgment-debtor. The petitioner objected. That objection was overruled by the Munsif, Third Court, who held that the entire purchase money for which the properties were sold in Execution

Case No. 106 of the Fourth Munsif's Court should be taken into account for distribution of assets among all the decree-holders although the Fourth Munsif might have ordered a set off against the petitioner's decree. This rule was obtained against this order and it is argued that the Fourth Munsif having allowed a set-off of the amount for which the petitioner had purchased the judgment-debtor's properties it could not be regarded as an asset in the hands of the execution Court and therefore could not be called upon for rateable distribution.

It is further contended that even though the order of the Fourth Munsif was bad, the Third Munsif had no jurisdiction to go behind that order. The case raises a point of nicety but on giving our consideration to it we think that it can be answered by referring to the particular circumstances of this case. No formal order was passed by the Fourth Munsif allowing a set off though it may be implied that by accepting only the poundage fee he agreed to the set off claimed. If the order of acceptance of the poundage fee by the Fourth Munsif is read in that light then that order must be treated as an order under O. 21, R. 72, Cl. (2), Civil P. C., which entitles the Court to permit the purchase money and the amount due on the decree to be set off against each other. But it can only be passed subject to the provisions of S. 73 which relates to the distribution amongst decree-holders. This qualification of the power of the Court is very important. Whenever a decree-holder applies for a rateable distribution under S. 73, the Court is not competent to pass an order under O. 21, R. 72 (2). In this case it appears that opposite party 1 had applied for rateable distribution though not before the set-off was allowed in the Court that held the assets but in the Court which passed the decree in his suit; and that Court communicated the fact to the execution Court which held the assets. In our opinion the purchase-money for which the property was purchased by the petitioner must be regarded as assets realized by the executing Court. It is true that no money was put in by the purchaser into the Court but according to the view taken in the case of *Sorabji Edulji Warden* v. *Govind Ramji* (1), it should be taken as part of the assets realized by the executing Court in execution of the decree. That decision was passed even before the words "subject to the provisions of S. 73" were introduced into O. 21, R. 72, Cl. (2).

In this view we think that the order passed by the Court below is correct and that the rule should be discharged with costs. The hearing-fee is assessed at one gold mohur.

Costello, J.—I agree.

V.B./R.K. *Rule discharged.*

(1) [1891] 16 Bom. 91.

A. I. R. 1930 Calcutta 762

RANKIN, C. J. AND C. C. GHOSE, J.

Joy Chandra Roy and *others*—Defendants—Appellants.

v.

Satis Chandra Roy — Plaintiff—Respondent.

Appeal No. 397 of 1928, Decided on 20th March 1930, against appellate decree of Sub-Judge, First Court, Dacca, D/- 12th September 1927.

Civil P. C., S. 52—Right of creditor to follow assets in legatee's hands can be exercised only by suit.

The right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit. It cannot possibly be exercised merely by levying execution against the assets in the hands of the legatee under a judgment against the legal representative: *Davies* v. *Nicholson*, 2 *De. G & J.* 693; *March* v. *Russell*, 3 *My. & Cr.* 31; *Re. Eustace*, (1912) 1 *Ch.* 561; *Ref.*; 4 *Cal.* 897, *Rel. on.*

[P 763 C 2; P 764 C 1]

Gunada Charan Sen and *Prokash Chunder Pakrashi*—for Appellants.

Jitendra Coomar Sen Gupta—for Respondent.

Rankin, C J.—This is an appeal by the defendants in a suit brought under O. 21, R. 63, Civil P. C., to have it declared that the plaintiff is entitled to a certain property and that the attachment which has been made thereon is invalid. The position is this: there was one Jagat Chunder Roy. The defendants brought a suit against him for possession of some property and obtained a decree. The decree was in 1907, and under the old Code an order was made that the question and the amount of mesne profits were to be decided in execution. An appeal by Jagat Chunder Roy was dismissed. Jagat Chunder Roy died in 1912 having by his

will left the property which is now in question to the shebaits of a certain idol. A question has been raised whether a mere charge was given upon the property in favour of the idol and I am clear and the lower Courts have found that the whole of the beneficial interest in that property was given to the idol. After Roy's death the defendants proceeded in execution and, after certain proceedings, there was a compromise by which the mesne profits were assessed at Rs. 2,500. That was in 1918. In the meantime the administrators with the will annexed to the estate of Roy had put the shebaits in possession of the property now in question. There can be no doubt that they have been in occupation of it and have been utilizing it for the purpose of the Thakur since 1915. Thereupon what happened was that the defendants as judgment-creditors proceeded in execution against the administrators of the estate of Roy to attach this property and the plaintiff made a claim in execution which was disallowed. Thereupon he has brought this suit under O. 21, R. 63, Civil P. C. claiming that it be declared that this property is not liable to attachment in execution of the decree against Jagat Chunder Roy's legal representatives.

Both the Courts have found in favour of the plaintiff and have held that the property is not liable to attachment. The defendants have appealed and what they say is that as this is a debt of Roy, this debt must be paid before any legacy and must be paid before any specific legacy can take effect. The defendants, rely upon S. 326, Succession Act, and in that way they say that the plaintiff's case ought to have been dismissed.

Now it is quite true that if a creditor is not paid, he has a right to follow the assets of the deceased whether they be specific legacies or whether they be of a different character. It is old law that he can follow the specific legacy just as much as any other legacy. I find it laid down in Williams on Executors on the authority of the case of *Davies* v. *Nicholson* (1) that

"property specifically bequeathed is not discharged from its liability to the testator's debts by the circumstances that there has come to the hands of the executor personal property of the testator not specifically bequeathed more than sufficient to pay his debts and that the specifically bequeathed property has been made over by the executor to the specific legatee."

Now the right in India is declared by S. 361, Succession Act. It is a right to call upon the legatee to refund and there are many cases in which it has been pointed out that that is a right which may be exercised by a creditor who remains unpaid. The question was considered in *March* v. *Russell* (2) and comparatively recently in *Re Eustace* (3). It is also dealt with by Lord Eldon in *Gillespie* v. *Alexander* (4). The present question however is not merely whether the creditor can follow the assets in the hands of the legatee but whether he can do so by the simple process of levying execution under a decree against the executors or in this case, the administrators. It is reasonably clear to me that that he cannot do. As Lord Eldon pointed out in the case to which I have referred, the legatee cannot be affected except by a suit and it is not possible upon a judgment against the legal representative to proceed to attach property which has years before been parted with to a specific legatee. The matter was considered in the case of an alienee in the case of *Greender Chunder Ghose* v. *Mackintosh* (5). The language in the older Code of the section which corresponds to S. 52 was somewhat different from what it is now and the alterations were apparently made in consequence of the observations made by Mr. Pontifex, J., in this very case where he pointed out that under that section it was intended to confine the procedure to property remaining in the possession of the legal representative, leaving the creditors to follow property improperly alienated by the legal representative by a separate suit. If one considers the language of S. 52 of the Code and if one considers the machinery provided thereunder by R. 58 onwards of O. 21, Civil P. C., it is clear to my mind that the right of a creditor to follow the assets in the hands of a legatee is a right which has to be exercised by a suit. It

(1) 2 De. G. & J. 693.

(2) 3 My. & Cr. 31=6 L. J. Ch. 303=1 Jur. 588.

(3) [1912] 1 Ch. 561=106 L. T. 789=56 S. J. 468=81 L. J. Ch. 529.

(4) 3 Russel C. C. 136.

(5) [1879] 4 Cal. 897=4 C. L. R. 193.

cannot possibly be exercised merely by levying execution against the assets in the hands of the legatee under a judgment against the legal representative.

For these reasons it appears to me that the appeal fails and must be dismissed with costs.

C. C. Ghose, J.—I agree.

S.N./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 764

GRAHAM AND MITTER, JJ.

Ashgar Ali and *others* — Plaintiffs — Appellants.

v.

Secy. of State and *others*—Defendants—Respondents.

Appeals Nos. 338 to 359 of 1928, Decided on 11th April 1930, from appellate decrees of First Addl. Sub-Judge, Noakhali, D/- 20th June 1927.

(a) Civil P. C., (5 of 1908), S. 75 (b), O. 26, Rr. 13 and 14—Trial of material issue cannot be delegated to commissioner—Commissioner referred to make local investigation and report if land was re-formed or accretion, complying with order and giving finding—Parties not objecting and Court adopting finding—Not raising objection held not sufficient to adopt finding.

A commission for local investigation is issued for the purpose of elucidating any matter in dispute, that is to say presumably to throw light upon that matter and assist the Court to form a decision thereon and the Court cannot delegate to the commissioner the trial of any material issue which the Court itself is bound to try : 16 *Mad.* 350, *Rel. on.*

A commission for local investigation was issued and the point which required local enquiry was stated to be " whether the lands in suit are re-formed lands of jote No. 72 or accretions thereto." The commissioner, in submitting his report complying with the reference gave finding that the disputed lands were accretion and the trial Court allowed the finding to prevail as no objection was taken to it.

Held : that it was not within the competence of commissioner to come to the conclusion whether the land was accretion or not but was for the Court to decide with the aid of such materials as the commissioner was able to place before him, and that merely no objection was taken to the finding by commissioner was not sufficient for the Court to adopt it. [P 765 C 2]

(b) Civil P. C., (5 of 1908), S. 100—" Accretion " is question of fact.

Whether a certain land is accretion or formation in situ is question of fact. [P 765 C 2]

(c) Words and Phrases —" Degi chur," "Doba chur," " Nutan chur " — Meanings stated.

The terms "Degi chur," "Doba chur," "Nutan chur " precisely mean much the same thing, namely a chur which emerges only at ebb tide and remains under water at flow tide. [P 766 C 1]

(d) Words and Phrases—" Bed of river " explained.

The bed of a river is a space between the banks occupied by the river at its fullest flow : 21 *I. C.* 233, *Ref.* [P 766 C 1]

(e) Bengal Alluvion and Diluvion Regulation (Reg. 9 of 1825), S. 4—Boundary of jote described as " Degi chur," " Doba chur," " Nutan chur,"—Holder gets right to lands which would in future be formed up to edge of river.

The effect of describing the boundary of jote at the time of original settlement as " Degi chur," Doba chur " or " Nutan chur," expressions which mean apparently a chur which emerges only at ebb tide and is covered at full tide is to give the holder of the jote a subsisting right of tenancy in all lands which would in future be formed up to the edge of the river. [P 765 C 1, P 766 C 2]

(f) Words and Phrases—" Patit," Lapta paystha," " Sasthal paystha " —Meanings explained.

The word " patit " means fallow or uncultivated land and the words " lapta paystha " mean contiguously formed land or accretions, as opposed to " Sasthal paystha " land re-formed in situ. [P 766 C 2]

Gunada Charan Sen and *Probodh Chandra Kar*—for Appellants.

Sarat Chandra Basak and *Nasim Ali*—for Respondents.

Graham, J.—These twenty-two appeals, in which the plaintiffs are the appellants, are from decisions of the First Additional Subordinate Judge of Noakhali reversing decisions of the Munsif of Hatiya, and arise out of as many suits brought by the plaintiffs-appellants, who are khas mehal tenants, claiming title to certain lands as re-formations and accretions to the lands of their respective jotes held under Government in Chur Jagabandhu a Government Khas Mehal bearing Touzi No. 1943 of the Noakhali Collectorate. The lands in dispute are on the west side of the admitted jote holdings of the plaintiffs under defendant 1, the Secretary of State for India, and the plaintiffs claimed them as appertaining to their settled jotes under defendant 1 by right of accretion, or by right of re-formation in situ.

The suits were contested by defendant 1 and by some of the defendants with whom the disputed lands have been settled by defendant 1, in breach, as the plaintiffs alleged, of the right conferred upon them (plaintiffs) by S. 4, Bengal Alluvion and Diluvion Regulation of 1825 (Regn. 11 of 1825).

Defendant 1, now respondent in these appeals, denied that the plaintiffs had

any right of accretion or re-formation in situ, and pleaded limitation under the general and special laws of limitation. Certain other points were also raised to which reference is not necessary for present purposes.

The trial Court partially decreed the suits holding that the plaintiffs' claim had become barred by special limitation in respect of certain portions of the disputed land.

Against that decision both sides appealed to the District Court with the result that the learned Additional Subordinate Judge, who heard the appeals, reversed the decisions of the Munsif, allowed the appeals preferred by defendant 1 and dismissed the appeals of the plaintiffs. The plaintiffs have now preferred these second appeals.

On their behalf two main points have been urged. Firstly it has been argued that, inasmuch as the commissioner, who was deputed for local investigation and the Munsif have found that the disputed lands are accretions, and no objection having been taken before the Munsif to the Commissioner's report, the Court of appeal below erred in law in allowing defendant 1 to raise a point which had been conceded in the Court of first instance. Secondly it was contended that, whatever view may be taken upon the first point, the Court of appeal below ought upon the merits to have held that at the date of the first settlement made by Government with the plaintiffs, the latter had a subsisting right of tenancy in respect of all lands that were, or would, in future be formed up to the edge of the water.

Two other points relating to costs and to the competency of the appeals preferred by defendant 1 before the Court of appeal below were also mentioned, but these were ultimately not pressed.

With regard to the first point taken on behalf of the appellants it appears that this was also raised before the Additional Subordinate Judge. The learned Judge took the view that it was not proper to ask the commissioner to find whether the land adjoining the plaintiffs' jote lands on the west were accretions within the meaning of the law, and that his function was merely to report on the facts as observed by him at the time of his investigation, as for example, whether the disputed lands are actually adjacent to the plaintiff's jote lands, leaving it to the Court to decide whether they are accretions within the meaning of the law or not. As a matter of fact I find on reference to the Munsif's order for local enquiry that the point which required to be elucidated and ascertained by local investigation was stated to be

"whether the lands in suit are re-formed lands of Jote No. 72 or accretions thereto."

The commissioner therefore in submitting his report in the form he did was merely complying with the instructions given to him. But whether such matters come within the province of a commissioner deputed for local investigation seems to be open to doubt. Such commissions are issued for the purpose of elucidating any matter in dispute, that is to say, presumably for the purpose of throwing light upon that matter and assisting the Court to form a decision thereon. The Court will not however be justified in delegating to a commissioner the trial of any material issue which the Court itself is bound to try: *Sangili* v. *Mookan* (1). The main question to be decided was, as the learned Additional Subordinate Judge has observed, whether the lands in dispute were accretions or re-formations in situ, and that was for the Court and not the commissioner to decide.

In my judgment the learned Judge was right upon this point and therefore it follows that there was no substance in the view taken in the trial Court that because no objection had been taken by any of the parties to the commissioner's report, it must necessarily prevail and be given effect to. The matter was one which was not properly within the competence of the commissioner, but was one for the decision of the Court with the aid of such materials as a commissioner was able to place before the Court.

The second question then arises for consideration whether upon the materials before him the learned Additional Subordinate Judge was justified in his conclusion that the disputed lands (or the greater part of them) are not accretions to the plaintiff's jotes. At first sight it might seem that this is a question of fact which it is not open to us to disturb in second appeal. It really

(1) [1893] 16 Mad. 350=3 M.L.J. 137.

turns however upon the construction of certain documents and the inference to be drawn from them in particular the khatians in which the western boundary of the jotes originally leased to the plaintiff have been variously described as 'Degi Chur,' 'Doba Chur' or 'Nutan Chur.' The question is what is the precise signification of these terms. They all apparently mean much the same thing, namely a chur which emerges only at ebb-tide and remains under water at flow tide. The argument advanced on behalf of the appellants is that such a chur forms part of the bed of the river because the extent of a river is the space covered by it when it is in full tide at flow or high tide. There is ample authority for this view. What is meant by the bed of a river is defined in Houck on Rivers, p. 6.

"The bed is covered by the river and is the space subjacent to the river over which it flows between the banks. It is the space between the banks occupied by the river at its fullest flow."

There was an elaborate discussion of the subject in the case of *Ahmadi Begum* v. *Tarak Nath Ghose* (2), it being held that the bed of a river is that portion of it which is in the ordinary and regular course covered by the waters of a river, and that it need not be constantly covered, if in the ordinary course of things it is habitually covered. Now in this instance, as already stated, the western boundary was described at the time of the original settlement with plaintiffs as Degi Chur, or Doba Chur, or Nutan Chur. Each of those expressions means apparently a chur which emerges only at ebb tide but is covered at full tide. That being so they are synonymous with river, and the effect of so describing the western boundary would be to give the plaintiffs a subsisting right of tenancy in all lands which would in future be formed up to the edge of the river. This seems to be in accord with what might be expected to be done in the circumstances, and that in point of fact it is what was intended, and was subsequently recognized by Government, is borne out by the recitals contained in certain notices which were served on the plaintiffs by Government in 1901 (Exs. 1 to 22) wherein the lands in dispute have been described as 'patit' and 'lapta paystha' outside and at the extremity of the plaintiff's holding. The word 'patit' means fallow or uncultivated, and the words 'lapta paystha' mean contiguously formed land or accretions, as opposed to 'sasthal paystha' land reformed in situ. It is difficult to reconcile this admission by Government in 1901 with the case which it has now been sought to make on its behalf that the disputed land is in fact a re-formation in situ of its khas mehal estate which was diluviated and subsequently re-formed. That case was never made in the Courts below and cannot be allowed to be now put forward in second appeal.

In my judgment the plaintiffs succeeded in establishing the claim to the lands in dispute save and except those lands in respect of which their claim has been found to be barred by limitation, and which are in the possession of some of the other defendants. The appeals must therefore be allowed, the judgments and decrees of the Additional Subordinate Judge set aside, and the judgments and decrees of the Munsif restored with costs in this Court and in the lower appellate Court.

Mitter, J.—It is not necessary to recapitulate all the facts of the cases to which these 22 appeals relate. It will be sufficient if I state a few salient ones.

In these 22 suits, the plaintiffs now appellants claim certain lands as either re-formations on their original site of or accretions to the lands of their original holdings which they hold under the Government in a certain khas mehal known as Char Jagabandhu. The plaintiffs allege that the original holdings were settled with them in 1899 or 1900; that after the settlement the original holdings were diluviated and the river having receded since the diluvion the lands in these suits have re-formed and accreted to the lands of the original holding; that after the lands had emerged the Secretary of State (defendant 1) has wrongly settled these lands with the other defendants who dispossessed the plaintiffs on the strength of the settlement in 1326 B. S. Hence the suits.

The defence of defendant 1 and other defendants so far as is material fall under two heads; (i) that the lands are not re-formations in situ of the plaintiff's original holdings or accretions thereto; (ii) that the defendants have acquired a

(2) [1913] 21 I.C. 233.

right by adverse possession for more than the statutory period in some of the disputed lands.

A commissioner was appointed to determine whether the lands in the suits are re-formations in situ of or accretions to the original holdings of the plaintiffs. The pleader commissioner found that the disputed lands are accretions to the original holdings. No objection was taken to the commissioner's report by any of the parties. The Munsif who tried these suits gave decrees to the plaintiffs declaring their title to so much of the lands as has been found by the commissioner in his chittas of the disputed lands of these suits to be included in the rest as Nalaek Chapra, i.e., to so much of the lands as will be left after deducting the lands found in actual possession of the defendants.

Against the decrees in these 22 suits appeals were taken by the defendants to the Court of the Additional Subordinate Judge of Noakhali and the suits were all dismissed.

These appeals are brought against the decrees of the appellate Court dismissing plaintiff's suits and it is argued for the appellants that the Subordinate Judge has fallen into an error of law in coming to the conclusion that the lands in suit are not accretions to plaintiff's original holdings, and that on the facts found by him he should have declared the lands to be accretions. I think the appellant's contention is well founded and must prevail.

It has been found by the lower appellate Court that the western boundaries of the disputed lands are Doba Chur and Degi Chur and consequently as the boundaries of the disputed lands are not the river, no question of accretion arises. It is argued for the appellants that Degi Chur and Doba Chur being lands between the high water and low water mark of the river, they are parts of the river bed and therefore the boundaries of the lands are parts of the river bed and certain authorities are cited to support the contention. It is found in this case that these lands were submerged during the fullest flow of the river. It is not necessary to decide whether where one of the boundaries is given as the Doba Chur and Degi Chur, the river should always be considered to be boundary for the purpose of S. 4 of Regn. 11 of 1825. The case in *Ahmadi Begam* v. *Tarak Nath* (2) to which my learned brother has referred was a case of jalkar, and Mookerjee, J., guards himself against laying down that for the purposes of the regulation the chur should be regarded as the river bed. It is sufficient for the purposes of the present appeals to say that in 1901 Government issued notices Exs. (1 to 22) in which they described the lands in dispute as patit and contiguously formed land ('lapta payasthi') of the plaintiff's holdings. The words 'lapta payasthi' are significant. They denote that these lands are accretions to the original holdings of the plaintiffs and was so regarded by the officers of the Government. Besides no exception was taken by the Government to the commissioner's reports on these suits. The commissioner's report is valuable, only as showing that these lands are contiguous to the disputed lands. As to their being accretions in law is for the Court to decide and in this the lower appellate Court is right. In these circumstances we think that the lower appellate Court should have held that the lands were accretions to plaintiff's original holdings. We set aside the judgment and decrees of the Subordinate Judge and restore those of the Munsif.

The learned Senior Government Pleader has tried to support the judgment of the lower appellate Court on the ground that these lands were re-formations in situ of lands of the khas mehal and cannot possibly be regarded as accretions. This case was not raised in the pleadings nor in the Courts below, and as it is a question which depends on facts it would not be right to allow the objection to be raised for the first time in second appeal.

V.B./R.K. *Appeal allowed*

A. I. R. 1930 Calcutta 767

GRAHAM AND MITTER, JJ.

Jogendra Nath Jana and *others*—Plaintiffs—Appellants.

v.

Baidya Nath Das and *others*—Defendants—Respondents.

Appeal No. 39 of 1926, Decided on 27th November 1929, against appellate decree of Addl. Dist. Judge, Midnapur, D/- 29th August 1925.

Advocate High Court Jammu & Kashmir Srinagar

Bengal Tenancy Act (8 of 1885), S.111-B—For suit under S. 111-B limitation begins to run from date of final publication of Record-of-Rights.

With regard to suits for correction of entry in Record-of-Rights under S. 111-B, under Art. 120, Lim. Act, time begins to run from the date of the final publication of the Record-of Rights and not from the date of the final certificate, and a suit can be brought between the final publication and the date of certificate: *A. I. R.* 1929 *Cal.* 481, *Ref.* [P 769 C 2]

Advocate-General, S. C. Maity and *Apurba Charan Mukerji*—for Appellants.

Amarendra Nath Bose, Bhupendra Kumar Ghose and *Biraj Mohan Majumdar*—for Respondents.

Graham, J. — This appeal by the plaintiffs has arisen out of a suit for a declaration that an entry in the Record-of-Rights, to the effect that the tenants (defendants) are entitled in the event of hajah, or destruction of crops by flood, to a proportionate remission of rent is wrong, and for correction of the same.

A preliminary objection was taken that the appeal is incompetent on the ground that two of respondents, 11 and 24, have died and that no substitutions have been made. There is no substance in the objection as the suit is a representative suit.

The short point involved in the appeal, and this is the only point which has been argued before us, is one of limitation. The Courts below have held that the suit was barred by six years limitation under Art. 120, Lim. Act.

The question is whether limitation runs from the date of the final publication of the Record-of-Rights, or from the date of the final certificate. The Record-of-Rights was finally published on 20th January 1917 and the certificate was signed on 16th June 1917. If time runs from the date of the final publication the suit will be barred, whereas, if it runs from the date of the certificate, it will be in time. The matter is concluded by a recent decision of this Court *Asutosh Bhuiyan* v. *Radhika Lal Goswami* (1), where it was held that the right to sue under S. 111-B, Ben. Ten. Act, accrues on the date of publication of the Record-of-Rights inasmuch as that record gives rise to a presumption of correctness which casts a cloud over the title of the person affected thereby. For the appellants it was argued that, inasmuch as S. 111-B, Ben. Ten. Act (as it formerly stood), makes provision for a stay of suits for a period of three months from the date of the certificate of final publication, it may be inferred that the intention of the legislature was that no suit should be instituted until after the date of the certificate, and that it would be anomalous to hold, notwithstanding this provision, that it was open to an aggrieved party to sue in the interval between final publication and the certificate. No such intention can however be found in the Act. S. 111-B merely provides for suspension of limitation for three months after the certificate has been made, and that does not necessarily mean that a party aggrieved by an entry in the khatian is precluded from suing so soon as his rights are prejudicially affected by the finally published record. His right to sue accrues there and then.

The position may certainly be said to be somewhat anomalous as it may be argued that if a suit cannot be brought until three months after the certificate, a fortiori, it ought not to be permissible to sue as soon as the final publication has taken place. We are in any case bound by the decision referred to above with which I do not find sufficient reason to disagree.

The appeal must accordingly be dismissed with costs. The cross appeal was not pressed and is also dismissed.

Mitter, J. — The question of law which falls for determination in this appeal is one of limitation. The relevant facts necessary for deciding this question are not now in dispute. They are briefly these:—The plaintiffs now appellants are the landlords of Mahal Shangra. The defendants now respondents represent the tenants of that mahal. In the Record-of-Rights of the mahal which was finally published on 20th January 1917, the khatian of miscellaneous rights contained an entry to the effect that the tenants of the mahal are entitled to get remission of rents in case of hajah (destruction of crops by flood). On 16th June 1923 i. e. more than six years after the final publication of the Record-of-Rights, the plaintiff brought the suit in which

(1) A. I. R. 1929 Cal. 481=119 I. C. 121=56 Cal. 407.

this appeal arises for a declaration that the said entry was erroneous and ultra vires.

The suit was a representative suit and notices and advertisements under O. 1, R. 8, Civil P. C., were issued. The tenants defendants, amongst other defences, raised the plea that the suit was barred by limitation. They also contended that the Record-of-Rights was correct as there was a custom in the mahal by which the tenants have been getting proportionate remission of rent in case of hajah. Both the Courts below have come to the conclusion that there was no such custom, as alleged by the defendants and that the entry in the Record-of-Rights is wrong but both the Courts below have concurred in holding that the plaintiffs' suit is barred by the statute of limitation and have dismissed the suit on that ground.

In second appeal the learned Advocate-General, appearing for the plaintiffs, has contended that the decision of the Courts below on the question of limitation is wrong, and has relied on an unreported decision of this Court, in appeal from appellate decree No. 743 of 1922, in support of his contention. The suit is one under S. 111-B (1) (d), Ben. Ten. Act, and it is contended that under Art. 120, Lim. Act, time begins to run in respect of such a suit after three months of the certificate of final publication and not from the date of the final publication as the Courts below have held. It is said that as no suit for the decision of any special condition or incidents of the tenancy could be brought within three months from the date of the certificate of final publication of the Record-of-Rights the cause of action for such a suit can only arise after three months of the date of the certificate of such publication, and as in the present case the date of the certificate is 16th June 1917 the suit is well within six years and three months of that day. On the other hand the respondents contend that the cause of action for the suit accrued on the date of the final publication, when a cloud was cast on plaintiffs' title to receive full rents even in the case of hajah or partial destruction of crops by flood.

The question which we have to determine is as to which of the two contentions is right. The plaintiffs are aggrieved by the entry in the Record-of-Rights which raises a presumption against them and in favour of the defendants with reference to the custom of remission of rent for the hajah. Under S. 103-B, Ben. Ten. Act, every entry in a Record-of-Rights finally published shall be evidence of the matter referred to in such entry and shall be presumed to be correct until it is proved by evidence to be incorrect. The cause of action for the declaration that the entry is wrong arose when the entry was finally published, and there was nothing to prevent the plaintiffs from bringing a declaratory suit immediately on such final publication. But as soon as the certificate stating the fact of such final publication and the date thereof is made the further progress of the suit is arrested for three months from the date of the certificate and it is therefore that S. 111-B (4) provides that, where the institution of the suit is delayed owing to the operation of sub-S. (1), the period of three months shall be excluded in computing the period of limitation prescribed for such suit. We are not unmindful of this: that much can be said in favour of the view that it can hardly have been the intention of the legislature to allow the institution of a suit between the date of the final publication and date of signing the certificate in view of the provisions of S. 111-B (1), but it seems to me that the intention has not manifested itself either expressly or by the plainest implication in the language of the subsection, and in the absence of such clear expression of intention we shall not be justified in holding that no suit could be brought between the final publication of the Record-of-Rights and the date of the certificate till after three months of the date of the certificate.

While we feel that the language of S. 111-B leads to a manifest contradiction of its apparent purpose or to some inconvenience, presumably not intended, we cannot modify the language of the statute to meet the intention unless it is impossible for us to resist the conviction that the legislature could not possibly have intended what its words signify and that the modification thus

to be made are mere corrections of careless language and really give the true meaning: see Maxwell on Interpretation of Statutes, Edn. 6, p. 406 (Chap. 9). I am not prepared to say in this case that we are under the influence of such irresistible conviction. The plain language of the statute must therefore be given effect to and the result is that the plaintiffs get the deduction of three months in computing the period of limitation. But that does not assist the plaintiffs-appellants; for if that period is taken into account the suit is still beyond the six years of the date of final publication. We are fortified in this view by a decision of Suhrawardy and Jack, JJ., in the case of *Ashutosh* v. *Radhika Lal* (1). The unreported decision to which the Advocate-General refers does not assist the appellants, for it does not appear from an examination of that case that the suit was brought beyond six years and three months from the date of the final publication of the Record-of-Rights. We think the view taken by the Courts below is right. For these reasons I agree with my learned brother that the appeal must be dismissed.

A cross-objection was preferred by the defendants which has not been pressed and must be dismissed.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 770

RANKIN, C. J., AND C. C. GHOSE, J.

J. C. Mukerjea—Appellant.

v.

Karnani Industrial Bank Limited — Respondents.

Appeal No. 6 of 1930, Decided on 20th June 1930, from original order of Lort-Williams, J., D/- 9th December 1929.

(a) Calcutta Municipal Act (1923), S. 137 (1)—Notice is consequent on general valuation.

The notice referred to in sub-S. (1) is a notice which is to be consequent upon the completion of a general valuation of the whole ward. [P 772 C 1]

(b) Calcutta Municipal Act (1923), S. 138—S. 138 applies to all cases of increase in valuation.

Section 138 applies to all cases of an increase in valuation and not merely to a case where general assessment of valuation has put a higher figure than previously. It applies to an increase of valuation made under any of the headings of S. 131 (2). [P 772 C 2]

(c) Calcutta Municipal Act (1923), S. 139 (2) — Dissatisfied person can give written notice of his objections to valuation at Municipal Office.

The right given to a person dissatisfied with valuation of giving a written notice of his objections at the Municipal Office also applies to the case of valuation made by the Executive Officer under Cls. (a) or (e), S. 131 (2). It is wrong to regard S. 139 (2) as cutting down in a drastic manner the deliberate general language of sub-S. (1). [P 772 C 2; P 773 C 1]

(d) Calcutta Municipal Act (1923), S. 139 (2)—Where owner is given benefit of notice objection should be made within a limited time: in other cases there is no time limit for objection.

In those cases where, under the Act, the owner is given the benefit of a notice, the time within which the objection is to be taken is limited to a certain period after receipt of the notice, and in cases where there is no provision for the notice the effect of sub-S. (2) is not to take away his right to object, but merely that there is no limit or no effective limit upon his right. [P 773 C 1]

(e) Interpretation of Statutes — Court should put construction that is nearest to language of legislature.

The duty of Court is not to put a construction, which seems to the Court to be best in the sense that it will work out with the most justice or with the least inconvenience, but to put a construction which seems to the Court to be the best in the sense that it is nearest to the language of the legislature. [P 773 C 2]

(f) Calcutta Municipal Act (1923), S. 131 (2) (a) and (e)—Both clauses give right to subject to call for new valuation with view of reduction in assessment.

Section 131 (2)(a) & (b) give a right to the subject to call for a new valuation with a view of reduction in the assessment, and the mere fact that by Cl. (b), S. 146, the Executive Officer has the power to reduce the amount of any valuation in the assessment book (a power from the exercise of which there is no appeal) in no way shows that there is no appeal from a valuation, which under S. 131 the owner or occupier has a right to require. [P 774 C 1]

N. N. Sircar and *S. N. Banerjee*—for Appellant.

S. C. Roy and *Nagen Bose* — for Respondents.

Rankin, C. J. — This is an appeal from the decision of my learned brother Lort-Williams, J., who has made absolute a Rule issued under S. 45, Specific Relief Act. The Rule is in the nature of a mandamus to hear and determine certain matters according to law, and is directed against Mr. J. C. Mukerjea who holds the office of the Chief Executive Officer of the Calcutta Corporation.

It appears that the applicant bank are the proprietors of certain premises in Park Street. Those premises included at one time certain shops and certain buildings called Palais-de-Danse, Park Hotel, and other hereditaments.

The premises were assessed at a certain figure under the machinery provided by Cl. (1), S. 131, Calcutta Municipal Act of 1923. That clause provides for a sexennial assessment of all the properties in Calcutta. On 5th January 1928, owing to the demolition of certain parts of the property, the valuation was reduced from Rs. 30,618 to the figure of 23,531, and on 23rd June 1928 the applicants took objection to this valuation on the ground that the reduction was insufficient and inadequate. Further demolition appears to have taken place thereafter, and, on 2nd July 1928, the valuation was further reduced from Rs. 23,531 to Rs. 17,140. To this the applicants lodged an objection on 13th July complaining again of the inadequacy of the reduction and maintaining that it should have been reduced to the figure 7,694.

Now the question which has arisen with reference to this matter is as to the statutory obligation of the Chief Executive Officer in the matter of hearing and deciding upon the applicants' objection. The Chief Executive Officer appears to have dealt with this case in accordance with the long-standing practice both under the Calcutta Municipal Act of 1923 and under the preceding Act of 1899 and the view which he takes, and which he presents to us, is that when, owing to demolition the sexennial assessment has to be reduced by virtue of Cl. (e), sub-S. (2), S. 131, the owner or occupier, while he is given the right to claim a revaluation in such a case, is not by the statute given any right of appeal upon the question of the correctness of the revaluation, at all events in a case such as the present where the valuation has been reduced and not increased. The question so raised has to be determined upon a consideration of the language employed in the various sections of Chap. 10 of the Act of 1923. The sections to which I am about to refer appear to be a revised edition of sections substantially the same which appeared in the Act of 1899 as S. 152 and the following sections, and the difficulty which we have to resolve in the present case is just as great in the Act of 1899 as it is in the Act of 1923. We have to take the language of the Statute of 1923 by itself and to construe it if we can.

By sub-S. (1), S. 131, provision is made for a general assessment or valuation, ward by ward, of the whole of the properties within the jurisdiction of the Corporation and it is provided that that valuation is to have effect for the purpose of assessment for the following six years. By sub-S. (2) however provision is made for certain cases in which it is considered unjust or impracticable for the valuation to remain uninterfered with for so long a period as six years. The first case which is dealt with is the case of bustees. Bustees which have huts upon them may be valued annually at the discretion of the Executive Officer and a right is given to the owner to claim that they shall be valued annually if he so desires. The language is "and shall be so valued on the application of the owner." So the right to have them revalued is plainly given as the right of the subject. There is only one other case in sub-S. (2) where similar right is given to the subject and that is by Cl. (e). There provision is made whereby demolition of the property, or for similar reasons, it is thought reasonable that the valuation originally made for six years should not be allowed to have effect for the whole of the period; and there again

"the Executive Officer shall, as soon as practicable on application being made to him in writing by the owner or occupier of such building, cause it to be revalued."

The other cases dealt with by sub-S. (2) are cases where it is just and reasonable that the valuation should be increased or that property not valued should be brought into assessment. There is the case of unvalued lands and buildings, Cl. (b); there is the case of alterations and improvements, Cl. (c); there is the case of new buildings, Cl. (d); and similar provisions in Cl. (f) for alterations and improvements after revaluation. In these cases the language of the statute is that the Executive Officer may have a new valuation of the premises. Leaving out of account Ss. 133 to 135, which deal really with assessment rather than valuation, we may come to S. 137. That section is in the following terms :

"(1) When the valuation under S. 131 of the lands and buildings in any ward has been completed, the Executive Officer shall cause the respective valuations to be entered in a list and give public notice of the place where such

list may be inspected. (2) Such notice shall be by advertisement in local newspapers and also by placards posted up in conspicuous places throughout such ward. (3) The Executive Officer shall also cause a placard to be posted up in each bustee showing separately for each building situated in the bustee the valuation assigned to it in the valuation list."

Now, so far as that section is concerned, it has been suggested in the judgment of the learned Judge that, when an intermediate valuation is made under Cl. (e), sub-S. (2), S. 131, the provisions of S. 137 (1) take effect, that is to say, a separate valuation list has to be made out and the notices required to be given by sub-Ss. (1) and (2), S. 137, have to be issued. That no doubt is a possible solution of the difficulty which arises upon S. 139, but I cannot see my way to accept it. It appears to me reasonably clear that the provisions in sub-S. (1), S. 137, are intended to apply when the general valuation for a ward has been completed. In that case, a list has to be made out of all the different valuations of the different properties. Then the statute says that public notice by advertisement in local newspapers and by placards is to be given. Of what? Of the place where such list may be inspected. It cannot, I think, be as. from day to day particular action has to be taken under Cl. (e), S. 131, reducing the valuation of particular premises by reason of substantial demolition, that after the premises have been revalued it is the duty of the Corporation to issue fresh notice in newspapers and placards merely of the place where the list may be inspected. The notice contemplated by S. 137 is not drafted by the Act but it is clear enough what it is to contain. It is a notice to say that the rate-payers are informed that the valuation list has been posted at such and such a place and that, if they go to the office of Mr. X at such and such address, they are at liberty to see it. It cannot be intended that every few days throughout the whole of the year public notices of that sort are to be published in the newspapers and on placards, and it seems to me reasonably clear that the notice referred to in sub-S. (1), S. 137 is a notice which is to be consequent upon the completion of a general valuation of the whole of the ward.

We then come to the provisions of S. 138. They are to this effect:

"The Executive Officer shall, in all cases in which any land, bustee or building is for the first time valued; or in which the valuation of any land, bustee or building previously valued, is increased under S. 131, give special notice thereof to the owner or occupier of the same; and when the valuation is so increased, the said notice shall contain a statement of the grounds of such increase."

Now, I do not know what view has hitherto been taken by the Corporation but it appears to me to be reasonably plain that S. 138 will apply to an increase of valuation made under any of the headings of sub-S. (2), S. 131. It not merely says that, where upon a general assessment a property is valued at a higher figure than before this notice is to be given, but it would apply to a case under sub-Cl. (a) where an annual valuation has to be increased, it would apply to a case under sub-Cl. (b), it would apply to a case under sub-Cl. (c) and it would apply to a case under sub-Cl. (d). I may say that, in the case of a bustee, the Act of 1899 made this absolutely clear; but I think that S. 138 of the present Act applies to all cases of an increase in valuation and not merely to a case where general assessment of valuation has put a higher figure than previously. Bearing that in mind, we come now to the following section upon which this question ultimately turns. Cl. 1 is very wide and broad:

"Any person who is dissatisfied with a valuation made under this chapter may deliver at the Municipal Office a written notice stating the grounds of his objection to such valuation."

We observe that there is no way of construing that clause as meaning "any person who is dissatisfied with a valuation. made under sub-S. (1), S.131." The language is "under this chapter." Having regard to the subsequent sections including S. 146, it may be a matter of doubt whether the draftsman fully appreciated what he was saying in this clause, but it certainly has reference to the immediately preceding sections. I leave out of account for the present any subsequent section. That right having been given to any person who is dissatisfied with a valuation made under this chapter, can it be contended that the valuation which the Executive Officer is required to make either under Cl. (a) or Cl. (e), sub-S. (2), S. 231 is not within the scope of the clause? In my opinion

any such contention must be wrong and we must take it therefore that the general language of this subsection does apply to this case of valuation. It is said however that when we come to sub-S. (2), S. 139, we find that the somewhat generous language in sub-S. (1) is very materially cut down. Sub-S. (2) is this:

"Such notice shall be delivered within 15 days after the publication of the notice referred to in S. 137 or after receipt of the notice referred to in S. 138, if such notice is received after the publication of the notice referred to in S. 137."

The contention is that that cuts down the general language of sub-S. (1) with the result that an appeal is only given against the valuation on the occasion of the general assessment or else against any valuation the result of which has been to bring into assessment lands not previously assessed or to cause an increase of assessment. The drafting of the statute in this respect gives rise to a good deal of hesitation on the part of anyone who has to interpret it; but it seems to me to be wrong to regard sub-S. (2) as cutting down in so drastic a manner the deliberate general language of sub-S. (1). It has to be remembered that the Act in certain cases provides that, upon a valuation being made, notice of one sort or another shall be given for the benefit of the owner or occupier. It provides that such public notice shall be given at the end of a general assessment for the ward. In any case of increase of assessment, or in any case of a building being assessed for the first time, a specific notice is to be given. I omit the case of bustee which may require separate consideration, but in other cases as I read it, there is no provision for a notice to the owner at all. In these circumstances, it seems to me to be nearer to the language and the intention of the Act to say that the effect of sub-S. (2), S. 139, is this: that, in those cases where under the Act the owner is given the benefit of a notice, the time within which the objection is to be taken is limited to a certain period after receipt of the notice and, in cases where there is no provision for a notice, the effect of sub-S. (2) is not to take away his right to object but merely that there is no limit or no effective limit upon his right. I see no absurdity in this construction. After all, if a person does not object, he will in most cases be under the disadvantage at any rate for the meantime, of having to pay upon the basis of the valuation made. There is no such temptation to postpone filing objections to assessment so as to make it incumbent upon the Court to assume that there is a time limit in every case and, although I do not think that it is at all certain that the draftsman of this Act appreciated the meaning of the language he employed, I think that the construction which I have indicated is the most reasonable construction—it being remembered that the duty of the Court is not to put a construction which seems to the Court to be best in the sense that it will work out with the most justice or with the least inconvenience but to put a construction which seems to the Court to be the best in the sense that it is nearest to the language of the legislature. It does not seem to me reasonable that it should be supposed that, in spite of sub-S. (1), S. 139, the owner or occupier is to have no right of objection and it does not seem to me to be much more reasonable to say that he is to have a right of objection, but that his objection is to be dealt with, in some cases, formally under S. 140 and in other cases, informally without any of the provisions of S. 140 being complied with. After all, the provisions of S. 140 are very few and very simple. They merely say that a man is to have notice, that he or his agent is to be heard and that the order is to be recorded in the register.

It remains only to say that I have construed S. 139 without reference to S. 146. It is quite clear that S. 146 privides machinery as regards objections for an appeal and, as S. 146 is subsequent to S. 139, I do not think that any light upon the meaning of S. 139 is, in these circumstances, to be derived from a consideration of the provisions of S. 146. But let us consider S. 146. It will be remembered that by S. 131, upon improvements and alterations in a building and in certain other cases, the Chief Executive Officer is given a right to have a new valuation for the purpose of increasing the assessment. S. 146 gives power to the Executive Officer to amend the assessment book; and when we come to consider his

powers we find that the powers given to him are powers which he may exercise suo motu. Looking at Cl. (c), S. 146, we find that his power to increase the assessment suo motu is very limited indeed. That is confined to cases where in his opinion at the last general valuation the premises have been substantially under-valued by reason of misrepresentation or fraud; so that he has got no general right to raise people's assessment within the six years. His only right isin the particular cases of misrepresentation or fraud. That shows that the provisions of sub-S. (2), S. 131 are not to be confounded with the general right of the Executive Officer under S. 146. I have no doubt at all that the learned Judge is right in saying that both Cls. (a) and (e), sub-S. (2), S. 131 give a right to the subject to call for a new valuation with a view of reduction in the assessment and the mere fact that by Cl. (b), S. 146, the Executive Officer has the power to reduce the amount of any valuation in the assessment book—a power from the exercise of which there is no appeal—in no way shows that there is no appeal from a valuation which under S. 131 the owner or occupier has a right to require. After all, if an owner or occupier has no right to require a revaluation, the Executive Officer in a proper case may still reduce his assessment and naturally enough no right of appeal from that is given in a case in which the statute has not given a right to revaluation. Hence for the present purpose, the construction of S. 139 is not to be controlled or governed in any way by a contemplation of the concluding words of Cl. (b), S. 146.

For these reasons, it seems to me that the learned Judge decided the main points in this case correctly.

A question has arisen whether or not the necessity for hearing and dealing with the objection of the present applicants has been removed by the new general assessment having come into force as from 1st October 1929. But it appears that the necessity for hearing the objection has not been removed under the circumstances; and, on this account, it appears to me that the appeal must be dismissed with costs.

C. C. Ghose, J.—I agree.

B.V./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 774

RANKIN, C. J., AND C. C. GHOSE, J.

(Haji) Vali Mahomed Ayoob—Plaintiff—Appellant.

v.

Shamdeo Gopiram— Defendant—Respondent.

Appeal No. 95 of 1928, Decided on 10th February 1930, from original decree of Remfry, J., D/- 21st September 1928.

Contract—Construction—Contract for sale—Entry in sowda book of vendors signed by vendees that terms of the contract are to be the same as those in contract between vendors and third party—Arbitration clause in first contract forms term in second contract also.

In a contract of sale the entry in a sowda book of the vendors signed by the purchasers, recited that the vendors had purchased the goods from a certain importing firm and that all terms of the present transaction were to be according to the contract between the vendor's and the importing firm :

Held : that on account of the entry the terms of the contract between the vendors and the importing firm, so far as they could and did apply, were made applicable to the present transaction. Therefore, an arbitration clause which existed in the first contract was to be taken to have formed one of the terms of the second contract : *A. I. R.* 1921 *Cal.* 767, *Ref.* [P 776 C 1]

A. K. Roy and *Laha*—for Appellant.

B. K. Ghose and *N. C. Chatterjee*—for Respondent.

C. C. Ghose, J.—The only question which arises in this appeal is whether an arbitration clause to be found in a contract between the Japan Cotton Trading Co. Ltd., and Messrs. Shamdeo Gopiram was imported into the contract under which the plaintiff in the case bought the goods referred to in the plaint from the defendants Messrs. Shamdeo Gopiram.

On or about 7th September 1927, the plaintiff purchased from the defendants 100 bales of grey cotton yarn at the rate of Rs. 5 per bundle. The plaintiff alleged that it was a verbal contract and that the defendants in breach of the contract failed and neglected to deliver the goods. The defendants alleged that it was a written contract and was duly entered in the sowda book of the defendants and that the plaintiff had signed the same. They also stated that they were ready and willing to deliver the goods to the plaintiffs at all material times.

The sowda entry referred to above was in these terms :

"100 sold to Haji Wali Mahomed Ayub, through Gajanand Yarn No. 32 football ticket, bales 100, in words (one) hundred at 5th August shipment. We had purchased (the same) from the Japan Cotton Trading Co., which same we have sold to you, all terms (being) according to those obtaining in importing firms. Delivery at the Jetty Miti Bhada Sudi 11 Sambat 1984 dated 7th September 1927."

The words in the vernacular are "bahar muja" which, literally translated, would mean "according to importing firm," or in other words, all terms according to the contract between us (the defendants) and the importing firm. The defendants alleged that the arbitration clause in the contract between the importing firm and themselves were imported into the present contract between the defendants and the plaintiff. The arbitration clause in question is Cl. 23 on p. 20, of the paper book. Disputes having arisen between the parties the matter went to the Bengal Chamber of Commerce for arbitration. The arbitrators held that one of the terms of the contract between the defendants and the plaintiff was a clause to refer to arbitration being the said Cl. 23. They awarded to the defendants Rs. 6,784-2-6. Thereupon the plaintiff instituted the present suit for a declaration that the award was not binding on him and as indicated above, the main question was whether the said arbitration clause had been imported into the present contract by reason of the words used in the said sowda entry.

The trial Judge held that the said arbitration clause had been imported into the contract between the parties. He referred to the case of *Chatturbhuj Chandun Mull* v. *Basdeo Das Daga* (1) decided by the Court of appeal consisting of Mukherjee, J., and Fletcher, J., and reported in *Chatturbhuj Chandun Mull* v. *Basdeo Das Daga* (1), and for the reasons given by him he distinguished that case from the present case and held that the case was no authority for the contention put forward on behalf of the plaintiff in this case that the arbitration clause in question referred to above was not imported into the contract between the parties. In my opinion, it is not necessary for the purposes of this judgment to go into any discussion as to whether or not the decision in the case referred to above was right on the particular facts appearing therein.

So far as the present case is concerned, I am content to put it on this footing. Mr. A. K. Roy, who appeared for the plaintiff-appellant, argues that from the sowda entry no conclusion can be drawn as to whether or not the contract between the Japan Trading Co. Ltd., and the defendants was to be found in the document printed on pp. 17-21 of the paper book. In the Court below there was no specific question raised on this point, but as far as I can make out from the record before us, both sides proceeded on the footing that the contract between the importing firm, i. e., the Japan Cotton Trading Co., Ltd., and the defendants was the contract embodied in the document printed on pp. 17-21 of the paper book.

That being so, the only question is: What is the interpretation of the sowda entry referred to above? As I read the sowda entry, it means this : the defendants make it clear that the goods they were selling to the plaintiff had been purchased by them from the Japan Trading Co. Ltd., and that the terms which will regulate the sale and purchase of the goods under the present contract between the parties are the terms entered into by the defendants and the Japan Trading Co. Ltd. Now the terms of the contract relating to the purchase of these goods by the defendants from the Japan Cotton Trading Co., Ltd., were reduced into writing the document in question being the one which is printed on pp. 17-21 of the paper book. The defendants were selling these goods, or at any rate part of these goods to the plaintiff under those terms.

Now, it is quite true that there are several clauses in the document printed on pp. 17-21, of the paper book which are not applicable to the transaction between the defendants and the plaintiff. That may be so. But what the parties did really intend was this, that so far as the terms between the defendants and the Japan Cotton Trading Co. Ltd., could and did apply, they were made applicable to the transaction bet-

(1) A. I. R. 1921 Cal. 767=60 I. C. 909=47 Cal. 799.

ween the defendants and the plaintiff. If I am right in this view of the sowda entry, then it follows that Cl. 23, which is the material clause to be considered in the present case, was a clause which did form one of the terms of the contract between the defendants and the plaintiff. If that is so, there is no sustance, in my opinion, in this appeal and I would therefore affirm the judgment appealed against and dismiss the present appeal with costs.

Rankin, C. J.—I agree. I have some difficulty whether the words "Bahar Mouza" in the sowda in this case should be taken as referring to the specific written contract of the 25 clauses upon which the sellers bought from the Japan Cotton Trading Co. Ltd. Assuming that they do however I see no reason why Cl. 23, of that contract should not be taken to be incorporated into the contract in question. With reference to the case of *Chatturbuj Chandun Mull* v. *Basdeo Das Daga* (1) and the observations at p. 804 of that report, I agree with the learned Judge in the present case that :

"the terms of any other contract must as a general rule be intended only to apply between the parties thereto, yet that has never been suggested in the English cases as being in itself any difficulty, for the parties to the second contract in cases of this description agree that the terms made between these persons shall apply to their own contract."

It is, it seems to me, a different matter, if such words as "under the charter" are sought to be read into a bill of lading though even that is a very literal interpretation. I agree in the judgment proposed.

R.M./R.K. *Appeal dismissed.*

A. I. R. 1930 Calcutta 776

MUKERJI, J.

Narendra Nath Mitra—Petitioner.

v.

Paban Mondal—Opposite Party.

Civil Revn. No. 999 of 1928, Decided on 10th April 1929, against order of Sub-Judge, Khulna, D/- 1st June 1928.

(a) Usurious Loans Act (10 of 1918), S. 3—Interest must be excessive and transaction unfair.

Two conditions must be satisfied before the debtor can be relieved under S. 3 ; 1st that the interest must be excessive, and 2nd the transaction, substantially unfair as between the parties thereto. [P 777 C 2]

(b) Usurious Loans Act (10 of 1918), S. 3 (1)—Suit "heard ex parte" — Still Court must apply Act.

The duty is cast upon the Court in cases to which the statute may be applicable to apply its mind to its provisions even in a suit heard ex parte. [P 777 C 2]

(c) Usurious Loans Act (10 of 1918), S. 3 (1)—Words "whether heard ex parte or not" and "Court has reason to believe"—Meaning explained.

The words "whether heard ex parte or not" and the "Court has reason to believe" indicate that the intention of the legislature was to enable the Court to take up the question of its own motion, whether it has been raised by the defence or not. [P 777 C 2]

(d) Usurious Loans Act (10 of 1918), S. 3 (1)—Words "has reason to believe"—Meaning explained.

The words "has reason to believe" mean something more than mere suspicion. [P 777 C 2]

(e) Usurious Loans Act (10 of 1918). S. 3 (2) (a), (b), and (c)—Inquiries to be made and points to be noted, in order to find out whether rate of interest stipulated was excessive or not, stated.

Clauses (a), (b) and (c), sub-S. 2 indicate with sufficient particularity the inquiries to be made in order to find out in any given case whether the rate of interest stipulated for is excessive or not ; the points to be noted are to be determined by taking into account such matters as the financial conditions of the debtor, the nature of the security, etc., the risk incurred by the creditor ; the extra amounts not paid but incorporated into the principal as expenses, etc., in the case of compound interest the periods of the rests ; and lastly the total advantage that may be reasonably expected to accrue to the respective parties from the transaction: *Samuel* v. *Newbould*, (1906) *A. C.*, 467, *Ref.* [P 777 2, ; C P 778 C 1]

(f) Usurious Loans Act (10 of 1918), S. 3 (2)—"Substantially unfair" relieve Court from necessity of elaborate inquiry.

The words "substantially unfair" relieve the Courts from the necessity of going into elaborate and often very intricate questions which arise under Ss. 16 and 19-A, Contract Act. [P 778 C 1]

(g) Usurious Loans Act (10 of 1918), S. 3—Compound interest at 25 per cent per annum is not excessive—Nor fact that principal consisted of arrears of rent and selami and that tenant entered into stipulation with landlord is sufficient for holding transaction substantially unfair.

Interest at 25 per cent per annum compound with yearly rests by itself is not excessive and would not under Cl. (d), sub-S. (2) justify a conclusion that the transaction was substantially unfair. Further the fact that the amount consisted of arrears of rent and selami, if those items were justly due, and the fact that tenant entered into the stipulation with his landlord, are hardly sufficient to form the foundation for a reasonable belief that the transaction was substantially unfair. [P 778 C 2]

Narendra Chandra Bose and *Sateyendra Nath Mitter*—for Petitioner.

Judgment.—The suit out of which this revision case has arisen was instituted by the plaintiff for recovery of the principal and interest due on a registered bond, the amounts of principal and interest claimed being respectively Rs. 80 and Rs. 301-7-6 pies. The rate of interest claimed was what was stipulated in the bond, namely compound interest at 25 per cent per annum with yearly rests. The defendant did not appear to contest the claim. The Judge of the Court below decreed the suit ex parte for the principal amount of Rs. 80 and simple interest at the rate of 25 per cent per annum from the date of the bond, namely 1st May 1921, together with costs. The plaintiff has moved this Court and obtained this rule.

The learned Judge has refused enforcement of the stipulation as to compound interest contained in the bond for the following reason : "The transaction," says he :

"is between landlord and his tenant and consisting of arrears of rent and selami claimed, I consider that the transaction is substantially unfair inasmuch as an undue advantage has been taken in getting the very hard terms as to stipulation for compound interest. I therefore consider that the transaction is substantially unfair inasmuch as an undue advantage has been taken in getting the very hard terms as to stipulations for compound interest. I therefore consider the transaction unfair and stipulation to pay compound interest excessive, and by virtue of S. 3, I disallow the stipulation to pay compound interest."

Section 3 referred to in these observations is S. 3, Usurious Loans Act of 1918.

In several cases that have come up before me I have seen this Act loosely interpreted and applied and I therefore consider it necessary to take this opportunity of saying a few words as regards the precise scope of this piece of legislation.

Section 3, sub-S. (1) of the Act provides that, notwithstanding anything in the Usury Law Repeal Act, 1855, where, in any suit to which the Act applies, whether heard ex parte or otherwise, the Court has reason to believe that the interest is excessive and that the transaction was, as between the parties thereto, substantially unfair, the Court may exercise all or any of the powers, which are mentioned in the various clauses therein. Leaving aside the proviso to sub-S. (1) we pass on to sub-S. (2). Cls. (a), (b) and (c), sub-S. (2), deal with excessive interest. Cl. (d) sub-S. (2), says how the question as to whether a transaction is substantially unfair is to be determined and the explanation to this clause provides that interest may of itself be sufficient evidence that a transaction was substantially unfair.

Two conditions therefore must be satisfied before the debtor can be relieved : 1st, that the interest must be excessive, and 2nd, the transaction, substantially unfair as between the parties thereto.

Upon the section itself the following points are clear:

First.—The duty is cast upon the Court, in cases to which the statute may be applicable to apply its mind to its provisions even in a suit heard ex parte.

Second.—The words "whether heard ex parte or not" and the "Court has reason to believe" indicate that the intention of the legislature was to enable the Court to take up the question of its own motion, whether it has been raised by the defence or not.

Third.—The words "has reason to believe" have a significance. The Indian Legislature has said in some other Act that a person is said to have reason to believe a thing if he has sufficient cause to believe that thing, but not otherwise. It is only when the circumstances are such that a reasonable man would be led by a chain of probable reasoning to the conclusion or inference that the thing exists, though the circumstances may fall short of carrying absolute conviction to the mind of all persons, that the phrase is satisfied. The words however mean something more than mere suspicion.

Fourth.—As regards "excessive interest" the word "excessive" as James, L. J. said in the case of *Samuel* v. *Newbould* (1) "is a relative and elastic term, impossible of absolute definition." Cls. (a), (b) and (c) of sub-S. 2 indicate with sufficient particularity the enquiries to be made in order to find out in any given case whether the rate of interest stipulated for is excessive or not ; the points to be noted are to be

(1) [1906] A. C. 461 (467)=75 L. J. Ch. 705=22 T. L. R. 703=95 L. T. 209.

determined by taking into account such matters as the financial conditions of the debtor, the nature of the security, etc., the risk incurred by the creditor; the extra amounts not paid but incorporated into the principal as expenses, etc., in the case of compound interest the periods of the rests ; and lastly the the total advantage that may be reasonably expected to accrue to the respective parties from the transaction.

Fifth.—The expression "substantially unfair" requires to be properly understood. The section is founded upon S. 1, English Money Lenders Act. In *Samuel* v. *Newbould* (1), Lord Macnaghten observed :

"What an intolerable strain would be thrown upon inferior Courts, unfamiliar with the doctrines and the practice of Courts of equity, if they were privileged or condemned to listen to lengthy arguments and venerable precedents before deciding a question that any man of common sense is just as capable of deciding as the most learned Judge in the land provided he is not hampered by authorities which require no little training to discriminate and appreciate at their true value."

These words appear to have been borne in mind in the Usurious Loans Act of 1918. While keeping in view the principles of the English Act it has rendered the application of those principles much simpler by substituting the words "substantially unfair" for the words "harsh and unconscionable" and instead of referring the Court to considerations of general principles of equity has laid down in Cl. (d), sub-S. (2), certain practical tests for its guidance. The Act therefore, relieves the Courts from the necessity of going into elaborate and often very intricate questions which arise under Ss. 16 and 19-A, Contract Act.

Bearing these propositions in mind let us examine the facts of the present case. The only evidence that there is on the record is the evidence of the plaintiff's witness who, besides proving the execution of the bond and the consideration, said :

"Paban (meaning, the defendant) is literate ..... Rs. 80 was borrowed to pay off arrears of rent and selami. The interest claimed is at 4 annas a rupee per annum and this is the usual rate of interest prevailing there."

The Judge has not taken the trouble of enquiring into the matter by putting further questions to the witness to find out whether there existed circumstances which would enable him to apply the rules laid down in the different clauses of sub-S. (2), S. 3. Interest at 25 per cent. per annum compound with yearly rests by itself is not excessive and would not under Cl. (d), sub-S. (2) justify a conclusion that the transaction was substantially unfair. The fact that the amount consisted of arrears of rent and selami, if those items were justly due, and the fact that the tenant entered the stipulation with his landlord, are hardly sufficient to form the foundation for a reasonable belief that the transaction was substantially unfair. As regards the Judge's finding, that the creditor has taken an undue advantage over the debtor, there is absolutely nothing which can raise even a suspicion to that effect. It has been said on behalf of the plaintiff here that the arrears of rent for which the bond was executed carried interest under a patta at the rate of 37½ per cent per annum simple.

In my opinion there are no materials on which the debtor may justly be relieved of the stipulation to pay interest according to the bond and the learned Judge of the Court below was wrong in the decree that he has passed.

The Rule is accordingly made absolute. The decree of the Court below is set aside, and it is ordered that a decree be entered in plaintiff's favour for the principal amount of Rs. 80, with compound interest at the rate of 25 per cent. per annum, with yearly rests from the date of the bond, i. e. 1st May 1921, till the date of the institution of the suit, i. e. 26th April 1928, and interest at 6 per cent. per annum from the date of suit till date of realization. The plaintiff will be awarded the costs mentioned in the decree of the lower Court which will carry interest at the rate of 6 per cent per annum from the date of the lower Court's decree till date of realization. There will be no order as to costs in this rule.

V.B./R.K. *Rule made absolute.*

A. I. R. 1930 Calcutta 779

MITTER, J.

(*Sm*) *Rani Dassya* and *others*—Defendants—Appellants.

v.

(*Sm*) *Golapi Dassya* and *another*—Plaintiffs—Respondents.

Appeal No. 1580 of 1927, Decided on 28th January 1930, against appellate decree of Dist. Judge, Bankura, D/- 9th April 1927.

(a) Hindu Law—Dayabhaga law—Inheritence—Widow—Chastity.

Unless a widow kept unsullied her husband's bed up to the time of her husband's death she would not be entitled to inherit her husband's estate. [P 780 C 2]

(b) Hindu Law—Dayabhaga law—Widow—Condonation of widow's unchastity by husband does not affect question of determination of widow's inheritance. (*Obitor*)

On the subject of inheritance by widow condonation by husband of widow's unchastity does not come in for the purpose of determining whether the widow who had become unchaste during her husband's lifetime is entitled to inherit or not : (*Obitor*) 36 *Bom.* 138 and 40 *All.* 178, *Dist.*; 5 *Cal.* 776, *Ref.* [P 780 C 2]

Bankim Chandra Mukherji, *Purna Chandra Chatterji* and *Sailendra Nath Banerji*—for Appellants.

Ananda Charan Karkun for *Narendra Krishna Basu*—for Respondents.

Judgment.—This is an appeal by defendants 1 to 4 and arises out of a suit commenced by the plaintiff for a declaration that defendant 1 Rani Dasee has no right to inherit the property of her husband Jogendra as she became unchaste during her husband's lifetime, and for a further declaration that certain kabalas, which had been executed by Rani Dasee in favour of defendants 2 to 4 are collusive and fraudulent. Both the Courts have held that defendant 1 was immoral and unchaste during her husband's lifetime and that therefore she was not competent to inherit her husband's estate. They have also found that the kabalas executed by defendant 1 in favour of defendants 2 to 4 are collusive and fraudulent.

Against the concurrent decisions of the District Judge of Bankura and the Munsif of the same district the present appeal has been preferred by defendants 1 to 4, and it has been argued by Mr. Bankim Chandra Mukherji who has appeared for the appellants that the suit offends against the provisions of S. 42, Specific Relief Act and therefore should have been dismissed by the Courts below. It is said that the Record-of-Rights disclosed that defendant 1 Rani Dasee was in possession of the property in respect of which the declaration was sought. This Record-of-Rights was finally published some time in the year 1924 and the present suit was instituted on 22nd January 1925. The lower appellate Court however has come to the conclusion on the evidence that the plaintiff Golapi Dasee who is the mother-in-law of Rani Dasee and the mother of Jogendra, was in possession of the disputed property at the time of the suit. There was evidence to sustain this finding by the lower appellate Court, for it is pointed out that the evidence on the side of the plaintiff shows that both Upendra, the brother of Jogendra and Golapi Dasee, the plaintiff, paid rent to the zamindar who himself deposed in this case. If, as is found, the plaintiff was in possession it was not necessary for her to ask for consequential relief of recovery of possession. Mr. Mukherji with great insistence urged before me that in arriving at the finding on the question of possession the lower appellate Court has not given proper legal effect to the presumption which arises under S. 103-B, Ben. Ten. Act, from the entry in the Record-of-Rights. Both the Courts below have referred to the Record-of-Rights. The first Court has pointed out rightly that the Record is no evidence of title. All that it shows is that at the date when the Record was finally published Rani Dasee was in possession of the disputed property. But it is admitted by Rani Dasee herself that Golapi Dasee, the plaintiff was living as a member of a joint family with Upendra and herself after the death of her husband. Under these circumstances having regard to the finding that Rani Dasee was not competent to inherit as she became unchaste during the lifetime of her husband and that Golapi was in possession, I do not think it is necessary to remand this case to the lower appellate Court for consideration of the effect of the Record-of-Rights and for consideration of the further question as to whether the entry in the Record-of-Rights has not been rebutted. As a matter of fact the present suit has been occasioned by reason of the entry in the Record-of-Rights which has cast a cloud upon the title of Golapi Dasee plaintiff

as she is the next heir of her son Jogendra under the Bengal School of Hindu law by which this case is governed. I think therefore the ground urged by the learned advocate for the appellant must fail.

With regard to the question of inheritance it has been sought to be argued that as there is nothing to show in the evidence of the mother of Jogendra and his brother that Jogendra did not condone the act of adultery committed by Rani Dasee with her sister's husband Bhuban it could not be said that Rani Dasee is disentitled from inheriting her husband's property. There is however evidence in this case amongst others of Ganga Ram Kundu, plaintiff's witness 7, which leads to the conclusion that Rani Dasee left her husband's home in his lifetime and was living as mistress of Bhuban, her sister's husband at the time of Jogendra's death. It is also pointed out that she was not allowed to perform the Sradh of her husband. This witness also points out that a panchayat was called and the panchayat declared defendant 1 as an outcast and that Jogendra consequently did not take her back. So there is no evidence that this act of unchastity was condoned by the husband. It is not necessary therefore to consider whether the decisions of the Bombay and the Allahabad High Courts in the case of *Gangadhar Parappa Alur* v. *Yellu* (1) and in the case of *Radhe Lal* v. *Bhawani Ram* (2), which lay down that under the Hindu law a widow is not debarred from inheriting to her husband on the ground that she had become unchaste in her husband's lifetime, if the husband had condoned her unchastity, lay down the law correctly with reference to the texts of the Hindu sages. These two decisions however are not decisions in respect of that School of Hindu law which prevails in Bengal, consequently they should not be regarded as authorities controlling the law which regulates the Dayabhaga law of succession. On the other hand there is the text of Vrihat Menu to the effect that the widow of a childless man keeping unsullied her husband's bed and persevering in religious observances shall present his funeral oblation and obtain his entire share, which would seem to suggest that, unless the widow kept unsullied her husband's bed up to the time of her husband's death she would not be entitled to inherit her husband's estate. It is pointed out by their Lordships of the Judicial Committee of the Privy Council in the case of *Moniram Kolita* v. *Keri Kolitani* (3) that :

"although the present participle is used in this text of Vrihat Manu it clearly refers only to the conduct of the widow up to the time of her husband's death, and not to her conduct subsequently."

The Bombay and the Allahabad decisions also have been commented on unfavourably by Mr. Golap Chandra Sastri in his book on Hindu Law, Edn. 6, p. 468. The learned author points out :

"But a woman's character may be above all suspicion, and she may be purity personified, but if she does not love her husband, refuses to live with him, and habitually acts contrary to his wishes, then she cannot inherit from him, for she is not sadhvi."

He points out that the word "sadhvi" as rendered into English by Colebrooke, is "chaste." Verse 165 of Chap. 5 of Manu's Code has been rendered into English by Sir William Jones as follows:

" While she, who slights not her lord, but keeps her mind, speech and body devoted to him attains his heavenly mansion, and is called sadhvi or virtuous by good men."

As I have already said there is no evidence of condonation consequently it is not necessary to express any final opinion on the question. In the texts to which I have referred already the question of condonation really does not come in for the purpose of determining as to whether the widow who has become unchaste during her husband's lifetime is entitled to inherit or not.

The result is that both the points urged fail and the appeal must be dismissed with costs.

Mr. Mukherji has asked leave to appeal under the Letters Patent. I do not think that the circumstances of the case are such that leave should be granted, and I do not consider the case a fit one for appeal.

V.B./R.K. *Appeal dismissed.*

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(1) [1912] 36 Bom. 138=12 I. C. 714.
(2) [1918] 40 All. 178=48 I. C. 553.
(3) [1880] 5 Cal. 776=7 I. A. 115=6 C. L. R. 322=4 Sar. 103 (P.C.).

A. I. R. 1930 Calcutta 781

SUHRAWARDY AND GRAHAM, JJ.

Lachira — Judgment-debtor — Petitioner.

v.

Rameswar Singh and *others*—Opposite Parties.

Civil Rule No. 370 of 1928, Decided on 4th April 1928, from order of Second Sub-Judge, 24 Parganas, at Alipore, D/- 11th February 1928.

Civil P. C., O. 21, R. 66 (2) (e)—Enquiry regarding value of property should be made by Court and not shirked on ground of trouble and expense.

The Civil Procedure Code does not make it incumbent upon the executing Court to insert the value of the property to be sold in the sale-proclamation. But under O. 21, R. 66 (2) (e), the proclamation shall contain everything besides the amount of the debt, etc. which the Court considers material for a purchaser to know in order to judge of the nature and value of the property. The value of the property to be sold as estimated by the Court is a piece of very valuable information which helps the intending purchaser to form an idea of the price which he is prepared to offer for the property. The price should therefore be stated as fairly and accurately as possible after making necessary enquiry. Such enquiry should not be shirked on the ground of trouble and expense. It need not be an elaborate enquiry, but the value that is to be put in the proclamation should be the value estimated by the Court and not what the parties state it to be.

Where both the decree-holder and the judgment-debtor give value of the property to be sold and the values differ considerably, the practice which is becoming common of evading responsibility resting on Court and inserting both the values in the sale proclamation is to be highly deprecated : 20 *All.* 412, *Rel. on* ; 12 *C. W. N.* 542 ; 37 *I. C.* 872 ; 6 *I. C.* 180 and *A.I.R.* 1924 *Cal.* 589, *Ref.* [P 481 C 2, P 782 C 2]

Surendra Nath Guha and *Paresh Chandra Mitter*—for Petitioner.

H. D. Bose, Amulya Chandra Sen and *Profulla K. Guha*—for Opposite Parties.

Judgment. — This rule is directed against an order of the Subordinate Judge of 24 Parganahs dated 11th February 1928 directing the valuations mentioned by the decree-holder and the judgment-debtor of the property to be sold to be inserted in the sale proclamation. The property intended to be sold is a mill of the judgment-debtor and the decree-holder valued it at Rs. 4,24,000. The judgment-debtor's case was that it was at different times estimated by experts and that its present value was Rs. 14,00,000. This matter came up before the learned Subordinate Judge when he passed the following order :

"The petitioner Lasmiram examined himself and none else. The decree-holder did not examine any witness. The valuation as given by the decree-holder is Rs. 4,24,000. The valuation given by the judgment-debtor is Rs. 14,00,000. Without making any elaborate enquiry into the valuation which cannot be made without a good deal of trouble and expense it is deemed proper that the valuation given by both parties be put in the sale proclamation. The learned advocate of the decree-holder has no objection to that. Hence the order of the Court is that let proclamation of sale be issued putting both valuations as given by the decree-holder and the judgment-debtor."

Against this order it is contended that the learned Subordinate Judge is wrong in refusing to enter into an enquiry as to the proper valuation of the property sold and directing the valuations as given by the judgment-creditor and the judgment-debtor to be inserted in the sale proclamation. We think that there is considerable force in this contention. It is true that the Civil Procedure Code does not make it incumbent upon the executing Court to insert the value of the property to be sold in the sale-proclamation. But under O. 21, R. 66 (2) (e) the proclamation shall contain everything besides the amount of the debt, &c., which the Court considers material for a purchaser to know in order to judge of the nature and value of the property. It cannot be denied that the value of the property to be sold as estimated by the Court is a piece of very valuable information which helps the intending purchaser to form an idea of the price which he is prepared to offer for the property. In the case of *Saadatmand Khan* v. *Phul Kuar* (1), their Lordships of the Judicial Committee suggested the course which ought to be followed by the executing Court in circumstances like the present. Their Lordships realize that it is not expressly enjoined upon the executing Court to mention the value of the property but they say that if it considers a fact to be material which should be mentioned in the sale proclamation (and the valuation of the property is a very material fact) such fact should be stated as fairly and accurately as possible. In the case before their Lordships the value given in the sale proclamation was much below what was subse-

(1) [1898] 20 All. 412=25 I. A. 146=7 Sar. 380 (P.C.).

quently found to be the real value. In consideration of that fact they observed :

"It must have been possible to state the value of this property with very much greater approach to fairness and accuracy than was done in the proclamation."

This observation of the Judicial Committee has induced Courts here to hold that the executing Court would not be discharging its duty properly if it evades an investigation into an approximate value of the property to be sold. In this Court this view has been adopted in several cases of which reference may be made to *Saurendra Mohan Tagore* v. *Harrak Chand* (2). The facts are not similar to those in the present case but the observation made by the learned Judges is to this effect "Whether this clause" (referring to S. 287, Cl. (c) of the old Code)

"requires that the value should be stated in all cases or not, the Court has in the present instance elected to state the value in the sale proclamation and has thus considered that element to be a material one. If in the opinion of the Court it is material, the value must be stated with approximate accuracy. For that purpose it may be and in some cases it will be necessary for the Court to make an enquiry in order to ascertain what the value of the property really is and this will be necessary in such a case as the present one, where there is conflict between the value placed on the property by the judgment-debtor and that by the judgment-creditor."

The same view was adopted in *Lachman Pershad* v. *Ganga Pershad* (3), where the following observation was made :

"In circumstances such as those which have occurred in the present case, where an application is made by a debtor objecting to the value of the property as stated in the sale proclamation, it is certainly the duty of the Court executing the decree to make an enquiry and to satisfy itself that the amount stated in the sale proclamation is substantially correct."

This question was carefully considered by the Patna High Court in the Full Bench case of *Raghunath Singh* v. *Hazari Sahu* (4) where the view as expressed in the above cases by this Court was unreservedly adopted under circumstances on all fours with the present case. The last case upon the point is the case of *Bejoy Singh* v. *Ashutosh Gossami* (5). It has been held there that it is proper that the Court should try to arrive at a fairly accurate value of the property to be mentioned in the sale proclamation in order to enable the purchaser to judge of the nature and value of the property but it cannot be laid down as an imperative rule of law that it must be done in every case. We agree with the observations made in that case. We take this occasion to deprecate the practice which is becoming common of evading the responsibility which undoubtedly rests on the Court.

In the circumstances of the present case we think it desirable that an enquiry should be made by the Court below and that the enquiry should not be shirked on the grounds mentioned by the learned Subordinate Judge, namely, trouble and expense. We do not suggest that this enquiry should be an elaborate one but there should be an enquiry and the value that is to be put in the proclamation should be the value estimated by the Court and not what the parties state it to be. If the Court is satisfied that the value mentioned by the decree-holder or the judgment-debtor is approximately correct it should be put in the sale proclamation as the value fixed by the Court; and if it is satisfied that some other value ought to be put there it should try to ascertain what that value should be. In this view we make the Rule absolute, set aside the order of the Court below and send the case back to it to be tried according to law. The petitioner is entitled to the costs of this Rule. We assess the hearing fee at five gold mohurs. Let the record be sent down as early as possible.

K.N./R.K. *Rule made absolute.*

(2) [1908] 12 C. W. N. 542.
(3) [1911] 15 C. W. N. 713=6 I. C. 180.
(4) [1917] 2 Pat. L. J. 130=37 I. C. 872.
(5) A. I. R. 1924 Cal. 589=83 I. C. 430.

A. I. R. 1930 Calcutta 782

RANKIN, C. J., AND BUCKLAND, J.

Probodh Chandra Mitra—Plaintiff—Appellant.

v.

Road Oils (India) Ltd. and *others*—Defendants—Respondents.

Appeal No. 51 of 1929, Decided on 22nd November 1929, from decree of Page, J., D/- 26th March 1929.

(a) Company—Agreements creating charge—Agreements need not be under seal and if seal affixed irregularly, irregularity does not affect binding character of agreement.

An agreement between a company and a person as banian of the company, that the

latter will advance all the necessary funds up to a certain limit and in return would have the sole right to collect all sums due on bills to the company and repay himself the advances so made as also his remuneration, is an instrument which if otherwise binding creates an equitable charge on the company's outstandings for the amount due to the person. Such agreement need not be under company's seal. It is enough if it is in writing and even if such agreement is required to be under seal by the Articles of Association of the company, if it is affixed with the seal irregularly, the irregularity does not affect the binding character of the agreement: (*English cases discussed.*) [P 785 C 1, 2]

(b) Company—Document required to be under seal —Defect in respect of the seal does not vitiate transaction and Court will give effect to intention —If document is acted upon it will be enforced.

When a document is intended and required to be under seal, a mere defect in respect of the seal does not make the document for all purposes bad and if the Court is satisfied that the parties intended and had power to create the charge, incumbrance or a transfer it will give effect to the intention notwithstanding any mistake in or a failure of the attempt to effect it. If further the document is acted upon by the company, the obligation it embodies will be enforced. [P 787 C 1]

(c) Company— Agreement with stranger by one director — Stranger believing that actual director had power to enter into agreement and such belief possible under Articles of Association — Agreement will be binding on company.

When an agreement on behalf of a company is entered into with a stranger by one of the directors, then if it was possible under the Articles of Association for authority of all the directors to be delegated to one and stranger is aware of no facts to the contrary the agreement will bind the company irrespective of whether such delegation of power has taken place or not. [P 787 C 1]

Advocate-General and *S. M. Bose* — for Appellant.

S. C. Bose and *D. N. Sen* — for Respondents.

Rankin, C. J —This is an appeal from a decree pronounced by my learned brother Page, J., and dated 26th March 1929. By that decree the learned Judge declared that an agreement dated 18th April 1928 purporting to create a charge on the outstanding bills due to the defendant company for the amount due to the plaintiff was not binding on the defendant company. He further ordered that the defendant company do pay to the plaintiff an agreed sum of Rs. 42,000 with interest at 6 per cent until realization and he reserved consideration of certain other matters which were dealt with by a subsequent order and are the subject of another appeal (No. 52 of 1929).

The suit was one brought by the plaintiff against a limited company called the Road Oils (India) Limited. It was originally instituted on 19th December 1928 and, by his plaint, the plaintiff alleged that the defendant company being a company which manufactured and sold certain road oils appointed him in April 1928 treasurer or banian or financial agent. He was to find up to a certain limit moneys necessary for carrying on the business of the company. He was to be the person who had the sole right to collect all sums due to the company in respect of the oils supplied. He was to have the various rights mentioned in that agreement in order to obtain for himself refund of the advances which he undertook to make. The plaintiff's case was that having been appointed under that agreement, he acted under that agreement throughout the rest of the year 1928 until the month of October but that in the month of October, the defendant company, instead of allowing him to collect the outstandings, collected it themselves in breach of the agreement. He further claimed that he had owing to him a sum exceeding Rs. 42,000 for which he asked for a decree and he asked for the appointment of a receiver. The defendant company who were at that time the sole defendant by their written statement admitted that the agreement of 18th April 1928 had been entered into. They referred to its terms for a proper construction and denied that it conferred a charge but they claimed that they had acted faithfully in terms of the agreement and cooperated with the plaintiff to the fullest possible extent in realizing and collecting the bills and other moneys due to the defendant company They alleged that, as a matter of fact, the plaintiff was in sole charge of the finances of the defendant company and met all the expenses for the working and management of the company and that none of the directors handled the funds of the company so that the defendant company's case was that the agreement had been acted on to the full. As regards the allegation that the defendant company had broken the

agreement by endeavouring to collect certain moneys direct and to prevent the plaintiff from obtaining them as under the agreement he would be entitled to do they set up various excuses. That defence was filed in January 1929.

It appears that certain persons of the name of Chowdhury had claims against the company. They too at a previous stage would appear to have acted as financiers of the company in some sense, and it would appear that they had brought a suit in June 1928 against this company for moneys advanced. In the long run, that suit was settled and it was settled on terms that gave these Chowdhuries a money decree for a sum which amounted altogether to Rs. 25,000. It seems that Rs. 10,000 was paid in September 1928 and that thereafter the balance of Rs. 15,000 was payable, at all events, by November 1928. In these circumstances, before the plaintiff's suit with which we are now concerned was heard these judgment-creditors of the company the Chowdhuries applied and obtained leave to attach the moneys in the hands of the receiver in this suit. I should have explained that in the present suit a receiver had been appointed for the purpose of collecting the outstandings in question and giving effect to the plaintiff's claim.

The receiver was appointed on 3rd December 1928 and it would appear that he began his collections on 15th December 1928. The Chowdhuries, as execution-creditors, having obtained leave to attach moneys in the hands of the receiver obtained an order in execution for attachment of the bills and moneys in his hands, and, on 4th February 1929, a prohibitory order was served on the receiver for a sum of Rs. 15,000. When the case came on for hearing it appears that the learned Judge had his attention called to the fact that these Chowdhuries were claiming in execution to obtain Rs. 15,000 out of the hands of the receiver in this suit and denying that there was any charge given by the agreement upon which the plaint is founded and he made an order accordingly which made these Chowdhuries defendants to this suit for the purpose of trial of a certain issue. That issue is stated in the order dated 7th March 1929 in this way whether the plaintiff has a prior charge on the outstanding bills mentioned in the said plaint and the moneys realized thereunder or which still remain to be realized and which moneys are now in the hands of the receiver and which have been attached in execution of the decree made in suit No. 1357 of 1928. Accordingly the case came on for trial.

As between the plaintiff and the company it does not appear that there was any dispute to be litigated as to the amount of the debt due to the plaintiff and in the decree appealed from definite figure is fixed as the amount due by agreement. The fight took place between the plaintiff on the one hand and the added defendants the Chowdhuries on the other hand and the question was whether the plaintiff in respect of his advance to the company had under the agreement of 18th April 1928 any valid equitable charge or security at all or whether he was not merely an unsecured creditor of the company in respect of the advance that he had made. Each party called a witness. In the first place, the plaintiff examined himself and his evidence was to the effect that he was present when Mr. Thomas signed the document relied on. He explained that under that agreement he had taken over charge of all the moneys and bills of the company and had made advances and collected debts, various cheques and other instruments which had been sent to the company in payment of bills being endorsed over to the plaintiff and paid into his bank account by the orders of the directors. It appears that in this company there were three Directors. The plaintiff explained how it was represented to him that these three directors had had a meeting and agreed to get another banian and how, in the end, Mr. Thomas agreed to appoint him and signed the document of 18th April. On the other hand the defendants Chowdhuries called Mr. Thomas himself and they were allowed to cross-examine him to some extent. Mr. Thomas said that he had signed it as a general draft of the agreement for the company and he admitted that the agreement was intended to be acted upon and that it was acted upon. In

these circumstances, the learned Judge delivered judgment.

When the document is examined, it appears to be an exceedingly inartificial, confused and in some way an absurd document. It begins "we D. Thomas and directors of the Road Oils (India) Co., Ltd." and it goes on to say that in a properly constituted meeting of the directors, it has been found expedient to appoint an agent or treasurer. Then it purports to appoint the plaintiff financial agent or treasurer on certain terms. Then it proceeds "given under our hands and seal of the Company on this 18th day of April 1928." Then comes a rubber stamp "Road Oils India Ltd." and underneath it the signature "David Thomas." On the left hand side at the bottom of the instrument, it appears that the seal of the Company has been put, but there is no evidence as to when or by whom. The document was made out in typescript and was made out with room for signatures of two Directors. Mr. Thomas having put in with a rubber stamp "Road Oils India Ltd. and having signed his name appears to have executed this documennt and it was produced by the plaintiff at the hearing of the case.

The learned Judge has proceeded to discuss first the question whether, if the document is good, it gives an equitable charge. It has been contended before us on this appeal by Mr. S. C. Bose on behalf of the respondents that it does not give the plaintiff any charge at all in respect of his advances and he has relied, in particular, on the case of *Palmer* v. *Cary* (1), aud on certain observations of Lord Truro in the old case of *Rodick* v. *Gandell* (2) at p 778. It appears to me, without discussing the special facts of the case of *Palmer* v. *Carey*, that if I apply the doctrine quoted thereon from *Rodick* v. *Gandell* the answer to the question of the meaning and effect of the letter of 18th April 1928 is in no way obscure:

"An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor will create a valid equitable charge upon such fund."

I take these words from the passage quoted by Lord Wrenbury in *Palmer* v. *Carey*, and I look at the document of 18th April in this light. I find there that the Banian was to collect all moneys due to the Company and to see that the Company's dues were properly credited. He was also to pay all bills which the Directors would countersign as properly payable. He was to purchase all raw materials and he was bound to advance such moneys up to the limit of Rs. 40,000 as were required for manufacturing the article "Mexaco". He was to prepare monthly statements of accounts and adjust the same and deduct the advances made by him to the Company with interest from the date of advance from the money collected out of the bills due to the Company and, if anything was found due from the plaintiff, the Company, it was to be credited in the books of account to the credit of the Company and the plaintiff was to be liable to pay the same. Cl. (7) is in these terms:

"That you alone will have the right to collect all moneys due on bills and appropiate the same in satisfaction of your advance money and remuneration."

In these circumstances, I confess to have but little difficulty in agreeing with the learned Judge who was of opinion that the document, if binding, contained a valid equitable charge.

The next and the main question is whether or not the document is binding. It is quite clear that by the Articles of this Company the seal of the Company had to be put on the document in the presence of two Directors and, on the face of this instrument, there is the seal of the Company and only one Director signed. On the evidence of the plaintiff only one Director was present. In these circumstances the question is whether or not the bargain was duly entered into so as to be effective in favour of the plaintiff. The seal was put upon the instrument by a person who was not authorized so to do. The document was not validly impressed with the Company's seal and, if it had been absolutely clear that a bargain of this sort required to be incorporated in a document having the Company's seal and, if it had been absolutely clear that the Company never acted upon the document so as to give rise to any estoppel, then no doubt this objection as to the irregularity of this sealing

(1) [1926] A. C. 703.
(2) [1852] 1 De. Gex. M. & G. 763=13 Jur. 1087=19 L. J. Ch. 13=12 Beav. 325.

of the instrument would be conclusive. As a matter of fact however there is no requirement of law making it necessary for an agreement of this sort entered into by and on behalf of a Company to be entered into by means of an instrument under the company's seal. It may be that such an agreement is, under S. 130, T. P. Act, a transfer of an actionable claim. But in any case it is certain that an agreement in writing is sufficient to effect the purposes of such an instrument as this.

In the next place, the evidence in this case, that the Company and all the three Directors—have acted under this agreement from the date thereof until the end of the year is overwhelming. The plaintiff has received all the moneys outstanding. He has obtained constantly endorsements from the Directors to enable him to pay the company's moneys into his bank. He has provided, as we see, advances to a large extent for the company. The company, when it came to file its written statement, accepted the agreement and claimed at length that the agreement had been acted upon and that it had faithfully performed its part under the agreement. There can be no doubt, therefore that this agreement was acted upon to the knowledge of all the Directors of the company.

Now, in these circumstances, the reasoning of the learned Judge is this : Although there was no meeting of the Directors by which the learned Judge would appear to mean a formal meeting of the Directors to confer any authority upon Thomas, to create a charge on behalf of the company by an instrument executed by himself or a bargain made by himself on behalf of the company, nevertheless under the article it was quite possible for such powers to have been delegated to Thomas. It is not suggested that the plaintiff knew of any fact to the contrary, and the learned Judge therefore begins by holding that the plaintiff is not concerned to enquire whether Thomas was properly delegated by the Directors because on the principle of the case of *Biggerstaff* v. *Rowatt's Wharf Ltd.* (3) that is a matter of internal management as to which a stranger is entitled to act on the presumption that the Director has such authority as it is possible for him to have under the regulations. Consequently the learned Judge agrees that, so far as the plaintiff is concerned, if he made a bargain with Thomas on behalf of the company, it would prima facie be a bargain which would bind the company. The learned Judge, however, has directed his attention to the form of this highly inartificial document of 18th April 1928. Finding that there is the seal of the company and that this seal was affixed when only one Director was present, he has come to the conclusion that the document is not binding on the company at all and that therefore the plaintiff has no valid equitable charge for his advances upon the outstandings which have been collected by the receiver. His reasoning is to this effect : that, as the plaintiff must be presumed to know that the articles require two Directors to be present when the seal is affixed, the principles laid down in *Biggerstaff's* case do not assist him, and he cannot say that he was entitled to presume that one Director was authorized to affix the seal of the company. So far the learned Judge appears to me to be entirely right. But the learned Judge has omitted to consider the question whether, even so, acting on the agreement by the company would not give rise to an estoppel ; and he has not considered whether, if a document under seal is in no way necessary, the mere defect in respect of the seal is an answer to the plaintiff's claim. In my judgment, it is no answer to the plaintiff's claim. To begin with, this document was prepared in draft upon the footing apparently that the parties to it were Thomas and the other Directors of the company. The draftsman in a muddle-headed way ends up by saying "Given under our hands and seal of the company." We do not know when the seal was impressed but there is space for two Directors to sign. That is the draft. When Mr. Thomas came to execute it he did not carry out part of its inconsistent design. He did not carry it out properly as an instrument to be executed by the company. He did not get the other Director to sign it. He put in what is called the Directors' rubber stamp and signed his own name under that apparently ignoring the seal

(3) [1896] 2 Ch. 93=65 L.J. Ch. 536=44 W.R. 536=74 L. T. 473.

The question arises whether, though the seal of the company was not validly affixed, the bargain is not one of which there is a perfectly good memorandum made on behalf of the company and so as to bind the company. In my judgment the case *In re Fireproof Doors, Limited Umney* v. *The Company* (4) shows that the mere defect in respect of the seal does not make the document for all purposes bad even if it was intended to be under seal. In that case the debentures were improperly sealed and the defect could not as such be cured by ratification. The defect was apparent to anyone reading the articles; but there being no provision requiring the debentures to be sealed at all the documents were held to be valid debentures although unsealed.

In this case, it would seem that Mr. Thomas in putting the rubber stamp and signing his own name was abandoning the original intention of the draft as regards getting a formal sealing by the company. Even if he was not, it appears to me that this instrument may be looked at as an agreement in writing made by Mr. Thomas on behalf of the company. The learned Judge in the *Fireproof* case pointed out that the principle of this matter was that the unsealed debentures would amount to an agreement or sufficient evidence of agreement for the issue of the debentures. In this case it appears to me that the instrument of 18th April 1928 is an instrument which embodies the agreement therein contained and the principle to be applied is that where the Court is satisfied that it was intended to create a charge and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which might have occurred in the attempt to effect it. It is pointed out in that case that the agreement is implied by the irregular document of charge and by the invalidly sealed debentures. In the case before us the attempt to get this document properly sealed has been abandoned or has failed, but there is no reason why the document should be cast aside for all purposes and the plaintiff relegated to the position of an unsecured creditor. Thomas had power as manager to appoint a banian in place of the old banians.

In this Court Mr. S. C. Bose asked leave to raise a contention that the document was not registered as required by S. 109, Companies Act. No such case was made at the trial. If notice had been given of it, it might well have been possible for the plaintiff to get relief on some terms from the Court. We are entirely unable to allow such objection to be taken at this stage and accordingly we have not entered into that aspect of the case at all.

In my opinion the decree which has been made in so far as it declares that the agreement is not binding on the defendant company should be set aside and instead thereof it should be declared that the agreement is binding on the defendant company and creates a valid charge in favour of the plaintiff on the outstanding bills mentioned in the plaint and on the moneys realized in respect thereof by the receiver. In these circumstances it appears to me that the appeal succeeds and that the respondents, the Chowdhuries must pay the costs of this appeal. The order of the lower Court allowing costs to the Chowdhuries as against the plaintiff is also set aside and the Chowdhuries must pay the costs of the plaintiff incurred in that Court from 7th March 1929. The amount paid by the respondents for receiver's commission is to be allowed to them in account as against the plaintiff less the sum of Rs. 150 paid to them by the plaintiff's solicitor under his undertaking and the undertaking given by the plaintiff's solicitor under the order of 29th May 1929 is discharged. The receiver will be discharged and pass his accounts.

Buckland, J.—I agree.

V.B./R.K. *Appeal allowed.*

(4) [1916] 2 Ch. D. 142=114 L. T. 904=60 S. J. 513=85 L. J. Ch. 444.

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* A. I. R. 1930 Calcutta 787

RANKIN, C. J. AND MUKERJI, J.

F. A. Shihan and *others*—Defendants—Appellants.

v.

Abdul Alim Abed and *others*—Plaintiffs—Respondents.

Appeals Nos. 187 and 196 of 1927, Decided on 12th June 1930, from original decrees of Sub-Judge, Third Court, 24 Parganas, D/- 27th June 1927.

*** (a) Specific Relief Act (1877), S. 42—Successor of mutwalli bringing suit for declaration that previous decree declaring wakfnama as invalid was null and void and that wakfnama was valid is not governed by S. 42—But such declaration cannot be given in presence of transferees unless it prays for annulment of transfers as well—Court-fees Act (1870), Art. 17 and S. 7 (4) (c).**

A suit by a person who has been nominated to succeed to the office of the mutwalli on the death of the present mutwalli, on his own behalf, for a mere declaration that a previous decree to which he was a party defendant, declaring the wakfnama as invalid, was null and void, and that the wakfnama is valid, without prayer for consequential relief in the form of setting aside the decree or for declaration that transfers of the wakf properties were invalid and created no title in the transferees who happened to be in possession is not governed by S. 42 ; but such a declaration cannot be given in the presence of transferees unless the suit also asks for a declaration that the transfers were inoperative. In the latter case the suit is incompetent if brought on a fixed court-fee payable under Art. 17, Court-fees Act : 22 *Mad.* 270 (*P.C.*); 35 *I. C.* 797; 20 *Bom.* 742; 30 *Cal.* 788; *A. I. R.* 1918 *P. C.* 188; 32 *C. W. N.* 781; *A. I. R.* 1928 *P. C.* 16; 25 *All.* 631; *A. I. R.* 1926 *Pat.* 321; *A. I. R.* 1927 *Lah.* 350 and *A. I. R.* 1923 *Pat.* 475, *Ref.* 35 *All.* 487 (*P.C.*), *Dist.*

(b) Civil P. C. (1908), S. 92—Suit for declaration that property is wakf does not come under S. 92.

A suit instituted solely for having it declared by Court that certain property is wakf is not a suit for administration of the wakf property or for the removal of the trustees of that property or for any of the purposes mentioned in S. 92. [P 795 C 1, 2]

(c) Court-fees Act (1870), S. 7 (4) (c) and Art. 17—Party doubtful as to amount of court-fee—Procedure.

Where a party is doubtful as to whether fixed or ad valorem court-fee is payable, it is reasonable to refuse to pay ad valorem court-fee until it is decided that that court-fee is payable. [P 794 C 1]

(d) Civil P. C. (1908), S. 11—Decision between co-defendants collusively or fraudulently obtained is not res judicata—(*Obiter*).

A decision of issue in a previous suit between co-defendants cannot operate as res judicata if such decision is obtained by collusion and fraud and under circumstances when parties cannot be said to be properly represented. [P 796 C 2]

(e) Mahomedan Law—Wakf—Right to sue for declaration that wakf is valid or particular property is wakf—(*Obiter*).

Hindu debuttars and Mahomedan wakfs are not on the same footing, and the fact that the plaintiff is a member of the family of the founder has, in the case of a Mahomedan, no bearing upon his right to bring a suit to declare a wakf valid or particular property is wakf property. [P 797 C 1]

N. N. Sircar, S. C. Roy, N. C. Chatterji, Rupendra Coomar Mitter, Bijan Coomer Mukherji, Promathanath Mitter, Manindra Kumar Bose, Nasim Ali and *Dwipendra Mohan Ghose* — for Appellants.

Brojolal Chakrabarty, Prokash Chandra Pakrashi, Apurba Charan Mukherji, Surendra Nath Bose, Nuruddin Ahmed, A. S. M. Akram, Amiruddin Ahmed, A. Quasam, Janhabi Charan Das Gupta, Satindra Nath Roy Choudury and *Jogesh Chandra Sinha*—for Respondents.

Surja Coomar Aich and *Profulla Chandra Chakraborthy* — for Deputy Registrar.

Rankin, C. J.—In 1876 Shaikh Jummon Mistry, by a registered deed or towliatnama, made wakf of certain properties specified in the schedule thereto and laid down the rules and objects of the wakf. He stated that he had built a mosque on certain land and he dedicated other land for the purpose of a public burial ground. The main object of the wakf was the maintenance and preservation of the mosque and burial ground and the income to arise from the dedicated properties was estimated at Rs. 1,360 per annum. The deed contains provisions for an annual expenditure upon certain specified objects directly charitable of a sum of Rs. 285 apart from the allowance given to the mutwallis of the wakf. By the deed Jummon Mistry appointed himself and his second wife, Sm. Sundan Bibi, to be the first mutwallis and an allowance was provided for himself of Rs. 30 per month and for his wife of Rs. 40 per month. The deed further provided that after Jummon's death his son Umar Ali was not to be mutwalli but was to get monthly allowance of Rs. 30 per month for lifetime from the wakf property. It seems that Sm. Sundan Bibi was much younger than her husband and the deed contained elaborate provisions with respect to the office of mutwalli to take effect in the event of Jummon Mistry's predeceasing Sundan Bibi. No provision was made for the event of Jummon Mistry surviving his wife save that it was declared as regards Umar Ali, the son :

"He is not fit to be mutwalli of the properties hereby made wakf of during my lifetime or after my death, and he shall not to be so, and I will not make him so, nor shall any Court make him so."

In or about 1879 Sundan Bibi died and in 1880 Jummon Mistry executed a second deed or towliatnama. By this he purported to annul and set aside those provisions of the deed of 1876 contained in paras. 5 to 11 thereof. In effect however by the terms of this deed, he dedicated the properties mentioned in the previous deed upon the same terms as before, save that he now declared that upon his death his son, Umar Ali, was to be mutwalli and to receive a salary of Rs. 60 per month. He provided also, as to Umar Ali that

> " when he will be unable to carry on the work, he will, according to his discretion, appoint a trustworthy, pious and wise person as mutwalli. "

Jummon Mistry died in 1884. In 1908 Umar Ali, the son, by a registered deed purported himself to dedicate the same properties all over again—one property had been sold and substituted by another, but this fact may be disregarded. Two new properties were however brought in by Umar Ali—those marked Una and Chha in the schedule—the one being the family dwelling-house and the other a piece of land upon which a building was in course of erection. By this deed Umar Ali purported to make the two properties "part of the wakf estate dedicated by my father." He provided that after his death his sister Aberjan Bibi and his nephew's son Samiruddin were to be mutwallis. He further provided that on the death of either of these two, his daughter's son Abdul Alim Abed (the plaintiff in the present case) would be appointed mutwalli in his or her place. The deed further proceeded to declare that the mutwallis were after his death to make various substantial payments. Thus, they were to spend Rs. 500 every year on charities and distribute Rs. 500 annually to the poor on the occasion of Bakr-Id. On Umar Ali's death they were directed to give feasts at an expenditure of Rs. 1,000 and to spend Rs. 250 every year in giving feasts to the poor in his and his father's name. Not content with this, Umar Ali went on to provide that certain family expenses of his own were to be paid by the wakf, that certain family and ceremonial presents were to be given to relatives and that various allowances were to be given to various relations. In 1911 Umar Ali died leaving as his heirs his sister Aberjan Bibi and one Karim Bux, a grandson of Jummon Mistry's brother.

In 1912 Aberjan Bibi brought a suit (No. 36 of 1912) in the Court of the Subordinate Judge at Alipore against Samiruddin, whom Umar Ali had appointed to be joint mutwalli with her, Karim Bux and various other members of the family including the plaintiff, who was then a minor. This suit was for a declaration that the wakfs created by Jummon and Umar Ali were all invalid and for partition of all the properties comprised in the towliatnamas made by them on the footing that Umar Ali had succeeded to a two-thirds share and she to a one-third share of Jummon's property, and that she on Umar Ali's death had succeeded to a half-share of the properties left by him. Samiruddin was impleaded by reason that he had been appointed by Umar Ali to be a mutwalli of the wakf. The other defendants (including the plaintiff) were impleaded "in the view that they may claim any rights to the said shares." An order was obtained from the Court appointing Karim Bux to be guardian-ad-litem of the present plaintiff and also of three other persons who were minors on the strength of a petition of Aberjan Bibi to the effect that Karim Bux was their guardian, that he was maintaining and looking after them and that the interests of the minors and the interests of Karim Bux were not adverse to each other. Samiruddin, Karim Bux and Aminuddin filed a joint written statement on their own account. By this they refused to admit as true certain portions of the plaint and contended that, even although the wakfnamas be set aside, the approximate annual expenditure for the mosque should be declared a charge upon the properties comprised in the wakfnamas. They admitted that Aberjan and Karim Bux were the heirs of Umar Ali and stated that they had no objection to a partition being made of the properties other than those which the Court would assign for meeting the expenses of the mosque and the festival and other lawful expenses. Karim Bux, on behalf of the minors, filed an equally flabby defence, stating that the minors

were prepared to accept whatever decision the Court would come to as to whether the wakfs were valid or not and claiming that if the wakfs were invalid they should nevertheless get the allowances given to them by the deeds and that there should be a charge on some one of the properties therefor.

At the hearing the plaintiff withdrew her claim for partition and the suit proceeded only as a suit for a declaration that the wakfs were invalid. Aberjan was examined on commission and cross-examined by the pleader who acted for all the defendants. In Court two witnesses were called for the plaintiff and two for the defendants. The learned Subordinate Judge found by his judgment, dated 6th September 1912, that the wakfnamas were not meant to be acted on and that, with the exception of a small part of the income which they spent for their religious purposes Jumman and Umar Ali had spent the income for their own purposes. He held further that all the three deeds were invalid. He refused to give any effect to the provisions contained therein for the maintenance of the defendants but, finding that certain small sums amounting to Rs. 212 per annum had been regularly spent for religious purposes he declared this sum to be a charge on the properties. Upon this Aberjan immediately filed a petition for review asking that the charge should be confined to a portion of the estate adequate in value to bear it and suggesting a certain property as suitable for the purpose. By this petition she also stated that a scheme for partition of the estate had been amicably arrived at by all the parties interested. A solenama was filed on 5th October 1912, and by the decree of that date the Court declared that the wakfnamas were invalid and that the sums spent for religious purposes were to be a charge on the properties. It went on to declare that the Court having admitted a review of its original judgment and the parties having come to an agreement as to the partition of the properties in suit and for a scheme for the maintenance of the mosque certain properties were set apart for the maintenance of the mosque and to meet the charge above mentioned. It further ordered thet certain properties were to go to Aberjan Bibi and certain other properties to Karim Bux as an agreed partition of their shares in the estate of Umar Ali.

In 1915, another suit (No. 190 of 1915) was brought in the same Court by Samiruddin who, it may be noticed, was the son of Karim Bux and the person appointed by Umar Ali to be joint-mutwalli with Aberjan Bibi of the wakfs. Associated with him as plaintiffs were, inter alia one Hormat Ali the Imam of Jummon Mistry's mosque, and three other persons coming to be members of the congregation. Aberjan, Karim Bux, Aminuddin and the present plaintiff, Abdul Alim Abed, were among the defendants, Abdul Alim Abed being still a minor and being described as " pro forma defendant for the purpose of decision in his presence." This suit was for the purpose of obtaining a declaration of the validity of the wakfs and that the properties of the schedules to the plaint belonged to the wakfs; that Samiruddin and Aberjan Bibi were the mutwallis and that the decree of 1912 was not binding. It also asked for possession of the properties to be given to Samiruddin as mutwalli jointly with Aberjan and for incidental reliefs. Abdul Alim Abed (the present plaintiff) objected to the guardian proposed for him and asked the Court to appoint an officer of the Court to be guardian on his behalf. The Court appointed the Sheristadar as such guardian. A written statement was filed on his behalf alleging that the suit of 1912 was fraudulent and collusive, that the wakfnamas were valid and operative and that Aberjan should be removed from the post of mutwalli. A case was made that in the suit of 1912 Abdul Alim was not properly represented and that he was not bound by the decree. In other respects Abdul Alim Abed supported the plaintiff Samiruddin. The suit was contested by Aberjan and two other defendants who had been impleaded as transferees from her of some of the wakf properties. No less than 21 issues were framed by the Court, and in the judgment dated 27th November 1916 they were dealt with at length. The main case of the plaintiff Samiruddin was that at the time of the suit of 1912 he had been insane, and this defence was rejected on the evidence. As

regards the suit of Samiruddin and the plaintiffs who sued as members of the congregation it was held that the prayer for recovery of possession of the properties and vesting the same in trustees was incompetent and not maintainable by any of the plaintiffs by reason that the suit had not been brought with the consent of the Advocate-General under S. 92 of the Code. The prayer to set aside the previous decree of 1912 was however held to be competent to plaintiffs 1 to 4 who had been parties to the previous suit. On the merits the wakfnamas were held to be invalid. It was held that Samiruddin's minor sons impleaded in the suit of 1912 were properly represented by Karim Bux and that in the suit of 1912 no fraud or collusion had taken place. Accordingly the suit was dismissed. From this decree an appeal was on 12th January 1917 preferred to the High Court by Samiruddin and his minor sons. This appeal they withdrew, it being certified by the Court that the withdrawal of the appeal was for the benefit of the minors concerned.

In 1921 Abdul Alim Abed, claiming to have attained majority on 30th May 1918, brought the present suit impleading 22 defendants. Aberjan Bibi, Samiruddin, Karim Bux and other members of the family are among the defendants. Defendants 17, 18, 20, 21, and 22 are transferees of properties from Aberjan, and in appeal No. 187/27 they are the appellants before us. The appellants in appeal No. 196/27 are Aberjan, defendant 1, and Badruddin Ahmed a transferee from her, who had also been a defendant in the suit of 1915.

The plaint does not purport to be brought by the plaintiff on behalf of any person other than himself. It mentions the deed of 1876 but states that before it was acted on or was in operation, the deed of 1880 was executed by Jummon Mistry. It refers to the deed of 1908 and to the direction given by Umar Ali that on the death of either Aberjan or Samiruddin the plaintiff was to become mutwalli. It states, untruly, that on the death of Umar Ali, Aberjan was his only heir and that Karim Bux was no relation of Jummon and Umar Ali. It alleges that the suit of 1912 was fraudulent and collusive and that Karim Bux was appointed to be guardian-ad-litem with a view to preventing any real contest. As originally drawn it concluded with three prayers: (1) for a declaration that the second and third (not the first) wakfnamas were valid and operative; (2) that the decree of 5th October 1912, may be declared to be a nullity; (3) that if necessary the said decree be set aside. This last prayer was however deleted, it having been held by the Subordinate Judge that the inclusion of this prayer rendered the plaint liable to be stamped as a plaint claiming a declaration with consequential relief, that is with a fee calculated ad valorem on the value put by the plaintiff on the relief sought by him. The plaintiffs object in striking out the third prayer was to get the benefit of Art. 17, Sch. 2, Court-fees Act under which a fixed fee of ten rupees was then payable upon a plaint to obtain a declaratory decree where no consequential relief is claimed.

I will not endeavour to set out the effect of the numerous written statements or the purport of 21 issues framed by the trial Judge. It will be sufficient to explain that the defendants contend (1) that all the three wakfnamas were invalid according to the law obtaining prior to the Mussalman Wakf Validating Act (6 of 1913); (2) that the plaintiff was properly represented in the suit of 1912, that no fraud or collusion existed in that suit, and that the decree is binding upon him; (3) that the suit of 1915 concludes the plaintiff upon the question of the validity of the wakf not only because he was a party thereto but also (a) because both the mutwallis were parties thereto so that the wakf estate was completely represented and (b) because it was a suit brought by certain members of the congregation on behalf of themselves and the Mahomedan public entitled to frequent the mosque; (4) that whether the wakfs were valid or invalid the transferee defendants have got a good title to the properties both as purchasers for value without notice and by reason of possession adverse to the wakf estate for more than 12 years. These are the main defences, but it is also contended that the plaintiff has not so framed his suit as to enable him in any event to get a declaration of the invalidity of the decree of 1912 and also that a mere declaration to the effect that the

second and third wakfnamas were valid and operative and created a valid wakf of the properties therein mentioned should not be given to the plaintiff in the presence of the transferees, or even as against Aberjan Bibi.

The learned Subordinate Judge, by his judgment of 27th June 1927, has dealt elaborately with all the issues. The effect of his judgment is to hold firstly that all the three towliatnamas were valid and effective deeds; that the plaintiff was validly appointed by Umar Ali to succeed to the office of mutwalli upon the death of Aberjan or Samiruddin; that in the suit of 1912 the plaintiff was not properly represented as the interest of Karim Bakhsh was adverse and as no real contest was made on his behalf and the suit was a collusive suit; that the decision in the suit of 1915 does not estop the plaintiff from asserting the validity of the wakf deeds and the invalidity of the decree of 1912. In these circumstances the learned Judge has held that the plaintiff is entitled to obtain a declaration that the decree of 1912 is a nullity as against the plaintiff notwithstanding that he has asked for no other relief in respect of this decree. He has held also that the plaintiff is entitled to a declaration that 'the towliatnamas of 1880 and 1908 were valid and operative and created a valid wakf of the properties therein mentioned notwithstanding that he has not asked for a declaration that the transferee defendants' purchases are null and void or that they have no title to the properties purchased by them, and notwithstanding that he has asked for no consequential relief.

First, as to the decree of 1912. It appears to me reasonably plain that the plaintiff is entitled to relief in respect of this decree and that it is not binding upon him. For some reason of his own (probably with a view to exaggerate the fraud committed in the course of that suit), the plaintiff attempted to dispute that Karim Bakhsh was an heir of Umar Ali. On that footing the application for review and that agreed partition between Aberjan and Karim Bakhsh of Umar Ali's estate embodied in consent in the decree of 5th October 1912, would amount to a very obvious fraud. But in truth Karim Bakhsh was the one person who, with Aberjan, stood to gain by a declaration that the wakfnamas were invalid. The Court was induced by a false statement that he had no adverse interest to appoint as guardian ad litem a person who could be relied upon to make no real defence of the wakfs. Again that he did in fact make no real defence of the wakfs is evident; and when the wakfs were out of the way he took prompt steps to secure for himself the advantage of a share in the wakf property. I agree with the learned Subordinate Judge in finding that the present plaintiff wae not properly represented in that suit and that the suit was a collusive suit. As he was only one of the parties to the decree complained of, relief in the form of a declaration that the decree is a nullity against him is, I think, proper and sufficient. It can be contended that the binding character of the decree of 1912 so far as regards the plaintiff was an issue in the suit of 1925, though the binding character of the decree upon the minor sons of Samiruddin was in issue. Nor can it be contended that the transferee-defendants in the present suit are not persons in whose presence the binding character of the decree of 1912 can be investigated. Though not parties to that decree they are privies, having taken title from Aberjan and they would be prima facie entitled to rely upon that decree on any question as between the plaintiff and themselves with reference to that title.

It is contended, however, for the appellants that the plaintiff having brought this suit namely for a declaration and having struck out his original prayer that the decree may be set aside, paid court-fee under Art. 17, Sch. 2, Court-fees Act, and refused to pay court-fee under S. 7, Cl. (4) (c) of that enactment, his suit is not in order. It is said that the declaration given to him offends against the provisions of S. 42, Specific Relief Act, which provides that no Court shall give any mere declaratory relief where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. The argument is that the setting aside of a decree is itself substantial relief, that it may be prefaced by a declaration, but that the plaintiff cannot ask in such a case for a mere declaration that the decree is not binding upon him.

Upon this argument I would observe that there is both principle and authority for saying that so far as regards the decree of 1912 the present suit is not governed by S. 42, Specific Relief Act. In *Robert Fischer* v. *Secy. of State* (1) Lord Macnaghten said of this section:

"There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of S. 50, Chancery Procedure Act of 1852 as interpreted by judicial decision. Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is in substance a suit to have the true construction of a statute declared and to have an act done in contravention of the statute, rightly understood, pronounced void and of no effect. That is not the sort of declaratory decree which the framers of the Act had in their mind."

In *Pratab Singh* v. *Bhaduti Singh* (2) the appellants sued for a declaration that a compromise of certain pre-emption suits and decrees passed thereunder, made on their behalf when they were minors, were not binding on them having been obtained by the fraud of the respondent and in proceedings in which they were practically unrepresented. The Subordinate Judge having decreed the suit on appeal the members of the Court of the Judicial Commissioner differed upon the question whether the declaration sought should be refused as a matter of discretion under S. 42, Specific Relief Act. Before the Judicial Committee it was contended for the respondent that the suit having been filed for the purpose of obtaining a declaratory decree only was bad in form inasmuch as it did not pray that the decree should be set aside; but that assuming that it was rightly framed in asking only for a declaratory decree, the Court had a discretion as to the granting or refusing such a declaration. The Judicial Committee observed that S. 42, Specific Relief Act, did not apply to the case and that it was not a question of exercising a discretion under that section and that they gave to the appellant a decree setting aside the decree complained of and declaring that the agreement of compromise and the decree complained of were not binding upon the appellants or either of them and that they were entitled to such rights as they had before the suit was dismissed on 15th December 1899.

It appears to me that a decree of the character which has been given by the Subordinate Judge in the present case is not one as to which the additional powers conferred by the Act of 1852 were required by the Court of Chancery. The injury complained of is that the Court has against the plaintiff declared that the wakfnamas were invalid. If this declaration be rescinded by the Court, so far as he is concerned, the plaintiff obtains that measure of relief which he asks. He is not obliged to investigate the position as between the other parties to the suit; nor is he as one person against whom the decree was made, obliged either to remain bound by the decree or to rip up the transactions had between the other parties to the suit. Though a declaration that the decree is not binding upon him is in itself substantial relief in a case such as the present the question whether it comes within Art, 17, Sch. 2, Court-fees Act, is a question upon which there are several decisions in favour of the plaintiff: *Bagala Sundari Debi* v. *Prosanna Nath Mukherjee* (3), *Shrimant Sagjirao* v. *S. Smith* (4).

Thus in *Zinatunnessa* v. *Gobinda Nath* (5) the plaintiffs sued to have it declared that a certain decree was inoperative against them. The Subordinate Judge had refused to allow them to sue upon payment of a fixed court-fee prescribed by Art. 17. The High Court decided that the suit was for a declaratory decree without consequential relief and that the court-fee paid was sufficient. Assuming however that the question of the amount of the court-fee payable is a matter of any doubt, it seems to me to be quite improper that the plaintiff's claim to relief in this suit should, in the circumstances, fail. The Court-fees Act is a taxing statute. Not only has it to be construed with strictness, but, as Sir Lawrence Jenkins pointed out in *Rachappa Subrao* v. *Sidappa Venkat Rao* (6), the Court-fees Act was passed not to arm a litigant with a weapon of tech-

(1) [1898] 22 Mad. 270=26 I. A. 16=7 Sar. 459 (P.C.).
(2) [1913] 35 All. 487=21 I. C. 283=40 I. A. 182 (P. C.).
(3) [1917] 35 I. C. 737.
(4) [1896] 20 Bom. 742.
(5) [1903] 30 Cal. 788.
(6) A. I. R. 1918 P. C. 188=50 I. C. 280=46 I. A. 24=43 Bom. 507 (P. C.).

nicality against his opponent but to secure revenue for the benefit of the State; and in *Faizulla v. Mauladad* (7), where a question of the sufficiency of the court-fees came before the Privy Council, Lord Shaw made these observations:

"But upon the second point, an important point of precedure their Lordships think it right to add the following: granted that a fee had bsen paid which was insufficient in amount what was the duty of the Court? In such a case as the present it appears to be prominently one for the exercise by the Judicial authority of the descretion for giving an opportunity to add to the amount lodged the extra Rs. 70 or Rs. 80 required...Even accordingly, if the mistake insisted on had been made, this in the opinion of the Board was a plain case for rectifying that mistake if it could be done and the Courts are fortunately furnished with an easy method of doing so: S. 149, Civil P. C.."

I do not think it necessary to utilize the provisions of S. 149 in the present case; were it necessary I should have had no hesitation in so doing. In the trial Court the plaintiff succeeded in obtaining the relief desired upon the court-fee which he had in fact paid. It appears to me that the view taken by the plaintiff was at least reasonable and that the plaintiff has not been unreasonable merely because he has resisted the attempts of the defendants to utilize the provisions of the Court-fees Act as an obstruction to his prayer. In a doubtful case such as the present it is reasonable to refuse to pay ad valorem court-fee until it is decided that the fee is payable.

The second declaration made by the decree under appeal is that the towliatnamas, dated 21st June 1880 and 11th November 1908 were valid and operative and created valid wakf of the properties therein mentioned. It will be observed that the plaintiff did not ask for or obtain a declaration of the validity of the towliatnama of 1876. It will also be observed that while transferees from Aberjan have been impleaded, the plaintiff has not asked for a declaration that their title was bad, or that the property in their hands is the property of the wakf. By their written statements the transferee-defendants set up questions of limitation and claim to be entitled to protection as purchasers for value without notice. These defences are reflected in the issues which were settled, particularly in Issues 14 and 17. The learned Subordinate Judge has held upon these issues as follows:

"These issues do not really arise in the case. The plaintiff, as I have said, cannot ask for possession, and has not asked for it. There is no prayer even for any declaration that the transfers were inoperative or created no title. I therefore decline to try them in this suit."

On behalf of the plaintiff-respondent notice of cross-objections was given in these appeals, contending that the Subordinate Judge ought to have decided the question regarding the validity of the transfers and come to a definite finding in favour of the plaintiff. At the hearing of these appeals however Mr. Brojolal Chakrabarty, for the plaintiff-respondent, expressly disclaimed this contention and the cross-objections were withdrawn. His argument was that if he got a declaration that the wakfnamas were valid instruments he would be able to get proper mutwallis appointed thereunder and that it would be for them to recover possession of the properties from the transferees or from Aberjan. In my opinion it would be indefensible to give to the plaintiff, in the presence of the transferees, any declaration which would be in its nature a mere first instalment of an attack upon their title. If a Mahomedan, anxious to protect a wakf estate, is prepared, as against third parties, to establish that they have wakf property in their hands a declaration to this effect may certainly be given upon the terms set forth in S, 42, Specific Relief Act. Thus in what is now the leading authority upon this question —the case of *Abdul Rahim* v. *Muhammad Barkat Ali* (8)—the declaration given was that the property in suit was wakf property and not the personal property of the defendants. If however the plaintiff does not profess to establish that he had any grievance against the defendants, it is difficult to see how he can be entitled to ask that a declaration that certain trusts for the benefit of the Mahomedan community in which the transferees may not be in the least interested were validly created should be given at all. Still less is it reasonable to give such a declaration on the basis that the plaintiff wants relief piecemeal. It is as though, without claiming any title to certain property, the plaintiff were to sue a purchaser thereof for a declaration that document No. 6 mentioned in his abstract of title

(7) A. I. R. 1929 P. C. 147=117 I. C. 493=56 I. A. 232=10 Lah. 737 (P. C.).

(8) A. I. R. 1928 P. C. 16=108 I. C. 361= 55 I. A. 96=55 Cal. 519 (P. C.).

was not a valid conveyance. I have no doubt that such a suit is bad and that it would be a bad exercise of the discretion vested in the Court under S. 42, Specific Relief Act, were we to uphold against the transferees of Aberjan the declaration which has been given as to the towliatnamas. So far as this part of the case is concerned, I am of opinion that the plaintiff's suit fails as against the transferees, it being quite unnecessary, in my opinion, to discuss in their presence, the validity or otherwise of the deeds of 1876, 1880 and 1908 or any of them. This disposes of Appeal No. 187 where the appellants are all transferees from Aberjan. The appeal must be allowed and the decree of the Subordinate Judge varied by deleting the first of the two declarations which it contains namely that the towliatnamas of 21st June 1880 and 11th November 1908 were valid and operative and created a valid wakf of the properties therein mentioned.

In appeal No. 196 the appellants are Aberjan and Shaikh Badruddin. It is necessary to consider whether the declaration as to the towliatnamas being valid can be maintained against Aberjan who it appears, still retains some portions of the dedicated properties. The question is whether or not the plaintiff is able to seek further relief than a mere declaration of title. If he is, the proviso to S. 42 makes the suit bad. Under S. 92, Civil P. C., a suit claiming reliefs of the kind there in specified has to be brought with the sanction of the Advocate-General and in a particular Court. The plaintiff in the present suit is not able to seek such relief, at all events according to his case, which is that Aberjan is a mutwalli of the wakf. In *Jamaluddin* v. *Mujtaba Hussain* (9), where the suit was against certain defendants two of whom were alleged to be mutwallis to have it declared that the property was wakf, the case of the defendants was that the property was their individual property. It was held of S. 539 of the Code of 1882 that the section presupposes the existence of a trust, that a plaintiff applying to the Advocate-General for liberty to institute a suit has to satisfy him of the existence of a trust; accordingly that a suit instituted solely for having it declared by the Court that certain property is wakf is not a suit within this section, being in no way a suit for the administration of the wakf property or for the removal of the trustees of that property or for any of the other purposes referred to in the section. This decision has been followed in *Khursaidi Begum* v. *Secy. of State* (10) and *Miran Bux* v. *Allabux* (11). It is in consonance with *Abdul Rahim's* case (8) supra and may be taken as correct. None of these cases however purport to dispense with the necessity of compliance with the proviso to S. 42, Specific Relief Act.

In *Maulavi Muhammad* v. *Jagat Ballav Ghose* (12), a Division Bench of the Patna High Court, in a case on all fours with the present case, decided that the plaintiff being entitled to consequential relief, was not entitled to sue for a mere declaration. Now it is clear that the plaintiff, as a member of the Mahomedan community or otherwise, was not entitled to ask at the date of the suit that possession of the wakf property be made over to himself. But I think that in the present case it is idle to contend that the plaintiff was unable to claim any consequential relief independently of the reliefs mentioned in S. 92 of the Code. According to his case Aberjan had for many years been treating the wakf property as her own and she was insisting upon her right so to do. An injunction to restrain her from diverting the wakf property to her own use, an order that she should make over joint possession with herself of what remained in her hands to her co-mutwalli Samiruddin, these may be given as instances of reliefs which the plaintiff upon his own case was not unable to seek. A suit for mere declaration that the wakfs were valid wakfs, brought upon a fixed court-fee payable under Art. 17, Sch. 2, Court-fees Act, is, in my opinion, incompetent.

It seems to me that the plaintiff has three courses open to him in such a case as the present. He may disregard the decree of 1912 without taking any proceeding to set aside, relying upon

(9) [1903] 25 All. 631=(1903) A.W.N. 120.

(10) A. I. R. 1926 Pat. 321=94 I.C. 433=5 Pat. 539.

(11) A. I. R. 1927 Lah. 350=99 I. C. 756=9 Lah. 111.

(12) A. I. R. 1923 Pat. 475=74 I. C. 403=2 Pat. 391.

general principles of law and S. 44, Evidence Act. Again he may bring a suit merely for a declaration that the decree is not binding upon him and that he is remitted to his rights as they stood before the decree of 1912 was pronounced. In the third place, he may attack the decree of 1912, seek to reopen the matters therein dealt with claiming such orders from the Court as are necessary to undo whatever was wrongly done by that decree and to give him such relief with reference to the subject-matter of the suit as he is entitled to. Such a suit, for example, was that of *Carew* v. *Johnson* (13). Thus in the present case, the decree of 5th October 1912 gave certain properties to Aberjan and certain properties to Karim Bux; it gave certain rights of management on the mosque to Aberjan alone and gave her the right to prescribe arrangements to take effect after her death. The plaintiff in the present suit, without in any way contravening the provisions of S. 92 of the Code, might ask for directions which would undo the effect of the decree of 1912 and put him in enjoyment of such rights as he claims whether personally or as a member of the Mahomedan community. In the present suit however he seeks to adopt a course different from any one of the three courses which I have mentioned. He is not content with a decree which would merely cancel the decree of 1912 so far as it purports to bind himself; he wants in addition a mere declaration of the validity of the wakf deed. This is not, in my judgment, the proper way of dealing with the matter and this additional declaration must be refused.

In appeal No. 196 therefore I reach the same result as in appeal No. 187. The appeal succeeds so far as regards the first of the two declarations given by the Subordinate Judge.

It remains to consider how far it is desirable or proper to deal with the other questions which arise in the case. In the suit of 1915 the Subordinate Judge, though he held the suit to be incompetent as regards the prayer for recovery of possession of the wakf properties, proceeded to deal with all the issues framed with the result that grave questions arise as to how far this decision operates as res judicata in subsequent litigation. If a plaintiff asks for a bare declaration when consequential relief can be claimed, and if, after holding that the suit is incompetent upon this ground, the Court proceeds to decide the questions propounded to it by the plaintiff, it is apt to find that it has given to the plaintiff with one hand what it has refused to give him with the other. In *Tarakant Banerjee* v. *Pudumoni Dassi* (14) and *Muhammad Suleimman* v. *Birendra* (15) the Judicial Committee expressed the opinion that in appealable cases the Court should, as far as may be practicable, pronounce its opinion on all the important points. In appeal 196 therefore I think it right to indicate my opinion upon certain of the questions discussed before us, but I desire to make it clear that these observations are made solely out of deference to the learned Subordinate Judge who has dealt so fully with the case and out of deference to the opinion of the Judicial Committee to which I have referred. They are not intended as decisions operating as estoppel between the parties.

In the first place I am of opinion that the deed of 1876 was a valid one and that the deed of 1880 was in essence a mere affirmation of the previous deed and good as such. Both as to Jummon's wakf and Umar Ali's wakf of 1908 I accept the conclusion of the Subordinate Judge as to their validity. They satisfy the test laid down in *Balla Mal* v. *Ata Ulla Khan* (16).

Secondly upon the question whether the suit of 1915 operates as res judicata on the question of the validity of wakf, I am opinion that the plaintiff was not bound by it as being a decision between co-defendants. I am further of opinion that the position of Samiruddin was that having been one of the colluding parties to the 1912 litigation he, in 1915, set up a false story about his lunacy because he wanted to reverse his previous course of conduct. The Subordinate Judge did not think that this part of the case was competent to

(13) [1805] 2 S. C. H. & L. E. F. 280.

(14) [1966] 10 M. I. A. 476=5 W. R. 63=1 Suther 631=2 Sar. 184 (P. C.).

(15) A. I. R. 1922 P. C. 405=74 I. C. 906=50 I. A. 247=50 Cal. 243 (P. C.).

(16) A. I. R. 1927 P. C. 191=103 I. C. 518=54 I. A. 372 (P. C.).

any plaintiff in view of S. 92 of the Code. It does not seem to be that he was litigating bona fide in the interests of the trust. So far as regards the four plaintiffs who sued as members of the the congregation, in view of the fact that no order was obtained making them representatives under O. 1, R. 8 or the fact that the Court held that no one of the plaintiffs could on this part of the case maintain the suit by reason of S. 92 of the Code, it cannot in my opinion, be contended that the Court treated these plaintiffs as in fact representative plaintiffs or informally sanctioned their conduct in claiming to represent other people. I am not therefore prepared to hold that the decree of 1915 estops the plaintiff from bringing the present suit with referenee to the wakfnamas.

In the third place it seems to me reasonably plain that the appointment by Umar Ali of the plaintiff as mutwalli in succession to Aberjan or Samiruddin was altogether bad. Umar Ali had no power under the Muhomedan law or under his father's deed to appoint anyone as a remote mutwalli. As regards Jummon Mistri's wakf the plaintiff's case must stand or fall as a suit on behalf of the Muhomedan public. Hindu debuttars and Mohamedan wakfs are not, I am inclined to think, on the same footing and I doubt whether the fact that the plaintiff is a member of the family of the founder has, in the case of a Mahomedan, any bearing upon his right to bring such a suit as the present.

With these explanations, I would allow these appeals so far only as regards the declaration that the towliatnamas dated 21st June 1880, and 11th November 1908, were valid and operative and created a valid wakf of the property therein mentioned. This declaration must be set aside as against the appellants. I think there should be no order as to the costs of these appeals.

Mukerji, J.—I entirely agree.

V.B./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 797

B. B. GHOSE AND S. K. GHOSE, JJ.

Sudhinkumar Pal and *others*—Plaintiffs—Appellants.

v.

Asgar and *others*—Defendants—Respondents.

Appeals Nos. 1486 to 1492 of 1926, Decided on 29th August 1929, from appellate decree of Sub-Judge, 24-Parganas, D/- 27th March 1925.

(a) Bengal Embankment Act (1882), S. 86—Civil Court cannot question apportionment of cesses by Collector.

The apportionment of the cesses due under the Act between the zamindar, the owner of the estate, and the tenure-holder made by the Collector cannot be questioned by the civil Court. [P 798 C 2]

(b) Bengal Embankment Act (1882), S. 74, Proviso—It includes not only persons holding interest subordinate to, but also transferee from, defaulter.

The proviso refers not only to persons holding an interest subordinate to that of the defaulter, but also a transferee from the defaulter. The word "from" is wider than the word "under" and there is no reason why the wording "from the defaulter" should be restricted only to mean as "under the defaulter." [P 799 C 1]

(c) Bengal Embankment Act (1882), Ss. 59, 68 and 74—Tenure split up at instance of zamindar—Collector on zamindar's representation that there was only one tenure making apportionment of embankment charges on that basis—Zamindars cannot bring to sale all tenures by taking proceedings against holders of one tenure under S. 74.

One tenure was split up at the instance of the zamindars into several smaller tenures. They represented to the Collector that there was only one tenure and the Collector made an apportionment of the embankment charges on that basis. A suit was filed against one tenure-holder for sale of all tenures on default of payment of charges.

Held: that under the circumstances the zamindars had no right to bring all the several tenures to sale, by taking proceedings against the holder of one of the tenures under S. 74 and affect the interest of all other tenure-holders, who hold lands comprising different tenures on the parent tenure being split up into several other tenures. The whole proceedings before the Collector would amount to a nullity so far as the holders of the newly created tenures were concerned. [P 799 C 1]

Brajalal Chakravarti, *Pyarilal Chatterji* and *Krishnalal Banerji*—for Appellants.

Saratchandra Basak and *Diptendramohan Ghose*—for Respondents.

Ramendramohan Majumdar for *Birajmohan Majumdar*—for Dy. Registrar.

B. B. Ghose, J.—These appeals arise out of several suits brought by different

persons for declaration of their right to and recovery of possession of certain lands, on the ground that these lands appertained to their several tenures under defendants 1 to 4, who are the zamindars with regard to the property in question. A mourasi mokarrari tenure of 80 bighas odd was held by two persons, Ramsebak Biswas and Ramgati Biswas, the predecessors-in-interest of defendants 5 to 9. The tenure was reduced to some extent by acquisitions being made by the Government for constructing embankments. Nothing turns upon that fact. The original tenure-holders subsequently sold specific plots of land to the plaintiffs in the different suits, out of which the appeals before us have arisen. The zamindar landlords recognized these different sales and constituted the different plots of land so sold into different tenures bearing separate shares of the original rent. Subsequently it appears that there were dues under the Bengal Embankment Act (Beng. 2 of 1882) which had to be realized from the estate and, according to the provisions of Ss. 59 and 68 of that Act, the Collector had to apportion the cesses due under the Act between the zamindar, the owner of the estate, and the tenure-holder. What was done apparently was that the names of the holders of the original tenure, viz. Ramsebak and Ramgati, were only given to the Collector who made a certain allotment as payable by those tenure-holders. Defendants 5 to 7 allowed their share of the embankment charges to fall into arrears and the zamindars thereupon proceeded to sell the entire original tenure under the provisions of the Embankment Act. The sale was held on 17th June 1915, and the tenure, as described by the zamindar landlords, stated to comprise the original lands in the possession of the heirs of Ramsebak and Ramgati, was sold and purchased by defendant 10. The plaintiffs however remained in possession of their different allotments and defendant 10 tried to obtain possession of those lands on the strength of his auction-purchase. There was a struggle between the parties and the inevitable proceedings under S. 145, Criminal P. C., were launched. The Magistrate attached the disputed properties under the provisions of S. 146, Criminal P. C., by his order, dated 26th August 1920. Thereupon the plaintiffs brought their several suits in August 1921. The Munsif decreed the suits; but, on appeal, the Subordinate Judge reversed the decision of the Munsif and dismissed the suits. The plaintiffs have appealed to this Court.

The learned Subordinate Judge took the view that the apportionment made by the Collector cannot be questioned by the civil Court. That view is quite correct, having regard to the provisions of S. 86, Embankment Act. The learned Subordinate Judge next refers to S. 72 of the Act and held that under that section the embankment cesses are a first charge on the tenure. Apparently, he misread that section, which only says that the embankment charges should be a first charge on the estate and that section only refers to the amount recoverable by the Government only from the estate as well as its subordinate tenures. The section that refers to the right of the zamindars to recover the share of the embankment charges payable by tenure-holders under him is S. 74 and the question is whether the lands within the tenures created by the zamindars passed under the provisions of that section. The learned Subordinate Judge decided the case on the supposition that all the provisions of a patni sale apply to the sale for recovery of embankment charges. It is quite true that by the sale under the Patni Regulation, if properly conducted, the whole interest in the patni passes and it is not necessary to serve notice on each of the defaulting proprietors. The question, however, is whether all the provisions of the Patni Regulation apply to such a sale as this, and the most important thing to consider is the proviso to S. 74, which runs thus:

> "Provided that the right or interest of any person holding from the defaulter shall not be affected by any sale held under these provisions."

There is no question that the plaintiffs are persons whose interest is held from the defaulters and, if that is so, then their interest would not pass by a sale under S. 74 of the Act. It is contended by Dr. Basak, on behalf of the respondent, that that proviso refers only to persons holding an interest subordinate to that of the defaulter; or in other words, he asks us to read the words "from the defaulter" as "under

the defaulter." I do not see any reason for restricting the interpretation of the word in that way. The word "from" is wider than the word "under" and I do not find any reason why a transferee from the defaulter should not fall within that proviso. There is however a further important point in this case which has been lost sight of by both the Courts below. The Collector is to apportion the embankment charges between the zamindars and the holders of tenures under him. It is true that there was originally one tenure of 80 bighas under the zamindars in this case. But it appears that this one tenure was split up at the instance of the zamindars into several smaller tenures. If the zamindars represented to the Collector that there was only one tenure and the Collector made an apportionment on that basis, the zamindars have no right to bring all the several tenures to sale by taking proceedings against the holders of one of the tenures under S. 74, Embankment Act, and affect the interests of all the other tenure-holders, who hold lands comprising different tenures, on the parent tenure being split up into several other tenures. The whole proceedings before the Collector would amount to a nullity, so far as the holders of the newly created tenures are concerned. When the zamindars represented to the Collector that there was only one tenure to be dealt with in making the apportionment, no doubt notices must have been served upon the owners or their representatives of the original tenure and they would be bound by the apportionment made by the Collector and the lands which they held must be held to have passed by the sale. But this sale cannot affect the interests of the plaintiffs, because the zamindars had themselves created several tenures in the place of one original tenure.

The learned Subordinate Judge lays great stress upon the fact that no kharij fee was paid to the zamindars and therefore the transfer was not according to law. I confess I fail to understand this view. The zamindars may make a kharij, that is, register the name of a purchaser in their books, without demanding any fee at all. But the next observation which the learned Subordinate Judge makes seems to be against obvious facts. He says that there was no transfer according to law, as no fee was paid by the purchaser. As the documents were registered, the registering officer must have demanded the usual statutory fee. There is one important fact, which the Munsif has noticed in his judgment, which shows that there was a separation of the lands purchased by the plaintiffs at the instance of the zamindars, as he says in deciding Issue 10, amongst other things, that when the landlords applied to the Collector for steps to realize embankment cesses from the defaulter, on that very day they filed a suit to recover arrears of rent from the holders of a separated tenancy. That shows beyond all controversy that the landlords did split up the original tenure into several distinct tenures. On this ground the appeals must be allowed, the judgment and decree of the Subordinate Judge set aside and those of the Munsif restored with costs in both the Courts.

S. K. Ghose, J.—I agree.

B.V./R.K. *Appeals allowed.*

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* A. I. R. 1930 Calcutta 799

GUHA, J.

Tara Kinkar Chanda and *another*—Plaintiffs—Appellants.

v.

Rasik Chandra Mahajan and *another*—Defendants—Respondents.

Appeal No. 1925 of 1928, Decided on 26th May 1930, from appellate decree of Addl. Dist. Judge, Chittagong, D/- 25th April 1928.

(a) Malicious Prosecution—Essentials for claiming damages stated.

The first essential and the main factor to be taken into consideration in a case of malicious prosecution is that the plaintiff must have been prosecuted by the defendant and that there was prosecution which would sustain a claim for damages as made in the suit, and although no doubt that the prosecution exists when criminal charge is made before tribunal, the prosecution, the act of the prosecutor, which renders him liable to be cast in damages, viz., malicious and not based on reasonable and probable cause, commences when the prosecutor has taken the initial step. The other essential which must co-exist to sustain such an action is that the prosecution must have terminated in plaintiff's favour: 22 *C.L.J.* 518 and *A. I. R.* 1930 *Cal.* 392, *Ref.* [P 800 C 1]

*** (b) Malicious Prosecution — Charge made on single succession of occurrences—One allegation on one act of circumstances found to be not malicious—Still action lies.**

Where charges are made before a Magistrate upon a single succession of occurrences and if one of the allegations based upon a single set

of circumstances cannot be found to be malicious at all, still an action for malicious prosecution will lie: 28 *Bom.* 220, *Rel. on*; (*English cases considered*). [P 801 C 2]

(c) **Malicious prosecution—Question whether prosecution was such as to be foundation for damages is a question to be determined on facts and on circumstances of particular case.**

The question whether there was a prosecution as could be the foundation for a claim for damages for malicious prosecution is a question to be determined on the particular facts and circumstances of a case. [P 801 C 2]

Tarakeshwar Pal Chowdhury, *Heramba Chandra Guha* and *Hara Krishna Pramanik*—for Appellants.

Ramdayal Dey and *Narendra Kumar Das*—for Respondents.

Judgment.—This is an appeal by the plaintiffs in a suit for damages for malicious prosecution. The facts of the case are with sufficient clearness set out in the judgment of the trial Court and have been summarized by the Court of appeal below. The Courts below have directed themselves rightly as to the essentials in an action for damages for malicious prosecution.

The first essential and the main factor to be taken into consideration in a case of this description is that plaintiff was prosecuted by the defendant. Was there a prosecution which would sustain a claim for damages as made in the suit? On this part of the case the learned District Judge has adverted to the facts about which there is no doubt or dispute: defendant 1 at the direction of defendant 2 lodged an information to the police charging plaintiffs and defendant 3 with theft. The allegations made were enquired into, the plaintiffs being examined by Police Officers. The Circle Officer reported the case to be false, and the Deputy Superintendent of Police reported the same as mistake of fact.

The information to the police appears to have been lodged on 5th September and on 19th September 1923 the date on which the District Magistrate ordered the information to be entered as mistake of fact defendant 1 filed a petition of objection against the non-submission by the police of charge sheet under S. 379 and S. 342, I. P. C., with a prayer either that the police be directed to submit a charge-sheet or that the complainant be allowed to prove his case. The petition to the District Magistrate which has been read to me in its entirety reiterated the charges made in the information to the police and the Magistrate in disposing of the same, recorded the following order: "The complainant declined to be examined. Dismissed under S. 203. S. 379 mistake of fact." In support of the appellant's contention before me that in view of the materials on the record, regard being specially had to what has been set out above there was prosecution in the present case.

It has been urged that there having been an information to the police accusing the plaintiffs of theft and evidence having been produced before the police to prove the case of theft and a petition having been filed before the Magistrate reiterating the charge of theft, defendants 1 and 2 should be held to have prosecuted the charge against the plaintiffs. Reliance has been placed on behalf of the appellants to the decisions in *Bishun Pergash Narayan Singh* v. *Phulman Singh* (1), *Satya Neranjan Chakravarti* v. *Sarajubala Debi* (2), *Jogendra Nath* v. *Emperor* (3), *Rabindra Nath Das* v. *Jogendra Chandra* (4) and *Ahmedbhai* v. *Fremji Edulji* (5), in support of the position that on the facts and in the circumstances of the present case there was prosecution as contemplated by law, and that the plaintiffs were prosecuted by defendants 1 and 2. The learnd advocates appearing for the respondents on the other hand strenuously argued that the facts of the case do not lead to the conclusion that there was a prosecution and that defendants 1 and 2 had not prosecuted the plaintiffs. The learned advocates for the respondents have argued that the decision relied upon by the other side do not apply to the facts of the present case, and that the preponderance of authority is in favour of their contention. They have relied on the decisions in *De Rozario* v. *Gulab Chand* (6), *Golap Jan* v. *Bholanath Khettry* (7), *Nagendra Nath* v. *Basanta Das* (8) and *Ishuri* v. *Muhammad Hadi* (9), in support of their

(1) [1915] 27 I. C. 449.
(2) A. I. R. 1930 P. C. 13.
(3) [1906] 33 Cal. 1=2 C. L. J. 228.
(4) A. I. R. 1928 Cal. 691=56 Cal. 482.
(5) [1904] 28 Bom. 226=5 Bom. L. R. 940.
(6) [1909] 37 Cal. 353=6 I. C. 877.
(7) [1910] 38 Cal. 880=11 I. C. 311.
(8) A. I. R. 1930 Cal. 392=57 Cal. 25.
(9) [1902] 24 All. 368=(1902) A. W. N. 96.

position that there was no such prosecution in the case as could entitle the plaintiffs to recover damages for a malicious prosecution. On a consideration of the decisions of Courts placed before me, it appears to me that the rule of practical application deducible from them is that the question whether there was such prosecution as could be the foundation for a claim for damages for malicious prosecution, and the further question whether the plaintiff in an action for damages for malicious prosecution was prosecuted by the defendant, are questions to be determined on the particular facts and circumstances of a case. There is no doubt as to the proposition that a prosecution exists when a criminal charge is made before a tribunal: *Bishnu Narain Singh* v. *Phulman Singh* (1), *Nagendra Nath Ray* v. *Basanta Das Bairagya* (8). The prosecution, i.e., the act of the prosecutor which renders him liable to be cast in damages, viz., malicious and not based on reasonable and probable cause, commences when the prosecutor has taken the initial step: *Bishun Prasad Narayan Singh* v. *Phulman Singh* (1). In the present case, on the facts found by the lower Courts, there is ample justification for the view taken by the lower Court; and irrespective of the complaint or the information to the police that there was a prosecution in the present case, and the plaintiffs were prosecuted by defendants 1 and 2 in the suit.

After the disposal of the main head so far as the factors determining the question of maintainability of a suit for damages for malicious prosecution were concerned in the manner aforesaid, it is necessary to discuss the other essentials which must co-exist in order to sustain such an action. That the prosecution terminated in favour of the plaintiffs there can be no doubt the Magistrate's order on 19th September 1923, was one of dismissal of the complainant's case and as such was a determination of the prosecution in favour of the plaintiffs. That the prosecution, so far as the charge of theft was concerned, was without any reasonable and probable cause, has been concurrently found by the Courts below and that question therefore is not open for discussion in this appeal. The same remark applies to the establishment of the facts of malice on the part of defendants 1 and 2 in the suit. On the question of damages although the learned District Judge in the Court of appeal below has differed from the trial Court in material particulars, the learned Judge has held that there was inconvenience suffered by the plaintiffs and the plaintiffs might be entitled to get nominal damages only. The learned advocate for the plaintiffs-appellants has represented to me that his clients would be satisfied with nominal damages.

One other aspect of the case however, which has been dealt with by the learned Judge in the Court below under the head of malice and want of reasonable and probable cause and upon which his decision is against the plaintiffs, remains to be considered. The question decided against the plaintiffs, and the question that has been raised in this appeal by plaintiffs, relate to this: that there having been one single prosecution upon a single succession of occurrence if one of allegations, namely the allegation of assault was not malicious, the prosecution based upon a single set of circumstances could not be found to be malicious at all. The point as decided by the learned Judge is in my judgment well settled by authority in favour of the plaintiffs-appellants.

So far as Courts in England are concerned it is taken to be settled that if a man were prosecuted on a charge which was divisible in its nature, and contained several parts, and absence of reasonable and probable cause was shown for one part of the charge he was entitled to succeed even though it appeared that as to the other part or parts of the charge, reasonable and probable cause existed: see Clerk and Lindsell, Law of Torts, 7th Edn., p. 651. In India the position has been correctly indicated by the Bombay High Court in *Ahmedbhai* v. *Framji Edulji* (5), where the learned Judges, following the decisions in *Reed* v. *Taylor* (10), and *Ellis* v. *Abrahams* (11) laid down the rule that where charges are made before a Magistrate, for some of which there is, while for others there is not, a reasonable and probable cause, an action for malicious prosecution will lie. The present case is to my mind stronger than the one

(10) [1812] 4 Taunt 616.
(11) [1846] 8 Q. B. 703=15 L. J, Q. B. 221.

decided by the learned Judge of the Bombay High Court and the learned District Judge's decision on this aspect of the case cannot therefore be supported and must be overruled.

In view of the conclusions I have come to, the decree of the lower Court must be set aside. The plaintiffs' suit must be decreed and their claim for damages for malicious prosecution allowed. The plaintiffs will be allowed only nominal damages as against defendants 1 and 2, who are both liable for the same, the amount of such damages being fixed at Rs. 10 only.

Defendants-respondents 1 and 2 will pay the plaintiff's costs in all the Courts.

V.B./R.K. *Appeal allowed.*

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* A. I. R. 1930 Calcutta 802

CUMING, J.

Asoke Prasanna Bal—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1429 of 1929, Decided on 20th January 1930, against order of Dy. Mag., Mymensingh, D/- 31st August 1929.

(a) Criminal P. C., S. 162 — Magistrate can make use of general diary to corroborate case of complainant.

There is nothing improper in a Magistrate making use of the general diary for the purpose of corroborating the case of the complainant and showing that the complainant made the same remarks at the time of recording the diary as he did in the Court. [P 802 C 2]

*** (b) Criminal P. C., S. 106—"Offence involving breach of peace"—Meaning explained.**

The expression "offences involving a breach of the peace" means offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace: 43 *Bom.* 554; 33 *All.* 771 and 30 *Cal.* 366, *Ref.* [P 803 C 1]

B. C. Chatterjee and *Birendra Kumar De*—for Petitioner.

G. Gupta and *Bireswar Chatterjee*—for the Crown.

Judgment.—The petitioner in this case has been sentenced to pay a fine of Rs. 25 under S. 504, I.P.C., and further to give security for his good behaviour under S. 106, Criminal P. C. The case against him was briefly that he filthily abused the complainant in such a way that the complainant was likely to lose control of himself and to commit a breach of the peace.

The Rule has been granted on grounds Nos. 3, 4 and 5 of the petition to this Court. The first ground urged by Mr. Chatterji is that the general diary entry, Ex. I, is not admissible for the purpose of proving the falsity of the defence case and it cannot legally be used in evidence to disprove the defence and the learned Magistrate was wrong in using the said entry, Ex. I, against the petitioner. As a matter of fact the learned Magistrate has used the general diary entry, Ex. I, for the purpose of corroborating the case of the complainant and showing that the complainant made the same remark then as he does now in Court and that there is no difference in his cases. There is nothing improper in the use that the learned Magistrate has made of the entry.

The next ground taken is that the Magistrate's finding with regard to the motive of the petitioner is wholly erroneous and the learned Magistrate acted under a misapprehension in proceeding upon the basis that the petitioner had filed his application for removal of Sashi Babu from the common managership before 1st November 1928. It does appear that as a matter of fact this application was not filed before 1st November 1929. Even however if the Magistrate was wrong on this question of motive, there still remains the positive evidence of witnesses that abusive language was used; the question of probability or improbability of the petitioner's losing temper at the sight of the complainant is not really so material when we have positive evidence that he had actually used the abusive language.

The last ground taken by Mr. Chatterji has more substance in it, namely that the order under S. 106, Criminal P. C., passed in the present case is bad in law. Mr. Chatterji argues that a breach of the peace is not a necessary ingredient of an offence under S. 504, I.P.C. The only portion of S. 106, Criminal P. C., under which the present offence could come is "other offence involving a breach of the peace," and S. 504, I.P.C., does not necessarily involve a breach of the peace. I think this contention is correct. There is no doubt that the decision in the case of *Emperor* v. *Syed Yacoob* (1) supports the case of the opposite party as also the decision in the case of *Emperor* v.

(1) [1919] 43 Bom. 554=20 Cr.L.J. 543=51 I.C. 783.

Manik Rai (2). These words "offence involving a breach of the peace" were considered and construed in the case of *Arun Samanta* v. *Emperor* (3) where it was held that the expression "offences involving a breach of the peace" means offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace. No doubt the learned Judges in that decision were considering the meaning of the words "offences involving a breach of the peace" as used in S. 110, Criminal P. C., Cl. (e). But I see no reason why any different meaning should be placed on identically the same words in S. 106, Criminal P. C., to what has been placed upon them in S. 110, Cl. (e), Criminal P. C. The order therefore binding over the petitioner is apparently bad in law and must be set aside. It is accordingly set aside and with this modification the Rule is discharged.

V.B./R.K. *Rule discharged.*

(2) [1911] 33 All. 771=12 Cr.L.J. 805=11 I.C. 589.

(3) [1903] 30 Cal. 366.

A. I. R. 1930 Calcutta 803

RANKIN, C.J., AND C. C. GHOSE, J.

Baidyanath Sein—Appellant.

v.

Rajendranath Sein and *others*—Respondents.

Appeal No. 9 of 1930, Decided on 19th June 1930, from original order of Lort-Williams, J. D/- 15th January 1930.

(a) Succession Act (39 of 1925), S. 222—Mere exhibition of bad temper and levelling foolish charges against testator's nominee cannot preclude him from becoming executor.

A mere exhibition of bad temper and levelling foolish charges against the man whom the testator has appointed ought not to be allowed to prevent the testator's nominee from becoming the executor in the ordinary way. If, after he has taken charge of the estate, it can be shown that he is in any way causing waste to the estate, no doubt the parties will have ample remedy. [P 804 C 1]

(b) Letters Patent (Calcutta), Cl. 15 — Order refusing to discharge receiver appointed in suit for partition on basis of intestacy subsequent to grant of probate to executor is judgment and so appealable under Letters Patent.

An order refusing to discharge a receiver appointed in a suit for partition brought on the basis of intestacy, after grant of letters of administration or probate to an executor, is a judgment under Letters Patent and there is a right of appeal against it under Letters Patent. [P 804 C 1]

Rankin, C. J.—In my opinion this appeal must be allowed. It appears that the testator died on 14th December 1928. He left a will dated 11th October 1928 appointing his son the present appellant to be the executor to his estate. Various people entered caveats and on 16th January 1929 before the testator had been dead more than a month, certain of his grandsons started a suit for partition of the estate left by him on the basis that the grandfather had died intestate. On that footing, and at that time, the Official Receiver was appointed the receiver. The main charges at that time against the present appellant were that he was collecting the moveables, that he was insisting upon collecting papers and doing the very things which he was bound and entitled to do if, in fact, he was the executor. Still caveats were entered by the grandsons and, on 24th January 1929, in this partition suit, on the basis of intestacy, a receiver was appointed. The matters went on and on 21st November 1929, an order was made that probate should issue to the present appellant as executor of his father's will. That order having been made on 21st November the executor found that he had no money wherewith to pay the probate duty or anything else and on 16th December 1929, he brought the present application humbly submitting that, as his father had appointed him executor, he should be allowed to begin to act as such. For reasons which do not appeal to me at all the learned Judge has refused to make the necessary order, and the only grounds that can be seen from the affidavits are a repetition of the various charges which are ludicrous on the basis that this man is, in fact, the executor. The charges are that he wrongfully and fraudulently took possession of the properties of the testator the very thing which it was his duty to do—that he is maintaining such wrongful possession and retaining the income of the estate and so on and so forth. It appears to me that the rest of the family may be very much chagrined at this particular person being put in charge of the testator's properties by the testator's will; but a mere

exhibition of bad temper and levelling foolish charges against the man whom the father has appointed ought not to be allowed to prevent the father's nominee from becoming the executor in the ordinary way. If, after he has taken charge of the estate, it can be shown that he is in any way causing waste to the estate no doubt the parties will have ample remedy. There seems to be nothing however against the executor. In my opinion, this appeal must be allowed and the Receiver must be discharged. The receiver must pass his accounts and make over possession of the property to the appellant forthwith.

As regards the question whether there is a right of appeal under the Letters Patent from an order refusing to discharge a receiver in the circumstances stated, I have no doubt at all that there is such a right of appeal and that such an order is a judgment under the Letters Patent.

Both sets of respondents will be personally liable to pay the costs of the appellant in this appeal as well as before the learned Judge.

C. C. Ghose, J.—I agree.

V.B./R.K. *Appeal allowed.*

A. I. R. 1930 Calcutta 804

RANKIN, C. J., AND PATTERSON, J.

Mathuranath Ray Chaudhuri—Judgment-debtor 1—Appellant.

v.

Janakinath Ray Chaudhuri and *others*—Decree-holder—Respondents.

Appeal No. 3 of 1929, Decided on 29th August 1929, from original order of Sub-Judge, Mymensingh, D/- 17th September 1928.

(a) Civil P. C. (1908), O. 21, R. 11—Copy not of whole decree but only ordering part of it is required.

For the purpose of executing a decree, there is no necessity for taking a copy of the whole decree. All that is necessary is the ordering of portion of the decree : 16 *C. W. N.* 736 and 741, *Ref.* [P 805 C 1]

(b) Civil P. C. (1908), S. 35 — Decree-holder asked by ex parte order to file copy of voluminous decree, not resisting order—Judgment-debtors partly responsible for putting cost on decree-holder for obtaining copy of decree, as they had not paid even after five years what they were ordered to pay at date of decree—Some fault with Court as copy of whole decree unnecessary for execution—Costs were equally divided between decree-holder and judgment-debtors.

A decree-holder was asked by an ex parte order to file a copy of a very voluminous decree requiring great costs of copying when he wanted to execute it. He did not resist the order nor did the judgment-debtors. Judgment-debtors were partly responsible for this cost on the decree-holder because they had not paid the decretal amount up to the time of execution while they were asked to do so immediately by the decree. Also the Court was at fault to some extent in asking for a full copy of the decree, while only the ordering of part of it was required.

Held : that under the circumstances the parties should be made to pay this cost in equal shares. [P 806 C 1]

S. C. Bose and *Bhupendrachandra Guha*—for Appellant.

Nareshchandra Sen Gupta and *Bamaprasanna Sen Gupta* — for Judgment-debtor 2.

Ramendrachandra Ray—for Decree-holder.

Rankin, C. J. — In this case, the plaintiff brought a partition suit and, after certain terms of settlement had been arrived at, obtained a final decree. This final decree was to the effect that the possession, delivered over to each of the parties after making separate allotments of the moveables and immovables according to a certain award, be declared as the final delivery of possession to the parties and that the parties do respectively bear all kinds of costs incurred in the suit up to 30th June 1923 : that the value of the stamp to the extent of Rs. 5,013-12-0 for the preparation of the decree, which the plaintiff had put in, be borne by the plaintiff to the extent of his share, namely Rs. 1,641-4-0, and of the balance Rs. 1,671-4-0 be borne by each of the defendants 1 and 2 respectively. That decree was made in 1923 and it appears that certain execution proceedings were taken in 1926. Until August 1928, neither defendant 1 nor defendant 2 put in his share of the decretal amount which he should have done in 1923. The plaintiff accordingly took steps in execution and the first thing we find is an ex parte order made by the Subordinate Judge, by which the decree-holder was to file a copy of the decree within three weeks. The terms of the settlement, which were embodied in the decree, were indeed extraordinarily lengthy, as appears from the fact that the charge for taking only a copy of

the decree amounted to Rs. 4,118 and also from the fact that the decree-holder was ordered to supply a big tin box, for holding the copy of the decree, to the office of the Court and it is beyond my conception how the decree-holder could be asked to file a copy of such a voluminous decree, within such a short period of three weeks and when, as we are informed, the office of the Court had been busy in making a copy of this decree for a considerable portion of the previous two years.

It appears that, in 1926, the decree-holder filed an application in execution and the Court then made an order that a copy of this decree be made. Time after time having been given by way of adjournments, the execution case was finally struck off. As I have pointed out, for the purpose of executing the decree, there was no necessity whatsoever for taking a copy of the whole decree. All that was necessary was the ordering portion of the decree, which is contained in a few lines of the present paper-book, which I have already cited, about the payment of one-third share of Rs. 5,013-12-0, for the preparation of the decree. In support of this view, our attention has been drawn to the provisions of R. 11, O. 21, Civil P. C., and to what was said by this Court in the case of *Raghubar Doyal Sukul* v. *Jadunandan Misser* (1). It was pointed out in that case that an order for a copy of the decree was wholly needless, because the Court, in which the application for execution was made, was the very Court which had made the decree and, if any reference to the decree was needed, the original could easily have been examined. That being the position we have to consider what happened upon this extraordinarily unfortunate order. The decree-holder appears to have asked for time to file a copy of the decree on 25th August and his prayer was granted. On 30th August, judgment-debtor 1 prayed for permission to deposit the decretal amount with half of the costs of the execution case and this was allowed.

"As copy of the decree had not yet been filed, no cost of the copy is allowed at this stage."

But that does not mean that the cost of the copy was going to be allowed at a further stage and it is also wrong on the basis of that order to hold that judgment-debtor 1 would no longer be liable to pay the cost. On 31st August an order was made :

"Let the amount be credited to the decree. Inform the decree-holder accordingly. Defendant 1's due is fully satisfied."

That is very ambiguous. But it cannot be supposed to be a decision upon the question which was postponed on a previous occasion, as the copy of the decree had not then been filed.

On 10th September judgment-debtor 2 filed a petition for permission to deposit the decretal amount with costs in Court. He also objected to pay anything by way of cost for the copy of the decree. The petition is before us and in that petition he points out that it is unnecessary to put in a copy of the decree and that the copy is required by the decree-holder for his own purposes and that, as the decree-holder has not yet filed a copy of the decree, there is no necessity for ordering payment of cost for the copy. Finally, on 11th September the decree-holder filed in instalments a copy of the decree, that is to say, he put in a copy in part and he was directed to file copies of other parts of the decree. It appeared later that the decree had not yet been fully copied and the question that has come for argument is whether the judgment-debtors should be made to pay anything for the copy of the decree. As to that, the question stands thus : judgment-debtor 2 has not appealed to this Court. In his case on 10th September he does seem to have complained that a copy of the decree was wholly unnecessary. Judgment-debtor 1 has appealed to this Court and I am bound to say that the objection that he has taken has not been based on the ground that the order requiring the copy is entirely wrong and unnecessary. The plaintiff is in this position. In 1926 he had to submit to an ex parte order requiring him to file a copy of the decree. He did not resist though he might have resisted the order, possibly because he wanted the copy for his own use at the expense of somebody else. The decree-holder was again ordered to file a copy at the commencement of this proceeding. In the circumstances one would expect that the decree-holder was, by this

(1) [1911] 13 I. C. 365.

time, himself unwilling to forgo such an expense, because he had been spending money in trying to obtain a copy of this extraordinary decree. The fact remains that judgment-debtor 1 does not really challenge that order, judgment-debtor 2 opposed after a fashion and both judgment-debtor 1 and judgment-debtor 2 are responsible in part for putting this cost upon the decree-holder by the fact that they have not paid even in 1928 what they were ordered to pay in 1923. In the circumstances, we cannot we think, omit to say that a part of this entirely unnecessary order as to cost of the copy is due to the fault of the Court and, in the circumstances, it is quite clear that, while the plaintiff ought not to get the whole of the cost, at the instance of the judgment-debtors he ought not to be treated on the footing that we can disregard the order requiring him to file a copy. If judgment-debtor 2 had appealed I think I might have been able to do more for him than I am disposed to do at the moment. But, looking at the matter as it stands, I think the best order to make is to make these parties pay this cost in equal thirds. The order of the Court below is therefore varied. The plaintiff will be entitled to recover from each of the judgment-debtors one-third of the cost of the copy of the decree and judgment-debtor 1 will be entitled to get a refund of two-thirds of the amount of cost for the copy of the decree, if it is found that he has paid the whole amount of cost for the copy of the decree.

I have no doubt that the entry in the tabular statement has reference to the matter of costs and it is perfectly clear that the costs of execution will, in the ordinary way, be paid by the judgment-debtors. The appellant is entitled to realize from the decree-holder respondent the amount of costs which he says, he has paid for the preparation of the respondent's portion of the paper-book. There will be no order for costs in this Court. Let the record be sent down at once.

Patterson, J.—I agree.

B.V./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 806

LORT-WILLIAMS, J.

Buideo Das Lohia—Plaintiff.

v.

Balmukund Brijmohan—Defendant.

Small Cause Court Suit No. 20260 of 1927, Decided on 24th June 1929, from a Full Bench order of Sm. C. C. Judge.

(a) Presidency Small Cause Courts Act, S. 38—Scope—Though wording in S. 38 is wide enough to cover jurisdiction on facts also it is limited to questions of law only—Judgment such as would not have been given by reasonable man—Now trial can be granted.

Though the wording of S. 38 is wide enough to cover appellate jurisdiction both on fact and on law it has been settled law in India for many years that the Court under S. 38 is limited to point of law only and cannot entertain questions of facts or of mixed fact and law: 19 *Mad.* 96; 24 *Cal.* 455; 21 *Mad.* 232 and 40 *Mad.* 355 (*F.B.*), *Ref.* 24 *Cal.* 455; 27 *Bom.* 563 and *Solomon* v. *Bitton*, (1882) 8 *Q. B. D.* 176, *Disc.* [P 807 C 2]

A new trial may however be granted when the judgment is one to which no reasonable man ought to have come andnot merely because the Court to whom the application is made takes a different view of the evidence.

A Full Bench of the Court of Small Causes consisting of two Judges granted an application for new trial and set aside the order of dismissal of suit by the trial Court ordering it to be reheard on ground that fresh evidence had been discovered, A further application was made to set aside the said order to a Full Bench consisting of three Judges who set aside the order passed by the Full Bench consisting of two Judges.

Held: that the Full Bench consisting of three Judges had acted without jurisdiction inasmuch as it had decided a question of fact namely sufficiency of fact entitling the applicant to a new trial, The decision of the Full Bench of two must be taken to have been according to law. [P 808 C 2, P 809 C 1]

(b) Presidency Small Cause Courts Act, S. 38—S. 38 allows successive applications for new trial but not successive applications to set aside orders granting or refusing new trials.

Successive applications for new trials may be within the scope of S. 38 but S. 38 does not permit successive applications to set aside previous orders granting or refusing new trials: *Great Northern Ry. Co.* v. *Mossop* (1855) 17 *C. B.* 130; 22 *Cal.* 784 and 10 *B. L. R.* 355, *Expl.* [P 809 C 1]

A. K. Roy and *N. C. Chatterjee*—for Plaintiff.

J. C. Hazra—for Defendant.

Judgment.—This is an application under S. 115, Civil P. C., alleging inter alia that the Full Bench of the Court of Small Causes in Calcutta has exercised a jurisdiction not vested in it.

The petitioner brought a suit in Court for the price of goods sold and delivered. The defence was a denial, and the seventh Judge of the Court, Mr. P. C. Dutt, dismissed the suit.

The petitioner then applied for a new trial under S. 38, Presidency Small Cause Courts Act.

This application was heard by what was called a Full Bench consisting of the Chief Judge and Mr. P. C. Dutt, when new grounds were added, namely that the petitioner had lately discovered fresh evidence to the effect that the defendant firm had disposed of the goods in suit to a third party, and after hearing arguments the Court granted the application, set aside the order of dismissal, restored the suit and ordered it to be heard by Mr. Latifur Rahman, Judge, Fourth Bench.

Thereupon the defendant firm applied for a new trial to set aside the said order on the ground inter alia that the Full Bench had erred in law in setting aside the order of dismissal of the trial Court on the mere allegation of the petitioner that he had discovered fresh evidence without requiring him to give particulars or prima facie proof of the existence of such evidence or to produce it before the Court and in finding without proof that such evidence was not available at the time of trial.

A Full Bench consisting of the Chief Judge, Mr. N. C. Sen and Mr. P. C. Dutt, heard this application ex parte and issued a notice directing the petitioner to produce documentary proof in support of his allegation that he had discovered fresh evidence.

The evidence upon which the petitioner relied was contained in khata books which were in the possession of one Wahed Hossain who lived more than 200 miles from Calcutta and alleged that he was ill, and the petitioner was unable to secure his attendance with his khata books in spite of the service of a subpoena. After several adjournments, and after dismissing the petitioner's application for the issue of a commission the Judges who expressed some doubt as to the genuineness of the petitioner's alleged inability to procure the attendance of his witness or produce the necessary khata books, set aside the order granting a new trial and restored the order of the trial Judge dismissing the suit.

According to the petitioner they did this on the ground that they thought that it was impossible that the evidence of the witness Hossain would .be believed especially as it was sought to examine him on commission or at any rate the possibility was not more one way than the other.

The question which I have to decide is whether they had jurisdiction to make this order.

Chapter 6, Presidency Small Cause Courts Act, bears the heading "New Trials and Appeals." S. 37 is as follows:

"Save as otherwise provided by this chapter or by any other enactment for the time being in force every decree and order of the Small Cause Court in a suit shall be final and conclusive."

Section 38 provides that the Court may on the application of either party made within eight days from the date of the decree or order in the suit order a new trial to be held or alter, set aside or reverse the decree or order upon such terms as it thinks reasonable and may in the meantime stay the proceedings. Ss. 39 and 40 provide machinery for removing into the High Court for trial suits in which the subject-matter exceeds in value one thousand rupees.

Thus it will be observed that there is no appeal from any decree or order of the Court except as provided by S. 38. The wording of this section is wide enough to cover appellate jurisdiction both on fact and on law. But it has been settled law in India for many years founded on a number of decisions of which the principal are. *Sadasook Gambir Chand* v. *Kannaya* (1); *Sassoon* v. *Hurry Das Bhukat* (2) *Srinivasa Charlu* v. *Balaji Rau* (3) and *Sai Sikandar Rawther* v. *Ghose Mohidin Marakayar* (4) that the Court under S. 38 can exercise only revisional jurisdiction, an expression used in India to distinguish appeal on points of law only, from appeals on questions of fact or mixed fact and law which alone are designated appellate. Or in other words the Court under this section has no jurisdiction to decide questions of fact. An apparent exception seems to have

(1) [1896] 19 Mad. 96.
(2) [1897] 24 Cal. 455=1 C. W. N. 44.
(3) [1898] 21 Mad. 232.
(4) [1917] 40 Mad. 355=33 I. C. 346 (F.B).

been made in the cases of *Behram Kaikhushru Irani* v. *Ardeshir Kavasji* (5) and *Johan Smidt* v. *Ram Prasad* (6) in which it was held that the Court could order a new trial where the judgment was manifestly against the weight of evidence. This means presumably that a new trial may be granted when the judgment is one to which no reasonable man ought to have come and not merely because the Court to whom application is made takes a different view of the evidence. This is the English practice: *Solomon* v. *Bitton* (7). And this exception was admitted by Sale, J., in *Sassoon* v. *Hurry Das Bhukat* (2) at p. 459 upon the authority of MacEwen's Small Cause Court Practice.

The main reasons given by the Judges for putting this limited construction upon the words of the sections are that such had been the settled practice of the Courts for many years, that no appellate powers had been given in the original Act of 1850 and that the powers of the Court were not intended to be increased when the Act of 1882 was passed or when it was amended in 1895. Further that the words of the section taken together show a clear intention not to allow appeals on questions of fact and to follow closely the English County Court legislation, procedure and practice.

Thus Ss. 37 and 38 of the Act of 1895 and the corresponding sections of previous Acts back to the first Act in 1850 are modelled obviously upon S. 93, English County Courts Act of 1888 and the corresponding sections of previous English Acts back to the first Act in 1846 with the addition of the words "or alter, set aside or reverse the decree or order" which take the place of the power to order judgment to be entered for any party given an appeal to the High Court by S. 120 of the English Act. S. 93 comes under part 4 of the Act which is headed "Procedure and Trial" but S. 120 comes under part 5 which is headed "Appeals &c." The word "appeal" in England is used to express not only appeal on fact only or on mixed fact and law but appeal on law only and it is in the latter sense that the word is used in S. 120 as appears from the express words of the section. And it is sufficiently obvious in my opinion that the word has the same meaning in Chap. 6, of the Indian Act in spite of the meaning which is ordinarily given to the word in India. The history of this concurrent legislation in England and India is fully described in the able and convincing judgment of Sir John Wallis, C. J., in *Sai Sikander Rowther* v. *Ghouse Mohidin Marakayar* (4) at ps. 361 to 365 with which I respectfully agree.

Owing to the fact that county Court Judges in England sit singly and that they might find some difficulty about granting new trials in cases tried before themselves a limited right of appeal to the Courts of Common Law was given and this is preserved by S. 120 of the present Act, which gives a similar right of appeal to the High Court.

This provision was unnecessary for Small Cause Courts because the application for a new trial could be heard by the Full Court or a Bench thereof. But in my opinion it cannot reasonably be contended that the legislature meant to give to such Full Courts and Benches larger powers than were given to the English High Court. On the contrary their powers are less because the English High Court has been expressly empowered by an amendment introduced in the Act of 1888 to draw any inference as to fact. But no such power has been conferred on the Small Cause Courts.

As was said by Grove, J., in *Cousins* v. *Lombard Deposit Bank* (8):

"If an appeal were allowed upon questions of fact the result would be that . . . . the object of the legislature in establishing cheap and expeditious tribunals would be defeated,"

and by Wallis, C. J., in *Sai Sikander Rowther* v. *Ghouse Moideen Markayar* (8):

"Not only would the summary nature of the tribunal be destroyed, but the work of the Court would be blocked. Again, if the legislature had intended to allow appeals on the facts, some record of the evidence would certainly have been prescribed."

This being the state of the law, I have now to consider what it was exactly that the Full Bench in this case purported to do. In accordance with the maxim *omnia rite acta praesumuntur* it must be presumed that the Bench consisting of the Chief Judge and P. C. Dutt J., exercised their jurisdiction in accordance with law and were satis-

(5) [1903] 27 Bom. 563=5 Bom. L. R. 555.
(7) [1912] 38 Cal. 425=12 I. C. 11.
(6) [1882] 8 Q. B. D. 176.

(8) [1876] 1 Ex. D. 440.

fied upon the materials which were before them that the petitioner had discovered fresh evidence, that such evidence could not with reasonable care have been discovered previously: *Robinson* v. *Smith* (9), and that such evidence if believed would be conclusive, *Brown* v. *Dean* (10). It was for them to decide whether the materials upon which they based their decision were sufficient to satisfy them, and the form, whether oral or in writing, in which these materials were to be tendered was within their absolute discretion to accept or reject.

Therefore, although the defendant firm, doubtless realizing that there could be no appeal on questions of fact, framed their application on the ground of error in law, there is nothing to show that the Court had failed to apply correctly the rules of law, and what the defendant firm really complained of was that the Court had come to a wrong decision on questions of fact, namely, the existence or otherwise of such facts as would entitle the petitioner to a new trial. And what the Full Bench consisting of the Chief Judge and Sen and Dutt, JJ., purported to do and did, was to decide questions of fact, and to set aside the decision on such questions of fact which had been given by the Chief Judge and P. C. Dutt, J. This, in my opinion, the Full Bench had no power or jurisdiction to do, under the provisions of S. 38 or otherwise.

I am aware that in the suit of *Surrut Coomari Dassee* v. *Radha Mohan Roy* (11), Sale, J., decided that the Small Cause Court has power to hear more than one application for a new trial in the same cause. The facts of that case however were peculiar, and the Court, instead of granting a re-hearing on the first application for a new trial, made a decree in favour of the applicant, whose suit had been dismissed in the first instance, and that decree ipso facto became the decree in the suit. The decision, moreover, turned apparently upon a point of law, namely whether a certain order of attachment, which had been obtained against two only out of four executors, was binding on the estate.

The learned Judge refused to accept the argument that successive applications for new trials might lead to great inconvenience, and said that S. 37 of the Act of 1882 (Ss. 37 and 38 of the present Act) was wide enough to permit more than one application in the same suit, and he referred with approval to the words of Sir Richard Couch in the case of *Pursonchund Gicacha* v. *Kajooram* (12). The language of S. 53, Act 9 of 1850, (the corresponding section in that Act) is certainly sufficiently large to allow of an application for a new trial, after a previous trial. There are instances in England in the Common Law Courts and in the Courts of equity where more than one trial has been granted, it appearing proper that it should be done. We think the same rule may be applied here. We must assume that the Judges of the Small Cause Courts will not exercise this power, unless it appears to them to be right to do so.

This was a case however where there had been a new trial, and then an application for a further new trial. This is a very different matter from an application to set aside an order for a new trial, which is in the nature of an appeal against an interlocutory order, and in the present case an appeal on questions of fact. If the judgment of Sale, J., was intended to cover a situation such as has arisen in the present case, I respectfully decline to follow it.

The argument that the words of the section are wide enough to include such extended jurisdiction, was repeatedly raised and rejected, among others by Sale, J. himself, upon the issue whether the Court's jurisdiction under Ch. 6 was appellate or only revisional. And the suggestion that the question should be left to the wisdom and discretion of the Judges was disposed of in the case of the *Great Northern Railway Co.* v. *Mossop* (13) in which the question arose whether a County Court Judge had jurisdiction to entertain successive applications for a new trial, and in which Jervis, C. J., asked pertinently "how

(9) [1915] 1 K.B. 711=84 L. J. K. B. 783=59 S. J. 269=31 T. L. R. 191.
(10) [1910] A. C. 373=79 L. J. K. B. 690=102 L. T. 661=54 S.J. 442.
(11) [1895] 22 Cal. 784.
(12) 10 Beng. L.R. 355=19 W.R. 203.
(13) [1856] 17 C. B. 130=25 L. J. C. P. 22=2 Jur. (n.s.) 21=4 W.R. 116.

often may the Judge review his discretion" and Wills, J. said:

"The very object of instituting Courts of Justice is that litigation should be decided and divided finally. That has been felt by all jurists. It is long since a reason was assigned why judgments should be considered final and should not be ripped up again. *Ne lites immortales essent dum litigantes mortales sunt.* Human life is not long enough to allow of matters once disposed of being brought under discussion again and for this reason it has always been considered a fundamental rule, that when a matter has once become res judicata, there shall be an end of question about it. And this is especially necessary in the case of County Courts, which are principally intended to deal with matters of small amount. Of allo thers, it is manifest that they should have that most important of all attributes of a Court of Justice, viz., that their decisions should be final. That (the power to grant a new trial) is a power to be exercised, not with reference to interlocutory matters, but with reference to the final judgment, which, unless a new trial, is granted, must be considered a settled matter. Immediately that the Judge has exercised his discretion to grant or refuse a new trial, the exception to the general rule is exhausted and the general rule must prevail."

The decision of a Judge or a Bench of the Small Cause Court, whether in a matter of discretion or otherwise, is a decision of the Court itself, and any exception introduced by the legislature to the fundamental rule of law, to which I have referred, ought to be strictly construed. If successive applications for orders to set aside previous orders granting or refusing new trials were permissible, it is difficult to understand how there could ever be any end to them, or any finality in litigation, except the physical exhaustion of the Court or the financial ruin of its suitors.

For these reasons, I am of opinion, that the Full Bench, in setting aside the order made for a new trial, acted without jurisdiction, and this application must be allowed with costs, and the original order for a new trial restored.

R.M./R.K. *Order accordingly.*

A. I. R. 1930 Calcutta 810

GRAHAM AND MITTER, JJ.

Mahomed Ismail and *others*—Plaintiffs—Appellants.

v.

Sharfutullah and *others*—Defendants—Respondents.

Appeal No. 1367 of 1926, Decided on 1st August 1929, from appellate decree of Offg. Sub-Judge, Chittagong, D/- 14th January 1926.

(a) Civil P. C. (1908), S. 11—Co-defendants—Court deciding points at invitation of parties—Matters so decided operate as res judicata although only one of such points is sufficient for disposal of suit.

When parties go to trial and evidence is given and the Court at their invitation decides points, the determination of one of which might have been sufficient for the disposal of the suit, but which are such as it is open for the Court to base its judgment among others on one or more of them, the matters so decided operate as res judicata. When the matter is drawn in controversy of two defendants, it would also operate as res judicata as between them: 29 *Cal.* 900; 21 *I.C.* 979; *A.I.R.* 1925 *Cal.* 996 & *A.I.R.* 1927 *P.C.* 128, *Rel. on.* [P 813 C 2]

(b) Mortgage — Redemption — Mortgagee acquiring portion of equity of redemption can redeem share of other coparceners for such right is inherent in all holders of equity of redemption.

A person who has any right to redeem at all has a right to redeem the whole of the mortgaged property and cannot be compelled to redeem only the part in which he may be interested. There is an exception to this general rule, viz. when the mortgagors are owners of distinct parcels or either joint tenants or tenants in common they cannot redeem only to the extent of their shares if the mortgagee has become the owner of a portion of the equity of redemption.

It would not however be right to limit the operation of the broad principle laid down in the above exception to cases where mortgagors are owners of distinct parcels of land comprised in the mortgage and not sharers in the whole of such property.

A mortgagee therefore who acquires a portion of the equity of redemption is entitled to redeem the share of other coparceners, for such a right is inherent in all the holders of the equity of redemption: 13 *M.I.A.* 404, *Rel. on.*; 28 *All.* 279; 38 *Mad.* 310; 25 *All.* 446 and 26 *All.* 72, *Foll.*; 15 *Bom.* 27n. and 21 *Bom.* 619, *not Foll.* [P 814 C 1, 2]

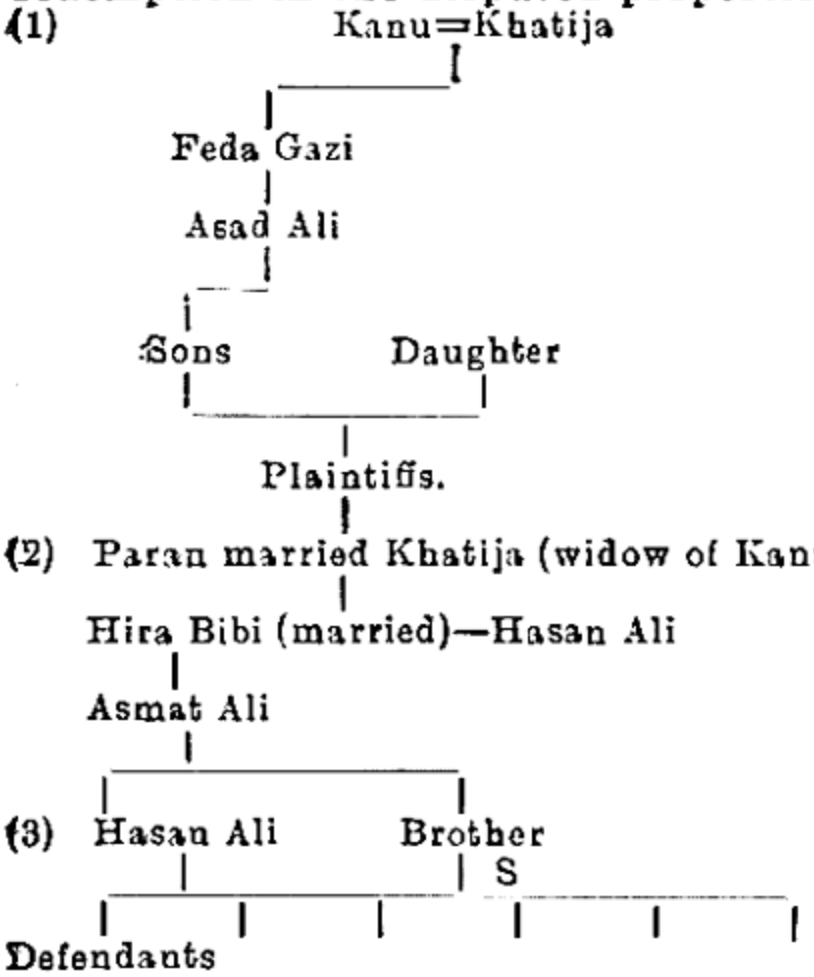
Saratchandra Basak and *Chandrasekhar Sen*—for Appellants.

Rupendrakumar Mitra, *Bhagirathchandra Das*, *Narendrakumar Das* and *Birajmohan Majumdar* — for Respondents.

Mitter, J.—This is an appeal by the plaintiffs and arises out of a suit for redemption of a mortgage executed by the predecessor of the plaintiffs in favour of the predecessors of defendants 1 to 12, so far back as the year 1852.

The three short genealogical trees given below will show who the mortgagees and their successors-in-interest are, as also who the mortgagors and their successors-in-interest are respectively. It is essential that we should have those trees before us in order to understand the questions in controversy in this appeal, more particularly as the

heirs of the mortgagees have also succeeded to certain shares in the equity of redemption in the disputed properties.



It is not necessary to state the earlier history of this somewhat long-drawn litigation, which commenced in 1919. It is sufficient to state that, by the decree of the lower appellate Court, which is now under appeal, the plaintiffs have been allowed to redeem to the extent of only four pies share and the controversy in the appeal before us has centred round the question as to whether the plaintiffs should not be allowed to redeem to the extent: (i) of 11 annas four pies share of the mortgagors, (ii) or, in any event, to the extent of eight annas four pies share and to have recovery of possession of the mortgaged property to the extent of the said shares.

It is common ground that the mortgaged property belongs to Paran and Kanu, whose relationship to the parties to the litigation is shown in the above genealogical tables.

The mortgage was executed in favour of Ahsanullah and Aminullah Sawdagar, predecessor of defendants 1 to 12, by Feda Gazi, Hira Bibi, daughter of Paran, and Manu Bibi, wife of Feda Gazi, in respect of 3 drones 12 kanis of land belonging to taluk, called Paran Kanu, on 10th Falgoon, 1215 M.E., for a consideration of Rs. 188, and it was agreed that the mortgagees were to be put in possession of the mortgaged property and enjoy the same in lieu of interest and that, on payment of the mortgage money, the mortgage property would be released.

The claim by the plaintiffs to redeem to the extent of 11 annas four pies share and to recover possession of the same is based on the case that Paran and Kanu were brothers; and plaintiffs, as the heirs of Feda Gazi, would also inherit the share which Feda Gazi inherited from his uncle Paran. It is argued, in this appeal, that, as there is no finding by the lower appellate Court, that Paran and Kanu were not brothers, the case should be remitted to the lower appellate Court for a proper finding on the question. We do not think there is any substance in this ground. The lower appellate Court clearly points out: (i) that it was distinctly stated in the plaint that Paran's heir was his daughter Hira Bibi alone; (ii) that, in the decree of 1859, Ex. 1, Feda Gazi did not claim any share of Paran's property as his heir; (iii) that Feda Gazi was not Paran's heir was recognized in a claim case in 1862; and (iv) that, to an attachment of certain property of Feda Gazi by Azim, Hira Bibi preferred a claim to it as Paran's heir and it was held Hira Bibi was the only heir. These findings of the lower appellate Court are quite destructive of the case of the plaintiffs that Paran was Kanu's brother or Feda Gazi's uncle, for, under the Sunni law of inheritance, by which the parties are governed, if Feda Gazi was Paran's brother's son, he would have certainly inherited a share of Paran's property. The plaintiff's claim to redeem the larger share of 11 annas four pies therefore must fail.

It is conceded that if Paran and Kanu were not brothers then Feda Gazi's share, after his inheritance from Khatija, would be eight annas four pies and that the remaining seven annas eight pies share of the mortgaged property would be inherited by defendants 1 to 12, who are also the heirs of the mortgagees.

Plaintiffs would therefore be entitled to inherit the eight annas four pies share, if Feda Gazi had not parted with any portion of this inheritance, as it is alleged he did, in favour of Basir Mahammad in 1219 M. E., nearly four years after the execution of the mortgage deed.

It is argued for the appellants that it is not open to the defendants now to

contend that there was the sale in favour of Basir Mahammad, because they are estopped by a previous judgment inter partes in the year 1859: Ex. 3. It appears that, after the execution of the mortgage, the mortgagors did not deliver possession to the mortgagee and the latter had to institute a suit for possession. To that suit Feda Gazi was a party and so was his vendee Basir Mahammad. Basir Mahammad raised the defence that, as he was a purchaser of the equity of redemption to the extent of eight annas, he should be permitted to redeem piecemeal, on payment of half of the mortgage money. Feda Gazi, in his statement, said that he was the owner of the 12 annas share of the equity of redemption and that he had paid the mortgage-money. He said nothing about the alleged sale to Basir. The Court came to two findings: (i) that the sale to Basir was not proved; (ii) even if the sale was good, he, having alleged to have made the purchase subsequent to the mortgage, cannot get possession of the land until the land is redeemed from the plaintiff's possession, according to the terms of the kabala, and the Principal Sudder Amin decreed the suit for possession with mesne profits against all the defendants to the suit, including Basir Mahammad.

It is said for the appellants that this decree operates as res judicata and bars the defence that there was a sale of the eight annas share by Feda Gazi to Basir Mahammad.

It is said for the respondent, on the other hand, that the finding that the sale to Basir was not proved was not necessary for the decision of the case and the decree could have been sustained even if the finding would have been the other way, viz., that the sale was a good sale and reliance is placed on the decision of the House of Lords in *Juan Jose De La Trinidad Concha* v. *Manual Antonio Concha* (1).

We are of opinion however that the case of *Concha* v. *Concha* (1) has no application to the facts of the present case. In that case, the question arose as to whether the residuary legatee would be bound by a finding in the probate proceedings as to the domicile of the testator. It was held that so far as regards all matters necessarily decided in a suit to which the executors were parties, the residuary legatee was bound by the decision. But with regard to matters upon a point which is immaterial for the purpose of determining the rights in question between the parties, he was held not to be bound by the decision. The question of domicile was not essential to the decision as to whether the plaintiffs were entitled to probate or not and it was held that the decision with regard to the domicile was not conclusive. Lord Herschell said in this case that :

"but the real and substantial controversy obviously was between the residuary legatee under the will and Adalinda Concha. It cannot be questioned that for certain purposes the executors do represent the legatees and the residuary legatee, and it may perhaps be admitted (at all events for the purposes of this case) that so far as regards all matters necessarily decided in a suit to which the executors are parties the residuary legatee and the other legatees may be bound by the decision. But I think that must be limited to the matters necessarily decided in the litigation to which the executors are parties, and that if the executors choose, as it is said here they have chosen, to obtain a decision of the Court upon a point which is immaterial for the purpose of determining the rights in question between the parties, they cannot by tendering for decision an issue which is unnecessary for the determination of the case bind all parties claiming under the will, legatees of whatever description, because that finding has been obtained in such a suit under such circumstances by the executors. That really is the present case. If the residuary legatee is bound here at all he is bound by a finding of the learned Judge which was quite unnecessary for the determination of what he had to decide and by a finding of the learned Judge which therefore could not be successfully appealed against."

The facts in the present case are different. The mortgagee was entitled to possession on execution of the mortgage bond by Feda Gazi and others (mortgagors). Such possession was not delivered to him. He sued for recovery of possession making the mortgagors and Basir Mahammad parties to the suit. Feda Gazi said in his defence to the suit of 1859 that he had 12 annas share in the mortgaged property and that he had paid his proportionate share of the mortgaged debt. Basir Mahammad said, in his defence, that he had purchased eight annas share of the mortgaged property from Feda Gazi

(1) [1886] 11 A. C. 541=56 L. J. Ch. 257=35 W. R. 477=55 L. T. 522.

and that he was willing to redeem his half-share on payment of Rs. 94. The Principal Sudder Amin held that the plea of payment by Feda Gazi was untrue, that Basir Mahammad's purchase was not proved and that even if the purchase was proved, as the purchase of the eight annas share was subsequent to the mortgage, Basir could redeem according to the terms of the mortgage. On these findings the Sudder Amin decreed the suit of the mortgagee against the mortgagor defendants, as well as against Basir Mahammad. The contention for the respondent is that the decision on the question of sale in favour of Basir Mahammad was not material to the suit and was not necessary for the determination of the previous litigation. We do not agree with this contention for it was open to the Court to base its judgment in favour of the defendants on more than one ground. The parties went to trial, evidence was given and the Court at their invitation decided the points raised by Basir in favour of the plaintiffs (mortgagees), although the decision in favour of the plaintiffs in that suit might have been sufficient to support the decree. This view receives ample support from the decisions of this Court in *Peary Mohun Mukerjee* v. *Ambica Churn Bandopadhya* (2) *Rashbehari Sarkar* v. *Maurendra Nath Ghose* (3) and *Gopal Jiu Thakur* v. *Radhabinode* (4). This last case was carried in appeal to the Privy Council, but on this question their Lordships of the Judicial Committee expressed no opinion : see *Radha Binode Mandal* v. *Gopal Jiu Thakur* (5).

We think therefore the finding, that the sale of Feda Gazi to Basir had not been proved, was conclusive as against the mortgagees, i. e., predecessor of defendants 1 to 12.

Then it is said that the said finding was not conclusive as between mortgagees and Feda Gazi, as no issue was joined between Feda Gazi and the mortgagees on the question of sale of the eight annas share. But it appears that Feda Gazi claimed to have inherited twelve annas share of the mortgaged property and to have mortgaged the same and as such had paid the twelve annas share of the mortgage debt. This was inconsistent with the case of Basir that eight annas out of the same was sold by Feda Gazi. The question was drawn in controversy between the mortgagee and Basir Mahammad, as also between Feda Gazi and Basir, and it would be res judicata between the mortgagees, the predecessors of defendants 1 to 12 and Basir Mahammad as also between Feda Gazi and the mortgagees. Feda Gazi said nothing about the sale to Basir, but claimed twelve annas share of the mortgaged property or the equity of redemption a position which is inconsistent with the sale of eight annas to Basir. Whether this is the correct view or not, in any event, this finding negativing the sale to Basir Mahammad was a finding which would require to be displaced before defendants can be heard to say that the sale to Feda Gazi was a good sale. But this finding has not been displaced by the respondent whose paramount duty was to displace the finding. Can the defendants be heard to say now after the lapse of many years that the sale was a good sale? To such a state of things the following observations of the Judicial Committee in the case of *Midnapur Zamindari Co., Ltd.* v. *Naresh Narayan Roy* (6), apply with great force:

> "Their Lordships do not consider that this will found an actual plea of res judicata, for the defendants, having succeeded on the other plea, had no occasion to go further as to the finding against them; but it is the finding of a Court which was dealing with facts nearer to their ken than the facts are to the Board now, and it certainly creates a paramount duty on the appellants to displace the finding, a duty which they have not been able to perform."

The mortgagees cannot be permitted to take up two inconsistent positions in Court, more particularly when the one proceeding arises out of the other. The Subordinate Judge finds that, after losing the case of 1860, Basir Muhammad "appears to have washed off his hand." In this view, we think the Subordinate Judge should have held that it was not open to the defendants to say that plaintiffs sold the eight annas share to Basir Muhammad. Plaintiffs' share is

(2) [1897] 24 Cal. 900.
(3) [1913] 21 I. C. 979.
(4) A. I. R. 1925 Cal. 936=88 I. C. 616.
(5) A. I. R. 1927 P. C. 128=101 I. C. 873=54 I. A. 238=54 Cal. 770 (P. C.).
(6) A. I. R. 1922 P. C. 241=64 I. C. 231=48 I. A. 40=48 Cal. 460 (P.C.).

-annas 4-pies and not 4-pies as has been found by the Subordinate Judge.

It becomes, therefore, unnecessary to determine the other question raised at the Bar, viz., that, even if the share of the plaintiffs be 4-pies, they can r deem in respect of the 8-annas share, which is alleged to have been sold by Feda Gazi to Basir Muhammad. But, as the question has been fully debated before us, we propose to give our decision on the same. In this case the equity of redemption in a portion of the disputed property has vested by inheritance in the heirs of the mortgagee, i. e., defendants 1 to 12 and, in such circumstances, the plaintiffs were entitled to redeem their share, but could not compel the mortgagee to redeem the share of Basir Muhammad also. The general rule is that a person who has any right at all to redeem has a right to redeem the whole of the mortgaged property and cannot be compelled to redeem only the part in which he may be interested. An exception, however, has been engrafted on the general rule by the case of *Azimut Ali Khan* v. *Jowahir Singh* (7). That exception is that where the mortgagors are the owners of distinct parcels or either joint tenants or tenants-in-common, they can redeem only to the extent of their shares, if the mortgagee has become the owner of a portion of the equity of redemption. In the case before the Judicial Committee, the person seeking to redeem was the owner of a specific village comprised in the mortgage and it is said, for the appellant, that that case is distinguishable from the present case, where a person seeking to redeem has only got an undivided share in the equity of redemption, and, to show the soundness of this distinction, reliance is placed on certain decisions of the Bombay High Court, viz., *Bhikaji Daji* v. *Lakshman Balal* (8) and *Narayan* v. *Ganpat* (9).

But Sir Rash Behary Ghose, in his classic work on the Law of Morgtgage, maintains that the distinction taken by the Bombay High Court is not a sound one. See his book on the Law of Mortgage (5th Edn.), p. 266 et seq. His view is that the mortgagee having acquired a portion of the equity of redemption is entitled to redeem the share of other coparceners, for such a right is inherent in all the holders of the equity of redemption. The Allahabad and the Madras High Courts take no such distinction as is taken by the Bombay High Court: see *Brij Kishore* v. *Madho Singh* (10); *Rathna Mudali* v. *Perumal Reddy* (11); *Dina Nath* v. *Lachmi Narain* (12) and *Shib Lal* v. *Bhawani Shankar* (13). We prefer to follow the view taken by the Allahabad and Madras Courts, which is in accordance with the opinion of the learned author on the law of mortgage. We do not think that it would be right to limit the operation of the broad principle laid down by the Privy Council in *Azimut's* case (7) to cases where the mortgagors are owners of distinct parcels comprised in the mortgage and not sharers in the whole of such property.

It should be noted, however, that the English law is different, for in England, the recognized rule compels the mortgagor to redeem the whole unless there is a special bargain: see *Hall* v. *Howard* (14) and *Charter* v. *Watson* (15). In England, a person only having a partial interest in the equity of redemption is entitled to redeem the whole property, leaving open the rights of other co-owners to be determined afterwards: *Pearce* v. *Morris* (16). We think, therefore, that the contention of the appellant on this point must fail.

As the appellant succeeds on the first point, the decree of the lower appellate Court will be varied by allowing them (appellants) to redeem the 8-annas 4-pies share, instead of only 4-pies share on payment of the proportionate part of the mortgaged debt. Our decree consequently will be in the following terms:

It is declared that the mortgage stands redeemed in respect of plaintiffs' 8-annas 4-pies share and the plaintiffs shall get possession of the same jointly with the defendants, as circumstances require, with the heirs and assignees of the mortgagee and his heirs where the

(7) [1870] 13 M. I. A. 404=14 W. R. 17 (P.C.).
(8) [1888] 15 Bom. 27 Note.
(9) [1896] 21 Bom. 619.
(10) [1905] 28 All. 279=(1905) A. W. N. 279=3 A. L. J. 27.
(11) [1915] 38 Mad. 310=17 I. C. 837.
(12) [1903] 25 All. 446=(1903) A. W. N. 150.
(13) [1903] 26 All. 72=(1903) A. W. N. 190.
(14) [1886] 32 Ch. D. 430=34 W. R. 571=55 L. J. Ch. 604=54 L. T. 810.
(15) [1899] 1 Ch. 175=47 W. R. 250=79 L. T. 440=68 L. J. Ch. 1.
(16) [1869] 5 Ch. 227.

lands are in their possession and with tenants where the lands are tenanted, except in case of defendant 41, against whom the suit stands dismissed. Defendants 1 to 12 and their transferees are directed to retransfer their 8-annas 4-pies share of the land to them and take out 8 annas 4-pies share of the money deposited by the plaintiffs, and the plaintiffs may take back 7-annas 8-pies share of the money deposited.

The appellants are entitled to costs of this appeal.

Graham, J.—I agree.

R.M./R.K. *Decree varied.*

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* A. I. R. 1930 Calcutta 815

SUHRAWARDY AND PATTERSON, JJ.

B. N. Ry. Co.—Appellant.

v.

Moolji Sicka & Co.—Respondent.

Appeal No. 2231 of 1928, Decided on 10th July 1930, from decision of Addl. Dist. Judge, 24-Parganahs, D/- 8th May 1928.

(a) Civil P. C. (1908), S. 100—Whether on certain admitted facts certain person is agent or not is question of law.

Whether a certain person is a legally constituted agent or not, upon certain admitted facts, is a question of law and the appellate Court should not refuse to consider it. [P 816 C 2]

*** (b) Railways Act (1890), S. 72 (2)—Person signing consignment note is person delivering goods—Consignor is bound by signature of person delivering goods.**

Person signing the consignment note at the time of the delivery of goods to the railway company is the person who delivers the goods. The railway is not concerned with the ownership of the goods.

A consignor is bound not only by the signature of himself or his agent on the contract, but also by the signature of the person who delivers the goods to the railway company whether that person had authority to sign or not. The contract may be signed by person delivering for carriage and such a person has not merely such authority to bind the sender as naturally arises from his position of agent, but an absolute statutory authority to bind him. He has authority to sign any form of contract: *A. I. R.* 1928 *Cal.* 170, *Foll.* [P 817 C 1]

(c) Railways Act (1890), S. 72—Suit for damages—Plaintiff cannot retain advantage of reduced rate and repudiate consideration for it, risk notes as being unauthorized.

Person claiming damages from railway company, for damages to his goods, cannot retain to himself the advantage of the reduced rate and repudiate the consideration for it, the risk note executed by the person who delivered the goods to the railway as being unauthorized: *A. I. R.* 1925 *Cal.* 915, *Foll.* [P 817 C 2]

(d) Railways Act (1890), S. 72 (2)—Signature on risk note—Effect considered.

A person delivering goods on behalf of Moolji Sicka & Co., signed the risk notes with the addition of words "for M. S.":

Held: that this did not in any way take away the effect of the execution of the document by the person delivering goods: 82 *I. C.* 393, *Dist.* [P 818 C 1]

(e) Railways Act (1890), S. 72—Risk notes, forwarding order and railway receipt need not bear same date if shown to refer to particular consignment.

The risk notes, forwarding order and the railway receipt need not bear the same date; if it is established, that they refer to a particular consignment in question, the railway company is protected: *A. I. R.* 1929 *Cal.* 482, *Foll.*; *A. I. R.* 1928 *Lah.* 162, *Diss. from.* [P 818 C 1]

(f) Railways Act (1890), S. 72—Suit for damages—Risk note B—Word "misconduct" includes wrongful commission and omission intentional or unintentional of any act by railway company—Owner has to prove misconduct on part of railway company—Contract Act, S. 152.

The word "misconduct" denotes any unbusinesslike conduct and includes negligence or want of proper care which a bailee is to take under S. 152, Contract Act. [P 820 C 1]

The word "misconduct" as used in the risk note B is wide enough to include wrongful commission and omission intentional or unintentional of any act which the railway company wrongfully did or which it wrongfully neglected to do, or to put it in another way, did what it should not have done and did not do what it should have done.

The immunity which the risk-note B brings to the railway company is by shifting the burden of proof. In the case of goods damaged in possession of the railway company covered by a risk-note, the owner of the goods is to prove that the injury to the goods was caused by the misconduct of the railway company.

A plaintiff claiming damages on account of damage caused to his bags of biris by rainwater leaking through holes of the wagon must establish by positive evidence that it was owing to the defective state of the wagon in which the goods were loaded that the injury was caused. By merely proving that when the wagon reached its destination it was found in a defective state, he does not discharge the onus which lies heavily upon him to prove misconduct by the servants of the railway company: *A. I. R.* 1929 *Cal.* 654, *Ref.* [P 819 C 2, P 820 C 1; P 821 C 1]

(g) Civil P. C. (1908), S. 100—No evidence in support of finding of fact—High Court can interfere.

When there is no evidence in support of a finding of fact, the High Court in second appeal can interfere with it. [P 820 C 2]

(h) Evidence Act (1872), S. 114—S. 114 does not enable Court to presume certain state of things without any proof.

Section 114 does not go so far as to enable the Court to presume that a certain state of things existed in the past without any proof from the party who is required to satisfy the Court on the point. [P 820 C 2]

(i) Evidence—Appreciation of — Probabilities based on certain facts not leading to one conclusion—Judge can draw legitimate inferences from facts proved—When particular inference cannot be reasonably drawn from facts party relying on it for discharging onus of proof fails—Evidence, burden of proof.

Where the Court has to depend upon probabilities based on certain facts which do not lead to one conclusion, the Judge is entitled to draw inferences from the facts proved before him, but the inferences must be such as could be legitimately drawn from the facts. If the facts are such that no reasonable man could draw a particular inference from them or if the particular inference is such as to be equally consistent with non-liability and with liability, then the party who relies on the inference to discharge the onus of proof of establishing liability fails : *Smith Ltd.* v. *G. W. Railway Co.* (1921) 2 *K. B.* 237, *Foll.*

[P 821 C 1]

Romesh Chandra Sen and *Jitendra Kumar Sen Gupta*—for Appellant.

Kali Kinkar Chakraburtty, *Shushil Madhab Mallick* and *Probodh Chandra Mallik*—for Respondents.

Suhrawardy, J.—This appeal is by the B. N. Ry. against the decision of the Additional District Judge of 24-Parganahs decreeing in agreement with the trial Court the respondents' suit for damages to their goods sent through the railway company. The plaintiffs' case is that they despatched 348 bags of country biris out of which 60 bags were damaged by rain in the course of transit from Tumsar Road station to Shalimar station, both on the B. N. Ry. The goods were booked on 26th June 1926 at Tumsar Road station and they reached Shalimar on 3rd July, but the wagon was not brought to the shed till the 6th July when the goods were delivered to the plaintiffs. The plaintiff company had hired a whole wagon and the goods were carried in that wagon. When their man took delivery of the goods he discovered that there were holes in the wagon through which water leaked into it and damaged 60 packages of the goods. He immediately brought the fact to the notice of the Superintendent of the station and subsequently the plaintiff brought this suit to recover Rs. 1,661-10-0 by way of damages. In the plaint the plaintiff company does not make mention of any risk notes covering the goods. The plaint as framed was against the railway company as if they were mere bailees of the goods and were liable for damages as such. The defence was that the goods were covered by risk notes A and B executed by one Nathu Singh who, according to the defendants, held legal authority from the plaintiff company to sign the risk notes. The railway further pleaded that there was no misconduct on their part as the wagon was in a good condition at the starting station. The trial Court gave a decree to the plaintiffs; and the appeal by the railway was dismissed. We have got to consider the various points that were raised before the learned District Judge and his findings thereupon. The learned Judge has discussed several points and decided them against the appellants. It will be convenient to consider the points mentioned in the judgment of the learned Judge in the order they are given there.

The first point discussed by the learned Judge is whether Nathu Singh had authority to sign the risk notes on behalf of the plaintiff company. On the evidence he agreed with the Munsif that the appellants failed to prove that Nathu Singh was the legally constituted agent of the plaintiff company. But it was argued before him on behalf of the appellants that though Nathu Singh was not the constituted agent of the plaintiff company as he had delivered the goods and signed the risk notes, the plaintiff company was bound by his acts and that the railway is entitled to rely upon the immunity given to it under the risk notes. The learned Judge observed that this question was not raised in the trial Court. It is true that it was not raised in the trial Court, but it was probably so because there was no express decision upon the point when the case was tried. It so happened that immediately after the Munsif's judgment was delivered the case of the *G. I. P. Ry. Co.* v. *Chakravarti Sons & Co.* (1) was reported and the point was evidently taken in consequence before the Judge on appeal. Though it so happened we do not think that it is proper that he should have refused to consider the point which is a pure question of law based upon the admitted facts of the case. Now, with regard to the delivery of the goods by Nathu Singh I do not think that there can be

(1) A. I. R. 1928 Cal. 170=106 I. C. 247=55 Cal. 142.

any dispute, though the learned Judge in one part of his judgment says that Nathu Singh did not deliver the goods to the goods clerk. The consignment note by which the delivery of the goods was made was signed by Nathu Singh and so were the risk notes. All these documents have been proved by the witness on behalf of the railway company who was examined on commission. On looking at the order-sheet it appears that the appellant company wanted to take out commission in order to prove Nathu Singh's signature on those papers; and the pleader for the plaintiffs intimated that if proper notice were given to him for admission he might admit that they were signed by Nathu Singh. There is no finding by any of the Courts below that the documents were not signed by Nathu Singh. What the learned Judge means to say is that Nathu Singh at the time of the delivery of the goods was accompanied by a man in the service of the plaintiffs and therefore it should be taken that the goods were delivered not by Nathu Singh but by the plaintiffs through their man.

The learned Judge overlooked the fact that the consignment note at the time of the delivery of the goods was signed by Nathu Singh. It cannot therefore be questioned that the goods were delivered by Nathu Singh and received by the defendant company from him. Now it has been authoritatively held that the consignor may be bound not only by the signature of himself or his agent on the contract but also by the signature of the person who delivers the goods to the railway company whether that person had authority to sign or not: *G. I. P. Ry. Co.* v. *Chakravarti Sons & Co.* (1). Another commentator on the Railways Act (Leslie) says that the contract may be signed not merely by the party, but also by the person delivering for carriage. Such person has not merely such authority to bind the sender as naturally arises from his position as agent, but an absolute statutory authority to bind him, and it seems that prima facie he has authority to sign any form of contract: Lahiri's Law of Carriers, p. 282. I do not think that much authority is needed to support this proposition because the words used in the Railways Act are quite explicit. Cl (2), S. 72 says that an agreement purporting to limit the responsibility of the railway administration under the Contract Act shall be void unless it is in writing signed by or on behalf of the person sending or delivering to the railway administration the goods. The railway administration is not concerned with the ownership of the goods; authority to enter into contract with it is implicit in the delivery of goods. The person therefore who delivers the goods is competent to sign the risk notes and his act binds the owner. It is in evidence that Nathu Singh is a broker who acts on behalf of persons dealing with the railway. He was evidently employed on behalf of the plaintiff on this occasion .

There is another way of looking at the question. The plaintiffs prove delivery of the goods to the railway company by means of the railway receipt which mentions the risk notes executed by Nathu Singh and which shows that the goods were delivered under the risk notes to be carried at a reduced rate. It is not reasonable to hold that the plaintiff can retain to himself the advantage of the reduced rate but repudiate the consideration for it, the risk notes executed by the person who delivered the goods to the railway, as being unauthorised. This was the view taken by Chotzner, J. in the *E. I. Ry. Co. Ltd.* v. *Ram Chabila Prosad* (2). The plaintiff's suit is not a strightforward one. He knew of the risk notes but did not in his plaint refer to or repudiate them for reasons not far to seek. I am accordingly of opinion that the risk notes were duly executed and they are binding on the plaintiff.

The second ground of the judgment of the learned Judge is that Nathu Singh signed the risk notes as Nathu Singh for M. S. This the learned Judge thinks is not a proper signature and therefore the risk notes are not valid. In support of this view he relies upon the decision of this Court in *Mahabasha Bankapore* v. *Secy. of State* (3). In that case the person who consigned the goods to the railway did not sign his own name on the risk note but the owner's name. On a construction of S. 72 (2) (a) the learned Judges held that it was not a proper

(2) A. I. R. 1925 Cal. 916=35 I. C. 658.
(3) [1915] 32 I. C. 393.

compliance with the requirements of that section. It is not necessary for us to consider that decision though to my mind it requires further consideration, because the facts of that case are totally different from the facts of the present case and it cannot by any stretch of argument support the view expressed by the learned Judge on this point. Here the risk notes were signed by the person who delivered the goods with the addition of the words "for M. S." This does not in any way take away the effect of the execution of the document by Nathu Singh. The learned Judge has further relied on *Mahabarsha's* (3) case for the view that the name of the principal should be mentioned in full. In that case the agent Kundan Mull, instead of signing his name and stating that he signed on behalf of Mahabarsha, his principal, simply wrote "Mahabarsha." This the learned Judges held was not according to law, as it would be impossible to prove that the agency had previously terminated if the name of the agent did not appear on the document. The argument adopted in that case is too technical and it does not help the plaintiff's in this case. The consignment note bore under the first column plaintiff's name in full, Moolji Sicka and Co., and as the plaintiff company had large dealings with the railway it is evident what M. S. stood for.

The third ground put forward by the learned Judge is that the risk notes, forwarding order and the railway recept do not bear the same date, and therefore there was no binding contract between the parties. For this view he relies upon the decision in *E. I. Ry.* v. *Jot Ram Chandra Bhan*, *A. I. R.* 1928 *Lah.* 162. This case has been dissented from by this Court in *Moolji Sicka & Co.* v. *B. N. Ry. Co. Ltd.* (4). I agree with the view held in that case and I do not think it necessary to say anything further on the point.

The fourth point which the learned Judge has decided againt the appellants is that on the risk note A the remark made by the goods clerk is that the packing conditions were not fulfilled and that the goods were liable to be damaged in course of transit. The learned Judge did not find in any thing before him as to what the packing conditions were and he thinks (not without justification in many cases) that this device is adopted by the railway servants for the purpose of taking risk notes. This ground was not taken in the trial Court and the appellant company justly complain that they were never given an opportunity of showing to the Judge that there are rules as to the mode in which biris sent through the railway should be packed. The tariff of the railway has been produced before us and we find that the instruction given is that biris or biddies should be packed in a certain way. This point however is not of much importance in view of the fact that the real contract on which the railway company base their claim is the risk note B.

The fifth point referred to by the learned Judge is that in the case of risk note B it must be proved that there were two rates for carriage of goods and that they were carried at the reduced rate in consideration of the execution of the risk note, but there was no evidence before the learned Judge whether the plaintiff company paid the ordinary rate or that they sent their goods at the reduced rate. The same observation applies to this ground as to the ground preceding. The point was not raised at the trial and the learned Judge did not care to look into the various tariff tables issued by the railway to find whether the goods were really sent on reduced rate. Mr. Sen on behalf of the railway has prcduced the tariff and we found that the goods were sent at reduced rate. The plaintiffs never claimed that the goods were sent at the ordinary rate and that therefore the risk notes were without consideration and not binding upon them.

The last point which is the most important point in the case is the finding of the learned Judge that the railway company has been guilty of misconduct under risk note B. It may be profitable to enquire as to what "misconduct" means as used in the risk note form B. The words used in the old risk note B, (we quote only those that are necessary for our present purpose) were :

"Except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of the railway administration or to theft by or to the wilful neglect of

(4) A. I. R. 1929 Cal. 482=121 I. C. 319=56 Cal. 1060.

its servants, transport agents or carriers employed by them."

It is a matter of modern history that an agitation was started against this form on the ground that it was well nigh impossible to prove the liability of the railway under it. On the recommendation of a committee appointed by the Government of India, the Governor-General under S. 72, Railways Act, sanctioned in 1924 the present risk note form B. In place of the above words in the old form the following words are substituted :

"Except upon proof of such loss or damage arising from misconduct of railway administration's servants."

When the risk note, old and new, are compared, it will be found that there has been introduced a wide difference in their scope. In this case we are concerned with the substitution of the words "misconduct of the railway administration's servants" for the words

" wilful neglect of the railway administration or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them "

in the old form. The English form of the risk note contains the words "wilful misconduct." The present risk note therefore is wider and more comprehensive in enlarging the liability of the railway than the old form or the English note. Under that note, as well as under the English note, misconduct should be intentional and it therefore excluded unintentional neglect or act. 'Wilful misconduct' in the English form has been defined by Alverstone, C. J., in *Forder* v. *Great Western Railway* (5). The learned Chief Justice accepted the following definition given by Johnson, J., in *Graham* v. *Belfast and Northern Counties Railway Co.* (6) :

"Wilful misconduct means misconduct to which the will is party as contradistinguished from accident and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or to omit to do (as the case may be), a particular thing and yet intentionally does or fails or omits to do it, or persists in the act, failure or omission regardless of consequences."

To it the learned Chief Justice added " or acts with reckless carelessness, not caring what the results of his carelessness may be."

(5) [1905] 2 K. B. 532=74 L. J. K. B. 971=93 L. T. 344=53 W. R. 574=21 T. L. R. 625.
(6) [1901] 2 I. R. 13.

This addition was objected to by Avery, J., as inconsistent with the above definition but approved by Lush, J., in *Norris* v. *Great Central Railway Company* (7). It will be noticed from the definition given by Alverstone, C. J., in *Forder* v. *Great Western Railway* (5) that it is confined more to the interpretation of the word "wilful" than to "misconduct." Divested of the words used to stress the sense of "wilful" in the above definition, the definition of misconduct will stand thus : Misconduct is distinguished from accident and is not far from negligence, not only gross and culpable negligence, and involves that a person misconducts himself, when it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be) a particular thing or to persist in the act, failure or omission or acts with carelessness. In the Oxford Dictionary "misconduct" is said to mean bad management ; mismanagement, malfeasance or culpable neglect of an official in regard to his office. According to Halsbury's Laws of England, Vol. 4, para. 55,

" misconduct is as that if a contract purports to relieve a company from liability for any fault or negligence, the company remains liable in case of misconduct."

Then it is added :

"Misconduct is not necessarily established by proving even culpable negligence."

The learned editor had, probably in mind when he used these words the definition of "wilful misconduct" as it appears that he has relied in support of his statement on *Forder* v. *Great Western Railway* (5). I am inclined to hold that the word "misconduct" as used in the new risk note *B* is wide enough to include wrongful commission and omission, intentional or unintentional, of any act which it wrongfully did or which it wrongfully neglected to do, or to put it in another way, did what it should not have done and did not do what it should have done. This seems to be the view taken by Mitter, J., in *B. N. Ry. Co. Ltd.*, v. *Moolji Sicka & Co.* (8) where the learned Judge observes that in certain cases negligence will be good evidence of misconduct and mismanagement of the railway company. I am not inclined to accept the view that misconduct only refers to acts of gross or cul-

(7) [1915] 114 L. T. 183.
(8) A .I. R. 1929 Cal. 654=122 I. C. 625.

pable negligence and the term does not ordinarily cover acts of mere negligence. In my judgment the word "misconduct" denotes any unbusiness-like conduct and includes negligence or want of proper care which a bailee is to take under S. 152, Contract Act. The immunity which the risk note brings to the railway company is by shifting the burden of proof. In the case of a bailee, if the goods are found damaged in his possession, the onus is upon him to prove how the damage occurred, if he wants to avoid liability. In the case of goods damaged in the possession of the railway company covered by a risk note, the owner of the goods is to prove that the injury to the goods was caused by the misconduct of the railway company. Under the old form the onus was always upon the owner to prove it in order to recover damages from the railway company. By the changes in the form of the risk note there has been no change of law; on the other hand it has been emphasized by the words "except upon proof of." The plaintiffs therefore in this case have to prove that the injury to the goods of which they complain was caused on account of the misconduct of the railway company.

It has been unquestionably proved that when the wagon arrived at Shalimar 10 or 11 days after, it was found to have holes on the roof. This alone in my judgment is not enough to charge the railway company with misconduct. The plaintiffs should prove not only that the wagon was found defective at the arrival station but also that it was on account of the misconduct of the servants of the railway company that it was or became defective. In other words they should prove that the goods were negligently or wilfully loaded in a defective wagon at the starting station or it was by their misconduct allowed to become leaky. But this they have not proved. On the other hand there is evidence on the side of the defendant that the wagon was in a good condition when it was loaded. D. W. 2, Sujat Ali, the goods clerk at the Tumsar Railway Station says :

"Nathu Singh and plaintiffs' man examined the wagon before booking. I examined the wagon myself also. There was no hole or defect in the wagon. The wagon did not leak. It was examined by throwing water by a hose pipe over the roof. No one on behalf of the plaintiffs' objected to the wagon. The station coolies loaded the wagon. The locks were supplied by the plaintiffs and the plaintiffs' seals were placed there by the coolies."

This evidence does not seem to have been challenged or contradicted on behalf of the plaintiffs. It is therefore clear that there is evidence that the wagon was in a good condition when it left Tumsar Station, but it was found in a leaky state when it arrived at Shalimar. The defect in the wagon that was discovered at Shalimar might be due to causes other than misconduct of the railway company. Unless the plaintiffs succeed in definitely establishing that the injury to their goods was due to misconduct of the railway servants and that the cause of such injury was their misconduct and nothing else, they are not entitled to succeed on mere surmise. The learned advocate for the respondent has strenuously argued that the findings upon this point by the Courts below are findings of fact with which we are not entitled to interfere in second appeal. But at the same time it is a well-established rule that when there is no evidence in support of a finding of fact this Court can interfere with it. The learned Judge records his finding thus :

"I cannot certainly conceive of a worse case of misconduct than the loading of a consignor's goods in a leaky wagon and thereby cuasing him considerable loss."

Here the learned Judge assumes that the consignor's goods were loaded in a leaky wagon. As I have pointed out there is no evidence in support of this finding and if there is any evidence upon this point it is just the other way. But it is argued that under S. 114, Evidence Act, the existence of any fact which is likely to happen, regard being had to the common course of natural events, human conduct and public and private business in their relations to the facts of the particular case, may be presumed. Therefore the Court is justified in presuming from the fact that the wagon was found leaky on 6th July 1925 that it was in the same leaky state on 26th June 1925. I do not think that S. 114 goes so far as to enable the Court to presume that the present state of things existed in the past without any proof from the party who is required to satisfy the Court on the point. The goods were sent in the rainy season

they took 10 or 11 days to arrive at their place of destination. It is possible that the wagon got damaged on the way by the elements or by some other cause not referable to the misconduct of the railway servants. The plaintiffs must establish by positive evidence that it was owing to the defective state of the wagon in which the goods were loaded that injury was caused to them. By merely proving that when the wagon reached its destination it was found in a defective state they do not discharge, the onus which lies heavily upon them to prove misconduct by the servants of the railway company. In cases where the Court has to depend upon probabilities based on certain facts, which do not lead to one conclusion, the rule that has been adopted in English Courts may profitably be followed here. In *Smith Ltd.* v. *G. W. Railway Co.* (9) Bankes, L. J. said :

"Although the learned Judge of the County Court was undoubtedly entitled to draw inferences from the facts proved before him, the inferences must be such as could legitimately be drawn from the facts. If the facts are such that no reasonable man could draw a particular inference from them, or if the particular inference is such as to be equally consistent with non-liability and with liability, then the party who relies on the inference to discharge the onus of proof of establishing liability fails."

This observation is applicable to the facts of this case. I do not think that any Court is justified in presuming that because the wagon is found leaky on 6th July it must be so on 26th June without any evidence to support it. The result of all these considerations is that the plaintiff company have failed to discharge the onus that lay upon them, namely to prove that the injury to their goods was due solely to the misconduct of the railway servants.

In the result this appeal is allowed, the decree of the lower appellate Court set aside and the suit dismissed. In the circumstances of this case we order each party to bear his own costs throughout.

Patterson, J.—I agree.

R.M./R.K. *Appeal allowed.*

(9) [1921] 2 K. B. 237.

A. I. R. 1930 Calcutta 821

PANCKRIDGE, J.

Shailabala Ray—Applicant—Auction-purchaser.

v.

Jnanendranath Ganguli and *others*—Non-Applicants—Mortgagee.

Appln. in Original Civil Suit No. 184 of 1926, Decided on 19th July 1929.

Calcutta High Court Original Side Notification Condition 12—Error as to area of land mentioned in notification—Purchaser has right to recover compensation for deficiency even if he might have made advantageous bargain in spite of misdecription—Execution sale—Right of purchaser.

The notification by the Registrar on the original side contained condition 12 which was to the following effect: "Where any error or misstatement shall appear to have been made in the particulars or description of the property, all such errors or misstatements, where capable of compensation, shall not annul the sale nor entitle the purchaser to be discharged from the purchase, but compensation shall be made to or by the purchaser as the case may be and the amount of such compensation shall be settled by a Judge in chambers.

Held: that on construction of the condition, that the purchaser was entitled to assume that the dimensions appearing in the notification were correct, and the discrepancy between the title-deeds and the notification was not sufficient to put them on enquiry in this respect, and that the right to compensation was not lost merely because, in spite of the misdescription the purchaser has made an advantageous bargain ; and if at all the decree-holder sought to disentitle the purchaser he must prove waiver of the right or something analogous to it on the part of the purchaser: *In re Turner* and *Skelton*, (1879) 13 *Ch. D.* 130 ; *Palmer* v. *Johnson*, (1883) 12 *Q. B. D.* 32, *Foll. Joliffe* v. *Baker*, (1883) 11 *Q. B. D.* 235; 29 *Cal.* 370 and 43 *Cal.* 124, *Dist.*; *Manson* v. *Thacker*, (1878) 7 *Ch. D.* 620 and *Allen* v. *Richardson*, (1879) 13 *Ch. D.* 524, *Dist.* [P 823 C 1, 2]

H. D. Bose and *J. K. Ghose*—for Auction-Purchasers.

N. N. Sircar and *A. K. Roy*—for Mortgagees.

Judgment.—This is a Chamber summons taken out by certain purchasers at a Registrar's sale in a mortgage suit and adjourned to Court for hearing. The mortgaged premises are No. 22, Nayanchand Datta Street, and they were brought to sale by public auction in pursuance of the final decree passed on 8th April 1927. In the notification of sale the premises are described as follows:

All that brick-built, partly one-storeyed and partly two-storeyed, messuage, tenement or dwelling-house together with the piece or parcel of land thereunto belonging, containing

by measurement 8 cottas 5 chhittaks 18 sq. ft. more or less, situate, lying at and being premises No. 22, Nayanchand Datta Street, in Sutunati in the northern part of the town of Calcutta.

Of the conditions of sale the following are material :

Condition 2. The sale is subject to a reserved bidding which has been fixed by the Registrar.

Condition 12. Where any error or misstatement shall appear to have been made in the particulars or description of the property, all such errors or misstatements, where capable of compensation, shall not annul the sale nor entitle the purchaser to be discharged from the purchase ; but compensation shall be made to or by the purchasers as the case may be, and the amount of such compensation shall be settled by a Judge in Chambers.

The applicants were, on 27th June 1928, declared the highest bidders and purchasers of the premises at the price of Rs. 36,150. There were certain objections as to title, which the purchasers failed to substantiate, and eventually a certificate of sale was granted on 18th February 1929, and, on 27th March, possession of the premises was obtained through the Sheriff.

On 19th April the applicants wrote to the Registrar and to the attorney of the plaintiff mortgagee complaining that a measurement made by an engineer at their instance disclosed the fact that the area of the premises was 7 cottas 8 chhittaks 13 square feet,and not 8 cottas 5 chhittaks and 18 square feet as stated in the notification.

It is conceded that the smaller area is correct, and there is therefore an error in the notification of 13 chhittaks 5 square feet or roughly 10 per cent. The error arose from the fact that, although the Registrar had directed measurement to be made by a qualified certified engineer whom he named, the measurement was actually made during the engineer's absence from Calcutta, and in circumstances which I am compelled to say do little credit to the judgment of the plaintiff's attorney, by the engineer's unqualified employee. The applicants now ask for an order that they may be declared entitled to such compensation as this Court may think reasonable, for the deficiency in the area of the purchased property, and that the plaintiff may be ordered and decreed to pay that compensation.

The plaintiff opposes the application and maintains, first, that as a matter of law it is now too late after completion and issue of the sale certificate to invoke the provisions of condition 12.

I have been referred to various authorities, and consideration of them has convinced me that this contention is unsound. In *In re Turner & Skelton* (1) Jessel, M. R., declined to follow the decision of Malins, V., C. in *Manson* v. *Thacker* (2), which was that a purchaser could not, in the absence of fraud. obtain compensation after conveyance for a misrepresentation, even though such misrepresentation related to the subject-matter of the contract ; and he upheld the order of the Judge in Chambers awarding compensation for the deficiency in terms of a condition of sale similar to condition 12 in this case.

It is true that Malins, V. C., in *Allen* v. *Richardson* (3), expressed his disagreement with Jessel M. R.'s decision in *In re Turner & Skelton* (1), but later cases show that the opinion of Jessel M. R. is to be preferred. *Joliffe* v. *Baker* (4) is distinguishable, in that the contract did not contain any provision for compensation : in *Palmer* v. *Johnson* (5), A. L. Smith, J., followed *In re Turner & Skelton* (1) in preference to *Allen* v. *Richardson* (3) and his decision was affirmed by the Court of Appeal—Brett M. R. Bowen and Fry, L. JJ.—whose judgments are reported in the same volume at p. 351. It is true these were all cases of sale by private treaty, but I can see no reason for not applying the same principle to a sale by the Registrar at the order of the Court.

I must notice two Indian cases cited by Mr. Roy. In *Doyal Krishna Naskar* v. *Amrita Lal Das* (6), an auction-purchaser of a tenure at a mufassil Court sale failed to recover compensation for deficiency in area, though he was held entitled to abatement of rent. There the suit was based on the allegation that the decree-holder was guilty of fraud, an allegation, the plaintiff failed to make good, and there was further, no condition in the sale proceedings as to

(1) [1879] 13 Ch. D. 130=49 L. J. Ch. 114=28 W. R. 312=41 L. T. 668.
(2) [1878] 7 Ch. D. 620=47 L. J. Ch. 312=26 W. R. 604=38 L. T. 299.
(3) [1879] 13 Ch. D. 524=49 L.J. Ch. 137=23 W.R. 313=41 L.T. 614.
(4) [1883] 11 Q.B.D. 255=52 L.J.Q.B. 609=47 J.P. 678=32 W.R. 59=48 L. T. 966.
(5) [1883] 12 Q.B.D. 32.
(6) [1901] 29 Cal. 370.

compensation for errors or misdescription.

I do not see that the observations of Chaudhuri, J., in *Basir Ali* v. *Hafiz Nazir Ali* (7), assist the plaintiffs. Indeed, if applicable at all, they show that the considerations which apply to sales under mortgage decrees are not different from those that apply to sales by private treaty.

Mr. Roy next maintains that the purchasers' conduct in the circumstances of this particular case disentitles them to the order they seek. To substantiate this, he must, in my opinion, prove facts that amount to waiver or something analogous to it. For myself I do not see in the purchasers' conduct anything approaching waiver. The notification expressly states that the area is "by measurement," and Mr. Bose has pointed out that, under the rules of this Court, where, as here, the mortgagee has obtained leave to bid, a survey and valuation are in fact always obtained.

I think these purchasers were entitled to assume that the dimensions appearing in the notification were correct, and the discrepancy between the title-deeds and the notification was not sufficient to put them on enquiry in this respect; further, I cannot see how the position is altered by the fact that the purchasers put forward objections as to title or how such a course can be construed as a waiver of all objections as to area. Vacant possession was not obtained until 27th March 1929, and the facts were communicated to the Registrar less than a month thereafter. There is nothing, in my opinion, to show that the purchasers abandoned their right to take exception to the area or accepted the notification as conclusive. Considering the case from the point of view of equity, I should be most reluctant to permit the plaintiff to take advantage of an irregularity to which her own attorney was a party.

Mr. Roy's final argument is not without attraction on the ground of common sense. He asks me to say that these purchasers should not be awarded compensation, because they have substantially obtained that for which they bid at the auction. What they really wanted and what, in fact, they have got is No. 22, Nayanchand Datta Street, and, in bidding for it, they were thinking of the property as a whole and not as an area of ground of so many cottas, chhittaks and square feet with buildings on it.

Now, apart from the practical difficulty, if not the impossibility of forming a conclusion as to the state of mind of each of these purchasers on 27th June 1928, the answer appears to me to be that the language of condition 12 shows that the auction is conducted on the basis that the purchaser shall be entitled as of right to a proportionate abatement in the case of error or misdescription, and he does not lose that right because he has in fact, in spite of the misdescription, made an advantageous bargain.

The order therefore that I make is to refer it to the Registrar to enquire and report what sum is properly payable by the plaintiff in respect of the deficiency of 13 chhittaks and 5 square feet in the area of the mortgaged premises, after deducting that portion of the purchase price which he considers represents the value of the building and structures, the sum payable to bear the same proportion to the purchase price after making the aforesaid deduction, as 13 chhittaks 5 square feet bear to the area given in the notification of sale.

The applicants will have their costs of this application, and the costs of the enquiry I have directed will be reserved. If necessary, I certify for counsel.

V.B./R.K. *Application allowed.*

(7) [1916] 43 Cal. 124=30 I.C. 406

A. I. R. 1930 Calcutta 823

S. K. GHOSE, J.

Bishnu Mondal and *others*—Defendants—Appellants.

v.

Charu Chandra Chatterjee—Plaintiff—Respondent.

Appeal No. 1619 of 1928, Decided on 8th April 1930, from appellate decree of Second Additional Sub-Judge, 24 Parganas, D/- 11th April 1928.

(a) Landlord and tenant—Rent — Rent agreed to be paid partly in cash and partly in kind—On failure to pay produce, equivalent payment in cash to be made at stated rate—Tenant held primarily liable to pay arrears of rent in measure and if proved to be unable to deliver produce, then only liable to equivalent in cash at mentioned rate.

Where a kabuliyat is executed by the tenant agreeing to pay rent partly in cash and partly

in kind, and in case of failure to deliver the rent in kind, the tenant agrees to pay the equivalent in cash calculated according to the rate fixed in the kabuliyat, the tenant is primarily liable to pay the arrears of rent partly in cash and partly in kind in the measure given in the kabuliyat. It is for the tenant to show that he is unable to pay the rent in kind and if he succeeds in doing this, he is liable not at the market rate but at the rate fixed in the kabuliyat. [P 824 C 1, 2]

(b) Bengal Tenancy Act (1885), S. 67—Kabuliyat executed after passing of the Act—Landlord is entitled to interest at 12 and half per cent on rent under S. 67 read with S. 178 (3) (b).

Where a kabuliyat agreeing to pay rent partly in cash and partly in kind is executed after the passing of the Act and the tenant is held liable to pay cash value of the produce, the amount payable by tenant being rent, the landlord is entitled to interest at the rate of 12 and half per cent per annum under S. 67 read with S. 178 (3) (b). [P 824 C 2]

Ramgati Sarkar—for Appellants.

Dhirendra Krishna Ray and *Bankim Chandra Roy*—for Respondent.

S. K. Ghose, J.—The plaintiff sues to recover arrears of rent for the years 1332 and 1333 at an annual jama of Rs. 12 in cash, 8 aris of paddy, and 12 seers of molasses on the basis of a registered kabuliyat dated 9th Baisakh 1306. The Courts below have agreed in decreeing the suit, valuing the paddy and molasses at the current market rate. The present second appeal is by the defendants. Their defence is that they are only liable for the value as given in the kabuliyat. The material portion of the kabuliyat, which is for a mourasi makarari kaimi lease, is recited in the judgment of the learned Subordinate Judge in appeal. It shows that the stipulation is that the jama is fixed at annual rent of Rs. 12 in cash, 12 seers of molasses and 8 aris of dried paddy. The price of the 12 seers of molasses is stated to be Re. 1 and that of the 8 aris of paddy is stated to be Rs. 12 the total being Rs. 25. It is however quite clear from the terms of the kabuliyat that the tenant contracted to pay Rs. 12 in cash, and the rest in produce, namely, molasses and paddy. It is only if he should fail to deliver molasses and paddy, that he will be liable to pay the equivalent in cash as stated in the kabuliyat. The result is that the tenant is primarily liable to pay the arrears of rent at the rate of Rs. 12 in cash, 12 seers of molasses and 8 aris of paddy, in the measure as given in the kabuliyat, namely, each ari being equal to 16 palis of 4 seers per pali. It will be for the tenant to show that he is not in a position to deliver the molasses and the paddy, and if he succeeds in doing that, then he will be liable, not at the market rate, but at the rate which is mentioned in the kabuliat. I may say that the case seems to be similar to that which I decided in second appeal No. 916 of 1928 on the 20th February 1930. It is also supported by the decision in the case of *Asutosh Mukhopadhya* v. *Haran Chandra Mukerji* (1).

If the tenants in the above view should be held to be liable for the cash value of the produce, in that case the question is whether he will be liable for interest thereon. The Courts below have taken the view that he will not be so liable, because there is no mention of interest in the kabuliyat. It is contended by the learned advocate for the respondent that, in spite of that, the plaintiff is entitled to get interest under S. 67 read with S. 178, sub-S. (3), Cl. (h) Ben. Ten. Act. I think that the contention is sound. The kabuliyat was executed after the passing of the Bengal Tenancy Act and, since the amount payable by the tenant is rent, it is clear that the landlord is entitled to interest under S. 67, Ben. Ten. Aet at the rate of 12 and half per cent per annum. The result is that the plaintiff will get a decree for the arrears of rent at the annual rate of Rs. 12 plus 8 aris of paddy plus 12 seers of molasses in the measure as described in the kabuliyat. If it be found that the defendants have no molasses or no paddy to deliver or that there is no molasses or no paddy to be attached, in that case they will be liable at the rate of Re. 1 in respect of 12 seers of molasses and Rs. 12 in respect of 8 aris of paddy per year, and these amounts will bear interest at the rate of 12 and half per cent per annum.

The appeal is dismissed with costs. The cross-objection is allowed with costs.

P.N./R.K. *Appeal dismissed.*

(1) [1920] 47 Cal. 133=58 I. C. 382.

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